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State of Colorado
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APPEAL FROM DISTRICT COURT
WATER DIVISION NO. 1
STATE OF COLORADO
CASE NO 99CW129
HONORABLE JONATHAN W. HAYS, PRESIDING

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Court Use Only

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Case No. 01SA56

Supreme Court

OPENING BRIEF OF APPELLANTS

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- Appendix B: Court Order Denying Summary Judgment (99CW129)
- Appendix C: Excerpts from Warner, Altenhofen, Odor and Welch, *Recharge As Augmentation in the South Platte River Basin*, CSU Groundwater Program Technical Report #21, (1994) pp. i-vii, 1-4
- Appendix D: Excerpts from Transcript of March 13, 1979, Senate Agriculture, Natural Resources, and Energy Committee Hearing, S.B. 79-481, pp. 2, 19-22, 45
- Appendix E: Excerpts from Transcript of March 15, 1979, Senate Agriculture Committee Hearing, S.B. 79-481, pp. 22-38, 50-52.
- Appendix F: Senate Committee of Reference Report, March 15, 1979, S.B. 79-481

I. ISSUE PRESENTED FOR REVIEW

May the appropriator of a water right store water in an underground reservoir below the surface of lands owned by others without obtaining an easement or consent from the landowners?

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Appellants, Park County, James B. Gardner and Amanda Woodbury (Landowners) are property owners in South Park, a high mountain valley approximately 75 miles southwest of Denver. Appellee, Park County Sportsmen's Ranch, LLP (PCSR), filed an application in Water Court claiming a water right to store water in a reservoir below the surface of the property owned by Landowners. (Supplemental record at Exhibit A.) Landowners filed an action for declaratory relief in the Park County District Court seeking a determination that PCSR could not store water under the Landowners' land without their consent or condemnation. (Record at 2-18.)

As a result of a motion for change of venue filed by PCSR (record at 22-34), the Park County District Court transferred the case to the District Court for Water Division No. 1 (the Water Court). (Record at 87.) Landowners then filed a motion for summary judgment on the legal issue presented. (Record at 160-162.) The Water Court denied the motion for summary judgment, finding that common law doctrines of property law do not apply to the storage of water underground and that no consent from the landowner is required. (Record at 303-304.) Based on that ruling, Landowners could not prevail before the Water Court, and sought entry of judgment in order to facilitate this appeal. (Record at 305-308.) The Water Court entered judgment against Landowners and this appeal followed. (Record at 316-317.) No evidence was

taken in this case. The Water Court ruled on this issue as a matter of law. The jurisdiction of this Court is governed by section 13-4-102(1)(d), 5 C.R.S. (2000).

B. STATEMENT OF FACTS.

PCSR filed an application for water rights in Case No. 96CW014, District Court for Water Division No. 1.¹ Claim 2 of the application asserted a claim for a conditional water storage right in the amount of 140,000 acre feet in an underground reservoir identified as the South Park Formation Underground Reservoir System. (Supplemental record at Exhibit A.) A copy of Claim 2 from the application and amendment in Case No. 96CW014 is attached as Appendix A (“App. A”). PCSR claims the right to store water in the South Park Formation Underground Reservoir System within all or part of 115 sections of land, or approximately 115 square miles. (App. A at 14–15.) The South Park Formation contains tributary aquifers. The owners of the land within the proposed reservoir site were not identified in the application.

Landowners own lands in fee simple within the proposed reservoir site and have not given PCSR consent to store water on or under the surface of their lands. In order to protect their property rights and ensure that water will not be stored under their land without their consent or a condemnation action, Landowners commenced this action.

After venue was transferred to the Water Court, PCSR filed its answer, denying that it had to obtain any real property interests from Landowners in order to store water under their lands. (Record at 89-96, particularly ¶¶F and G at 90-91 and ¶¶ 8-11 at 92-93.) See, e.g. ¶F of answer, record at 90, which states, *inter alia*, “PCSR states further that water may be stored under the land of others, without either the consent of the owners or acquisition of any interest

¹ This application is pending in Water Court.

therein by eminent domain.” As set forth above, Landowners then filed a motion for summary judgment in order to resolve this legal issue. The Water Court denied that motion, and this appeal followed.

III. SUMMARY OF ARGUMENT

This appeal involves a legal issue: May the owner of a water right for storage in an underground aquifer use the land of another without consent or condemnation? This issue, as it concerns the underground storage of water, is one of first impression in Colorado. However, it may be resolved by turning to basic principles of Colorado water law and property law, as discussed below. Once those fundamental principles are applied, reversal of the Water Court’s ruling is required.

Under the Colorado doctrine of prior appropriation, tributary water or “waters of the state” as defined in the Water Right Determination and Administration Act of 1969 (1969 Act) is declared to be public property and may be appropriated and put to beneficial use. Once the water is diverted from the tributary stream system, it is no longer tributary water (waters of the state) and is not subject to appropriation. Water diverted pursuant to an appropriation has been characterized as personal property, but more accurately as a usufructuary right or right of use. The appropriated water does not return to the tributary stream system, and become subject to appropriation again, until after it has been put to beneficial use. The right to appropriate water does not create any rights of ownership, easements or other real property rights in lands not owned by the appropriator. However, state law does allow an appropriator to acquire such property rights by condemnation if they cannot otherwise be acquired.

Colorado has long recognized that a fee owner of land owns the underground estate. Therefore, the fee owner has the right to control the storage of appropriated water in an underground reservoir on the property. The underground storage space is part of the fee owner's "bundle of sticks" or property rights. In order to store water in an underground reservoir as a part of a storage appropriation, the appropriator must obtain an easement or other real property interest from the fee owner of the property.

The Water Court's ruling mistakenly analyzed PCSR's storage claim as if it was for artificial recharge of water into an underground aquifer as part of an augmentation plan. An artificial recharge plan depends on the movement of recharged water back to the stream in order to generate augmentation credits to offset out-of-priority depletions from other uses of water. PCSR's water storage, on the other hand, depends upon the impoundment, possession and control of water under specific lands so that PCSR can use the water later.

The General Assembly, in allowing adjudication of underground water storage rights, did not exempt the owners of such water rights from obtaining real property interests in lands at the reservoir site. Rather, the General Assembly has required that a claimant for an underground water storage right meet at least the same requirements as a surface storage right, if not more restrictive criteria. Water cannot be stored in a surface storage reservoir without obtaining the consent of the property owner or providing just compensation to the owner; likewise, the storage of water in an underground reservoir must require either the property owner's consent or just compensation.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The standard of review of the District Court's judgment in this case is *de novo*. Fogg, II v. Macaluso, 892 P.2d 271, 273 (Colo. 1995); Evans v. Romer, 854 P.2d 1270, 1274 (Colo. 1993). (In resolving a question of law, the lower court's judgment is subject to independent review by the appellate court.) The Water Court found as a matter of law that the storage of water in an underground reservoir does not require PCSR to obtain any real property rights from the owners of the reservoir property. See App. B, Order Denying Summary Judgment and Order Entering Final Judgment. (Record at 303-304 and 316-317.) Because this order involves a question of law, as opposed to a factual dispute, it is subject to independent review without deference to the Water Court. Fogg, II v. Macaluso, supra; Evans v. Romer, supra.

B. THE DISTRICT COURT ERRED WHEN IT TREATED PCSR'S STORAGE CLAIM LIKE AN AUGMENTATION RECHARGE PLAN.

1. The Storage Of Tributary Water Removes Such Water From Use By Other Appropriators.

The 1969 Act, at section 37-92-103(13), 10 C.R.S. (2000), defines "waters of the state" or tributary water as "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)." Waters of the state are subject to appropriation as guaranteed by the Colorado Constitution, Article XVI, sections 5 and 6. An appropriation requires the application of waters of the state to beneficial use. Section 37-92-103(3)(a), 10 C.R.S. (2000) (the definition of "appropriation"). An appropriation of water may involve the storage of water for later beneficial use. See section 37-92-103(10.5), 10 C.R.S. (2000) (the definition of "storage" or "store"). Water in storage, having

already been diverted is no longer “waters of the state” and is not subject to appropriation. Water in storage has been described as personal property of the appropriator, Brighton Ditch Co. v. Englewood, 124 Colo. 366, 373, 237 P.2d 116, 120 (1951), but perhaps more accurately as a usufructuary right. Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1377 (Colo. 1982); see also Bijou Irr. Dist. v. Empire Club, 804 P.2d 175, 184 (Colo. 1991) (water appropriated and in storage is subject to the control of the reservoir owner, who may not own the water, but has the sole right to its use). Thus, water in storage, like diverted water in a private ditch, is not subject to appropriation by other users until the appropriator makes beneficial use and the unused or waste water is returned to the tributary system. Navajo Dev. Co., 655 P.2d at 1377. Likewise, water escaping from a reservoir as a result of seepage is subject to appropriation having returned to the tributary system or waters of the state. Fort Morgan Res. & Irr. Co. v. McCune, 71 Colo. 256, 262, 206 P. 393, 395 (1922); Bijou Irr. Dist., 804 P.2d at 184-185. Thus, in Colorado, there is a basic distinction between tributary water, which is subject to appropriation, and water already diverted and in storage, which may not be appropriated, but is subject to the exclusive right of use of the appropriator as long as the water remains in the reservoir.

2. The Water Court’s Ruling Confused Underground Storage With Recharge.

In its ruling, attached as Appendix B, the Water Court confused PCSR’s claim for a storage right in an underground reservoir with artificial recharge in an aquifer. The Water Court ruled that:

Legislative intent contemplates the artificial recharge of aquifers, and conjunctive use of stored groundwater, as a means for achieving maximum utilization. C.R.S. §§37-90-137(4)(b)(II); 37-92-305(9)(c). 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.

App. B at 2. The Water Court concluded by stating that:

In sum, the court concludes that the movement of underground water in an aquifer, resulting from artificial recharge, does not constitute a trespass.

Id.

The Landowners agree that the recharge and movement of water in an aquifer might not constitute a trespass. However, when an applicant seeks to store and hold water pursuant to a storage decree on or under lands that it does not own, it must obtain consent or an interest in the reservoir lands. The Water Court's failure to recognize this distinction caused the error in its ruling. The distinction between an underground storage right, in which water is held in place and is not subject to appropriation, as opposed to an augmentation plan involving the recharge and movement of water through an aquifer to a surface stream to replace depletions, is key to resolving this appeal, and mandates reversal of the Water Court's ruling.

3. Recharge Plans As Part Of A Plan For Augmentation Do Not Depend On Storage of Water Underground And Are Unaffected By This Appeal.

There are numerous augmentation plans involving the recharge of underground aquifers adjudicated in Colorado. Warner, Altenhofen, Odor and Welch, *Recharge As Augmentation in the South Platte River Basin*, CSU Groundwater Program Technical Report #21, at iv (1994). A copy of the Report, pp. i through vii and 1-4, is attached as Appendix C.² These plans typically involve diverting water from a stream or river with a junior priority during the non-irrigation season or during the spring run-off. App. C at 4. During those periods, such junior water rights may be in priority, even in the over-appropriated South Platte River system. Once diverted, the water is typically allowed to seep into the alluvial aquifer some distance from the stream so the

² One full copy of the Report has been filed with the Court.

water migrates back to the stream when it is needed to augment depletions from the exercise of other junior water rights. In some instances, water is recharged to the aquifer to directly offset depletions from well pumping in the aquifer.

The timing of the water's movement back to the river, and the ability to claim recharge credits is determined by the physical properties of the aquifer. (See Warner at iv.) As a result, not all water recharged to the aquifer will result in augmentation credits. For example, recharge water that accrues to the river during a flood or otherwise free river conditions may not result in any credits, while recharge water accruing to the river during a low flow period in the irrigation season may generate significant augmentation credits. Id. at 4. ("The concept is to time the recharge so that it will return and augment the river when needed during the critical period of the irrigation season.")

In such augmentation plans, water is recharged into the tributary aquifer to increase the available supply, and the recharged water is available for appropriation as "waters of the state." Any subsequent appropriator of such water must, in turn, replace its out-of-priority depletions. The recharged water is not legally "stored" in the aquifer, but merely diverted and placed back into the tributary stream system to increase the available supply at a subsequent time. Such augmentation recharge plans, however, do not constitute storage rights.

With a storage water right, an appropriator controls the water and prevents the water from re-entering the tributary stream system until after it has been applied to beneficial use. In order to obtain an underground water storage right, like a surface storage right, an applicant must demonstrate that it can impound, possess and control the water pursuant to section 37-92-103(10.5), 10 C.R.S. (2000). The applicant must store the water and prevent its migration back

to the river, and because the stored water has already been diverted, it is not subject to appropriation by anyone else.

This Court should correct the Water Court's error in treating PCSR's claim for an underground storage right like a recharge augmentation plan. While a claim for an underground storage right may involve artificial recharge to place water into an underground reservoir, all recharge activities do not result in an underground storage right. Since PCSR intends to appropriate a water storage right, PCSR must obtain the requisite real property interests in the reservoir lands from the Landowners.

C. COLORADO COMMON LAW PROVIDES THAT THE FEE OWNER CONTROLS THE SUBSURFACE ESTATE.

It is axiomatic that water cannot be stored on the surface of the land without obtaining the landowner's consent or condemning the right to do so. See FWS Land & Cattle Co. v. State, Div. of Wildlife, 795 P.2d 837 (Colo. 1990) (dismissing a claim for a water storage right where the applicant could not acquire the right to store water on state owned land). The relevant case law in Colorado confirms that the same rule applies to the storage of water underground.

As early as 1878 this Court held that fee ownership includes the space underneath the land:

At common law a grant of land carries with it all that lies beneath the surface down to the center of the earth. At his pleasure the owner of the soil may apply to his own purposes whatever is included in the segment of the earth carved out by his descending exterior boundary lines. Says Sir WILLIAM BLACKSTONE (Book 2, page 18): 'Cujus est solum, ejus est usque ad coelum is the maxim of the law; upwards therefore no man may erect any building or the like to overhang another's land; and downward whatever is in the direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface, as is every day's experience in the mining countries.' By the rules of

the common law, except so far as such rules have been modified by statute, must the extent of the plaintiff's patented grant be determined.

Wolfley v. Lebanon Min. Co., 4 Colo. 112, 114, 1878 WL 226, 2 (Colo.). (Emphasis added.)

In 1917, the Court again confirmed this rule of law in Colorado, holding that:

Land has an indefinite extent upward and downward from the surface of earth, and therefore includes whatever may be erected upon it, and whatever may lie in a direct line between the surface and the center of the earth. 3 Kent, 378 Tiedman, at Sec. 2 (3d Ed.), defines land thus: 'Land is the soil of the earth, and includes everything erected upon its surface, or which is buried beneath it. *** A grant of lands therefore, without any qualifications, conveys not only the soil, but everything which is attached to it, or which constitutes a part of it . . .'.

Walpole v. State Bd. of Land Comm'rs, 62 Colo. 554, 557, 163 P. 848, 849-850 (1917).

(Emphasis added.)

In a criminal trespass context involving recreational use of the surface of a stream, this Court reaffirmed that "[t]he common law rule holds that he who owns the surface of the ground has the exclusive right to everything above it (*'cujus est solum, ejus est usque ad coelum'*)."
People v. Emmert, 198 Colo. 137, 140, 597 P.2d 1025, 1027 (1979). Only the legislature may modify this rule within constitutionally permitted limits. *Id.* at 141, 1027.

The Colorado General Assembly has modified this rule only to limit the ownership of the air space above the ground or water surface. Section 41-1-107, 11 C.R.S. (2000) (establishing that air space is vested in the owners of the surface beneath, subject only to the right to fly aircraft). This statutory limit was adopted by the Colorado General Assembly as part of the Aeronautics Act of 1937 and has continued unchanged since that time. See, Thompson v. City and County of Denver, 958 P.2d 525, 527 (Colo. App. 1998). The legislature has not limited a landowner's rights in the subsurface estate.

The Colorado Court of Appeals has recognized that the right to store water under the surface of the land is part of the landowner's fee estate or "bundle of sticks." In Bushey v. Seven Lakes Res. Co., 37 Colo. App. 106, 545 P.2d 158 (1975), a reservoir company owned fee title to property, including land under its surface reservoirs and land extending beyond the high water line of the reservoirs. A neighboring landowner successfully claimed title to the surface of some of the land above the high water line by adverse possession. The Court of Appeals, however, limited the award to the surface of the land and did not award the subsurface estate, because it found that the reservoir company had continued to use the subsurface for storage of its water. Id. at 109–110, 161. Thus, the Court recognized that the right to store water underground is part of a landowner's fee estate.

In summary, this Court and the Court of Appeals have recognized that a landowner's property rights include the right to occupy and use the storage space under the land surface. Appropriators cannot store water on the surface of lands owned by others without consent or condemnation. Similarly, PCSR cannot store water in its proposed underground reservoir without first obtaining the right to do so from the Landowners. Allowing storage above or below the surface of the land without obtaining the right to do so is contrary to well established common law and would result in an impermissible taking of the fee owner's property rights.

D. THE COLORADO CONSTITUTION AND STATUTORY LAW DOES NOT EXEMPT APPROPRIATORS OF UNDERGROUND WATER STORAGE RIGHTS FROM ACQUIRING REAL PROPERTY RIGHTS FOR RESERVOIR SITES.

1. The Colorado Constitution Provides That Private Storage Rights Can Be Condemned But Not Taken.

The Colorado Constitution generally prohibits the taking of private property for use without the property owner's consent. Colo. Const. art. II, §14. Due to the importance of water

in Colorado, the Constitution provides five exceptions to that prohibition, four of which relate to water. Article II, §14 provides:

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes. (Emphasis added.)

Even those exceptions require that compensation be paid to the owner of the property taken:

“Private property shall not be taken or damaged, for public or private use, without compensation.

...” Colo. Const. art. II, §15.

The General Assembly has codified the right to condemn a right-of-way for ditches in sections 37-86-103 and 104, 10 C.R.S. (2000). The private right of condemnation for reservoir sites is codified in section 37-87-101(1), 10 C.R.S. (2000) which in its applicable part states:

. . . Acquisition of those interests in real property reasonably necessary for the construction, maintenance, or operation of any water storage reservoir, together with inlet, outlet, or spillway structures or other facilities necessary to make such reservoir effective to accomplish the beneficial use or uses of water stored or to be stored therein, may be secured under the laws of eminent domain. (Emphasis added.)

Colorado courts have long recognized that the right to appropriate water, which is guaranteed by the Colorado Constitution, Article XVI, Section 6, is separate and distinct from the real property rights necessary to transport or store the appropriated water, which are guaranteed against takings without just compensation by Article II, sections 14 and 15. In Yunker v. Nichols, 1 Colo. 551, 554, 1872 WL 149, 2 (Colo. Terr.), the Court explained that all lands are held in subordination to the dominant rights of others who need to pass over them to obtain water. The Court required, however, that any such non-consensual taking was subject to

the payment of compensation. Id. at 568, 11. Thus, the General Assembly has provided that all privately held reservoir sites may be condemned upon payment of just compensation.

Condemnation must compensate the landowner for the right to store water or other substances, including gas or oil, in the underground storage space. The right to store substances underground is recognized to be of significant value. See, e.g. Beck v. Northern Natural Gas Co., 170 F.3d 1018, 1021-1023 (10th Cir. 1999) (owner of land used for the storage of gas underground was entitled to the fair rental value for the storage of the gas). Moreover, property owners may also incur damages to the remainder of their property from the unauthorized storage of water under their lands. A higher water level may interfere with excavation and construction, individual septic systems, agricultural production and a myriad of other activities depending on the facts of each case. Colorado courts have recognized a landowner's right to compensation when a building's foundation was damaged by the subsurface trespass of water. Burt v. Beautiful Savior Lutheran Church, 809 P.2d 1064 (Colo. App. 1990). While the determination of damages, and the amount of compensation owed to the landowner, may be difficult in a condemnation action, as noted by the Water Court, App. B at 2, that difficulty does not justify a taking of a landowner's property rights without consent or compensation.

2. The General Assembly Has Never Made An Exception To This Rule For Underground Storage.

Based on the constitutional and common law provisions cited above, it is apparent that water cannot be stored above or below land owned by others without the landowner's consent or condemnation. The General Assembly has not altered these requirements for underground storage. In section 37-92-103(10.5), 10 C.R.S. (2000), the General Assembly has defined storage as:

“Storage” or “store” means the impoundment, possession, and control of water by means of a dam. Waters in underground aquifers are not in storage or stored except to the extent waters in such aquifers are placed there by other than natural means with water to which the person placing such water in the underground aquifer has a conditional or decreed right.

The first sentence applies to all storage claims. The second sentence restricts the manner in which water may be placed into underground aquifers to support a claim for storage. It does not, however, exempt storage underground from any of the requirements to obtain consent or to condemn a property interest in the reservoir site from the landowner.

As noted above, section 37-87-101, 10 C.R.S. (2000) authorizes acquisition of all real property interests in water storage reservoirs and other lands needed for the inlet, outlet, spillway and other facilities. Section 37-87-101(2) clarifies, for the purpose of acquiring such interests for underground storage reservoirs, that:

Underground aquifers are not reservoirs within the meaning of this section except to the extent such aquifers are filled by other than natural means with water to which the person filling such aquifer has a conditional or decreed right.

Thus, to the extent an appropriator intends to use an underground reservoir, under a decreed water storage right, the appropriator must condemn the reservoir site and all other lands needed for the inlet, outlet or other related facilities if those rights cannot be obtained by the consent of the landowners.

Section 37-92-305(9)(c), 10 C.R.S. (2000), sets forth the standards for recognizing a conditional water right for storage in an underground reservoir. It restricts the granting of a decree for such storage rights as follows:

No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed except to the extent water in such an aquifer has been placed there by other than

natural means by a person having a conditional or decreed right to such water.

These statutory provisions do not exempt underground storage from the requirement to obtain landowner consent or to condemn the reservoir site before storing water.

3. The Legislative History Confirms That Appropriators Of Underground Water Storage Rights Are Not Exempt From The Requirements Applicable To Surface Storage.

The statute requiring condemnation for underground reservoir sites is clear on its face, and requires no inquiry into the legislature's intent. However, the circumstances under which the above-cited statutes were enacted further demonstrate that the General Assembly did not intend to restrict or eliminate any property rights of landowners affected by storage in underground reservoirs. Each of the above-cited statutes was enacted in reaction to the filing of the Bluepond applications in December 1978. Those applications, filed contemporaneously with the Huston filings, made claims almost identical to the storage claim made by PCSR in Case No. 96CW014, which is the subject of this case. See, State v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294, 1320-1321 (Colo. 1983) (Huston II) describing the Bluepond claims, as compared to the application for underground storage claim attached as App. A.³ Both PCSR and the Bluepond applicants sought to use a natural underground geologic formation as a storage reservoir.

This Court described the Huston and Bluepond applications as presenting "one of the great emergencies in the history of Colorado water law" because they involved 122 applications, with claims for thousands of wells and over 20 million acre feet of water in claimed underground

³ In Huston II, 671 P.2d at 1320-1321, this Court did not consider the effect of S.B. 79-481, ch. 346, 1979 Colo. Sess. Laws 1366-1369, when it reviewed the Bluepond claims, because the statute was enacted in 1979, after the Bluepond claims had been filed.

reservoirs throughout the state. Southeastern Colo. Water Conservancy Dist. v. Huston, 197 Colo. 365, 369, 376, 593 P.2d 1347, 1349, 1354 (1979) (Huston I); see also Park County Sportsmen's Ranch v. Bargas, 986 P.2d 262, 269 at footnote 15 (Colo. 1999). In reaction to those claims, five different bills were introduced in the General Assembly. Appendix D, Transcript of March 13, 1979, Senate Agriculture, Natural Resources, and Energy Committee Hearing, p. 2 lines 3-12. Among them was Senate Bill 79-481 (S.B. 79-481) sponsored by Senator Fred Anderson. Originally, S.B. 79-481 only addressed the Huston claims for deep aquifer non-tributary ground water, primarily located in southern Colorado. At the first committee hearing, Bill Brown, a lawyer from northern Colorado, noted that S.B. 79-481 failed to address the Bluepond filings for underground water storage rights located to a large extent in northern Colorado. App. D, page 19, line 22 to page 20, line 8. At the next hearing, Mr. Brown's partner, Ward Fischer, testified regarding amendments to S.B. 79-481 that he had drafted to address the underground storage claims made by Bluepond. Appendix E, Transcript of March 15, 1979, Senate Agriculture Committee Hearing, page 22, line 17 to page 38, line 22. Mr. Fischer characterized those claims as "equally dangerous" as the Huston non-tributary claims. App. E, page 23, lines 4-9.

The three Fischer amendments to S.B. 79-481 concerning the underground storage of water were adopted by the committee. App. E at page 50, line 16 to page 52, line 18. They were proposed to be codified as sections 37-92-103(10.5), 37-87-101(2) and 37-92-305(9)(c). App. F, Senate Committee of Reference Report, March 15, 1979, section 3, p. 2, lines 5-7, proposed section 37-87-101(2); section 5, p. 2, lines 40-42, proposed section 37-92-103(10.5); and section 6, p. 3, lines 16-18, proposed section 37-92-305(9)(c). While the amendments were later altered

in part, to allow the filling of underground reservoirs with water placed into the aquifer “by other than natural means,” all three of these statutes were enacted to impose further limits on storage in underground aquifers, not to relax any of the requirements. See Trout, “Can and Will:” *The New Water Rights Battleground*, 20 Colo. Lawyer 727, 728 (1991) (“Senate Bill (“S.B.”) 481 apparently was intended to prevent such applications in the future and, perhaps, to kill the applications that had been only recently filed.”).

The General Assembly, in response to the Bluepond claims, did not confer special status upon claimants for underground storage decrees by imposing lesser requirements than those imposed by common law on surface storage applicants. If the legislature wishes to change the common law in that regard, it was required to manifest its intent either expressly or by clear implication. Vaughan v. McMinn, 945 P.2d 404, 408 (Colo. 1997) (citations omitted); see also section 2-4-211, 1 C.R.S. (2000). The General Assembly did not do so. As a result, persons desiring to appropriate and store water underground must obtain consent of the landowner or condemn property interests sufficient to cover the reservoir site.

F. A RULING IN THIS CASE WILL NOT AFFECT THE ARTIFICIAL RECHARGE AND EXTRACTION OF WATER IN THE DENVER BASIN AQUIFERS.

In the Water Court, amicus argued that a ruling in favor of the Landowners, requiring consent or condemnation to store water under lands owned by others in tributary aquifers, would adversely affect rights to recharge Denver Basin aquifers. However, any ruling in this case would be limited to tributary aquifers and would have no application to Denver Basin aquifers.

In 1994, in Senate Bill 97, ch. 106, 1994 Colo. Sess. Laws 617, the General Assembly amended Senate Bill 5, the statute governing withdrawal and use of water from non-tributary aquifers in Colorado, by adding section 37-90-137(9)(d):

On or before July 1, 1995, the state engineer shall 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. The rules shall effectuate the maximum utilization of these aquifers through the conjunctive use of surface and ground water resources. (Emphasis added.)

As a result, the State Engineer promulgated the “Rules and Regulations For The Permitting And Use of Waters Artificially Recharged Into The Dawson, Denver, Arapahoe, and Laramie-Fox Hills Aquifers,” 2 C.C.R. 402-11 (“Denver Basin Artificial Recharge Extraction Rules”).

A ruling in this case will not affect the artificial recharge and extraction of water from the Denver Basin because:

1. This case does not involve any Denver Basin aquifers. It involves a claim for storage in a tributary aquifer.
2. The Denver Basin Artificial Recharge Extraction Rules do not provide for, nor depend on, the granting of a decree for an underground water storage right for the water to be artificially recharged or extracted. The General Assembly has simply exercised its plenary power over water in these non-tributary aquifers, Bayou Land Co. v. Talley, 924 P.2d 136, 145-150 (Colo. 1996), to allow entities to artificially recharge and extract water in those non-tributary aquifers.
3. In a case related to this one, this Court recognized that portions of Senate Bill 5 adopted special rules for the Denver Basin aquifers that are not applicable to other aquifers in the State, and particularly not to the aquifers in South Park. Park County Sportsmen’s Ranch v. Bargas, *supra*. Like the portions of Senate Bill 5 considered in Bargas, the Denver Basin Artificial Recharge Extraction Rules only apply to the specified Denver Basin aquifers.

Thus, a ruling in this case, dealing only with the right of landowners within the proposed reservoir site for storage of water in a tributary aquifer outside of the Denver Basin, will have no effect on the recharge and extraction of water in the non-tributary Denver Basin aquifers.

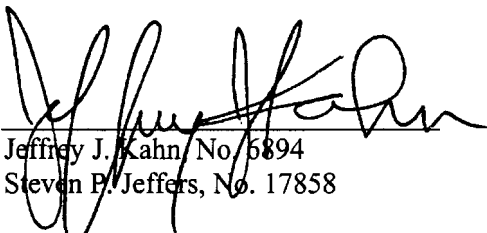
V. CONCLUSION

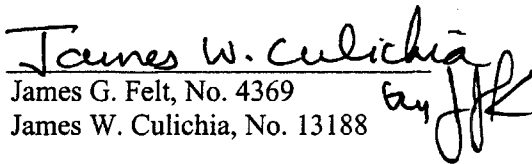
The Supreme Court should reverse the Order of the Water Court and rule that PCSR may not store any water in the underground reservoir on Landowners' property without their consent or acquiring real property interests in the reservoir site by condemnation.

Dated this 24th day of May, 2001.

BERNARD, LYONS, GADDIS & KAHN,
a Professional Corporation

FELT, MONSON & CULICHIA, LLC

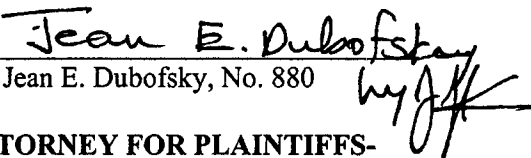
By: 
Jeffrey J. Kahn, No. 5894
Steven P. Jeffers, No. 17858

By: 
James G. Felt, No. 4369
James W. Culichia, No. 13188

**ATTORNEYS FOR PLAINTIFF-APPELLANT,
THE BOARD OF COMMISSIONERS OF
COUNTY OF PARK**

**ATTORNEYS FOR PLAINTIFFS-
APPELLANTS, JAMES B. GARDNER AND
AMANDA WOODBURY**

JEAN E. DUBOFSKY, P.C.

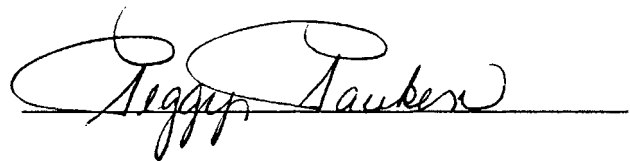
By: 
Jean E. Dubofsky, No. 880

**ATTORNEY FOR PLAINTIFFS-
APPELLANTS THE BOARD OF
COMMISSIONERS OF COUNTY OF PARK,
JAMES B. GARDNER AND AMANDA
WOODBURY**

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of May, 2001, a true and correct copy of the foregoing **OPENING BRIEF OF APPELLANTS** was deposited in the U.S. Mail, first-class postage prepaid, addressed to:

Kenneth J. Burke, Esq.
Bennington Johnson & Reeve
370 17th Street
Denver, CO 80202

A handwritten signature in cursive script, reading "Reggie Tauber", is written over a horizontal line.

APPENDICES

APPELLANTS' OPENING BRIEF

2001SA56

Appendix A: Claim 2, Application for Water Rights of Park County Sportsmen's Ranch (96CW014)

Appendix B: Court Order Denying Summary Judgment (99CW129)

Appendix C: Excerpts from Warner, Altenhofen, Odor and Welch, *Recharge As Augmentation in the South Platte River Basin*, CSU Groundwater Program Technical Report #21, (1994) pp. i-vii, 1-4

Appendix D: Excerpts from Transcript of March 13, 1979, Senate Agriculture, Natural Resources, and Energy Committee Hearing, S.B. 79-481, pp. 2, 19-22, 45

Appendix E: Excerpts from Transcript of March 15, 1979, Senate Agriculture Committee Hearing, S.B. 79-481, pp. 22-38, 50-52

Appendix F: Senate Committee of Reference Report, March 15, 1979, S.B. 79-481

Case No. 96 CW 014

APPLICATION FOR DETERMINATION OF CONDITIONAL UNDERGROUND WATER RIGHTS INCLUDING CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE, CONDITIONAL UNDERGROUND WATER STORAGE RIGHTS INCLUDING CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE, ABSOLUTE AND CONDITIONAL SURFACE RECHARGE RESERVOIRS AND COLLECTION SYSTEMS INCLUDING CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE AND APPLICATION FOR APPROVAL OF PLAN FOR AUGMENTATION INCLUDING CHANGE OF WATER RIGHTS AND CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH, IN PARK COUNTY

Applicant, Park County Sportsmen's Ranch, a Colorado general partnership, by and through its attorneys, BAKER & HOSTETTLER requests that a decree be entered as follows:

FIRST CLAIM FOR RELIEF

**Conditional Underground Water Rights Including
Conditional Appropriative Rights Of Exchange
For Wells To Be Constructed At
South Park Conjunctive Use Project Well Sites**

1. Name, address and telephone number of applicant:

a. Park County Sportsmen's Ranch
4901 East Dry Creek Road, #200
Littleton, CO 80122
(303) 773-6185

b. Applicant seeks the determination of its water rights for wells to be constructed at South Park Conjunctive Use Project Well Sites 1-26 both for itself and as agent in fact for City of Aurora, a municipal corporation of the counties of Adams, Arapahoe and Douglas, acting by and through its Utility Enterprise (hereinafter sometimes referred to as "City of Aurora"). As used herein, the term "Applicant" refers to Applicant acting for itself as well as in its capacity as agent in fact for City of Aurora.

2. Names of structures:

Wells to be constructed at South Park Conjunctive Use Project Well Sites 1-26, inclusive.

3. Sources of water:

a. The sources of water for each well to be constructed at these Well Sites are waters now found in the South Park Aquifer as well as waters subsequently placed therein and also placed in the

App. A
Appellants'
Opening Brief
2001SA56

FILED IN WELD COUNTY
COUNTY CLERK
APR 22 1996

SECOND CLAIM FOR RELIEF
Application For Conditional Underground Water Storage Rights
Including Conditional Appropriative Rights of Exchange
For South Park Formation Underground Reservoir System

1. Name, address and telephone number of applicant:

a. See Item 1.a of First Claim for Relief.

b. Applicant seeks the determination of its water rights to the South Park Formation Underground Reservoir System both for itself and as agent in fact for City of Aurora, a municipal corporation of the counties of Adams, Arapahoe and Douglas, acting by and through its Utility Enterprise (hereinafter sometimes referred to as "City of Aurora"). As used herein, the term "Applicant" refers to Applicant acting for itself as well as in its capacity as agent in fact for City of Aurora.

2. Name of water storage system:

South Park Formation Underground Reservoir System. For a description of the South Park Formation components which will be utilized by Applicant, see Item 3 of Applicant's First Claim for Relief herein. The South Park Formation Underground Reservoir System is described more fully as follows:

a. As indicated on Exhibit A, the precambrian granite immediately east of the Elkhorn Thrust Fault has created an existing, naturally occurring underground dam lying along the eastern edge of the South Park Formation. This naturally occurring dam as it is associated with the South Park Formation in turn creates a water storage system capable of operation by Applicant as an underground reservoir. The unsaturated portion of the South Park Formation itself contains storage capacity which Applicant will utilize. The South Park Aquifer is contained within the saturated portions of the South Park Formation and can also be utilized as a reservoir. A representative cross-section depicting the South Park Formation and the underground dam as they exist beneath the Subject Land is attached hereto as Exhibit C.

b. As discussed in its description of the project's wells, Applicant proposes to withdraw the water presently or hereafter held in the South Park Formation and to release it into the overlying streams. Applicant will thereby create active storage capacity in such formation. Applicant claims the right to utilize both the saturated as well as the unsaturated portions of the South Park Formation for water storage. Applicant will store water in both portions of the South Park Formation by securing water storage rights. These rights will permit Applicant to fill and refill this underground reservoir system from surface streams and other sources. Such filling will be made both to such reservoir system's existing storage capacity as well as to the new capacities created

by pumping from the system. Storage capacity available to Applicant will also be created by subsequent pumping of water stored in the formation and in the aquifer.

c. Applicant will remove waters stored in the South Park Formation Underground Reservoir System through use of the wells constructed at South Park Conjunctive Use Project Well Sites 1-26, inclusive, as described in Applicant's First Claim for Relief herein.

3. Sources of water:

Applicant will utilize water storage space in the South Park Formation Underground Reservoir System which will be filled and refilled from the following sources:

Fill and Refill Source	Legal Description	Flow in cfs and/or Capacity in AF
South Park Formation Recharge Reservoir No. 1	See Item 4.a of Applicant's Third Claim for Relief herein	479.4 cfs 17,210 AF
South Park Formation Recharge Reservoir No. 2	See Item 4.b of Applicant's Third Claim for Relief herein	479.67 cfs 1500 AF
South Park Formation Recharge Reservoir No. 3	See Item 4.c of Applicant's Third Claim for Relief herein	479.67 cfs 5575 AF
South Park Formation Recharge Reservoir No. 4	See Item 4.d of Applicant's Third Claim for Relief herein	476.75 cfs 1310 AF
South Park Formation Recharge Reservoir No. 5	See Item 4.e of Applicant's Third Claim for Relief herein	461.25 cfs 35 AF
South Park Formation Recharge Reservoir No. 6	See Item 4.f of Applicant's Third Claim for Relief herein	461.25 cfs 18 AF
PCSR Spring No. 4 Collection System	See Item 15 of Applicant's Third Claim for Relief herein	0.75 cfs
North Branch Collection System	See Item 21 of Applicant's Third Claim for Relief herein	459 cfs
Natural Stream Recharge and naturally occurring, percolating precipitation directly recharging the active capacity of the South Park Formation claimed herein	Natural stream recharge will occur at all points of contact between such natural streams and the South Park Formation as indicated on the attached Exhibit A. Naturally occurring, percolating precipitation will occur above the entirety of the extent of the South Park Formation as indicated on the attached Exhibit A.	From all natural recharge sources: 6522 AF
PCSR Spring No. 1	begins in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec 35, T8S, R76W, at a point from which the SE corner of said section bears S66°E a distance of 2600 ft	0.75 cfs

Fill and Refill Source	Legal Description	Flow in cfs and/or Capacity in AF
PCSR Spring No. 2	begins in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec 35, T8S, R76W, at a point from which the SW corner of said section bears S43°W a distance of 2850 ft.	0.75 cfs
PCSR Spring No. 3	begins in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec 35, T8S, R76W, at a point from which the NW corner of said section bears N43°W a distance of 3000 ft. (all springs run into PCSR Res. Nos. 1 & 2)	0.75 cfs
PCSR Diversion Dam No. 1	the right side of the dam being located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec 1, T9S, R76W, at a point from which the SE corner of said section bears S25°E a distance of 1100 ft.	2.25 cfs
PCSR Reservoir No. 2	the left side of the dam being located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec 7, T9S, R75W, at a point from which the SW corner of said section bears S45°W a distance of 2850 ft.	2.25 cfs 35.00 AF

Applicant also claims rights to continuing recharge from all sources of return flows, seepage and deep percolation recharging the South Park Formation after first use by anyone for irrigation or other beneficial uses occurring on the lands overlying the South Park Formation as described in Item 4 below of this Second Claim for Relief.

4. Legal Description of South Park Formation Underground Reservoir System:

The areal extent of the South Park Formation as it is located at or beneath the land surface is depicted on the attached Exhibit A, the content of which is incorporated herein by this reference as if fully set forth. These lands are located in all or portions of the following sections:

Sections	Township	Range
31	7 South	75 West of the 6th Principal Meridian
6, 7, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33, 34	8 South	75 West of the 6th Principal Meridian
3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, 33	9 South	75 West of the 6th Principal Meridian

Sections	Township	Range
4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35	10 South	75 West of the 6th Principal Meridian
1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27	11 South	75 West of the 6th Principal Meridian
35, 36	7 South	76 West of the 6th Principal Meridian
1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 35, 36	8 South	76 West of the 6th Principal Meridian
1, 2, 11, 12, 13, 14, 23, 24, 25, 26, 35, 36	9 South	76 West of the 6th Principal Meridian
1, 2, 12, 13	10 South	76 West of the 6th Principal Meridian

5. Dates of appropriation and manner in which each appropriation was initiated:

July 13, 1992 by Applicant's formation of its intent to utilize surface and ground water for the purposes set forth herein and by its performance of certain overt actions taken in furtherance of the project and as manifestations and notice to others of the foregoing intent, which actions include, but are not limited to, the following:

- a. Performing on-site geologic work, physically penetrating the South Park aquifer and conducting well bore sampling and water quality analyses.
- b. Securing professional geological and hydrological reports respecting the amount and location of available water.
- c. Locating project well sites and surface points of diversion and storage.
- d. Preparation and filing of this Application.

6. Date water applied to beneficial uses: Not applicable.

7. Amounts of water claimed:

140,000 acre feet and 116.0 cfs, all conditional, with 70,000 acre feet of such volumetric storage amount being separated into two Reservoir Zones (where the Link Springs Tuff Member is present) described as follows:

a. South Park Formation Underground Reservoir System Zone No. 1 (consisting of those portions of the formation lying above the base of the Link Springs Tuff Member):

70,000 acre feet and 58.0 cfs, all conditional.

b. South Park Formation Underground Reservoir System Zone No. 2 (consisting of those portions of the formation lying above the Laramie Formation but below the base of the Link Springs Tuff Member):

70,000 acre feet and 58.0 cfs, all conditional.

8. Uses and proposed uses:

a. Same as Items 10.a-10.e, inclusive, in Applicant's First Claim for Relief above.

b. Applicant also claims the right to fill and refill said water storage system on the same terms, with the same appropriation date, and for the same purposes as are described in such Items 10.a-10.e, inclusive, and to fully consume by recapture and otherwise all waters diverted into Applicant's South Park Formation Underground Reservoir System.

9. Total maximum capacities of each reservoir in acre feet:

a. South Park Formation Underground Reservoir System:

Active Capacity	140,000 acre feet
Dead Storage	-0- acre feet
TOTAL CAPACITY	140,000 acre feet

b. South Park Formation Underground Reservoir System Zone No. 1:

Active Capacity	70,000 acre feet
Dead Storage	-0- acre feet
TOTAL CAPACITY	70,000 acre feet

c. South Park Formation Underground Reservoir System Zone No. 2:

Active Capacity	70,000 acre feet
Dead Storage	-0- acre feet
TOTAL CAPACITY	70,000 acre feet

10. Remarks applicable to all water rights sought in sections 1 through 9 above, inclusive:

Applicant claims the right to use the natural streams of this state to deliver the waters withdrawn by the foregoing South Park Formation Underground Reservoir System directly, or by exchange, to their place or places of storage or initial beneficial use or their places of disposition, successive use or re-use. The date of

appropriation of the proposed exchange is July 13, 1992 and is based upon the same details of act and intent as set forth in Item 7 of Applicant's First Claim for Relief herein. Such exchange will take place at the rate of 116.0 cfs from the wells to be constructed at South Park Conjunctive Use Project Well Sites 1-26, inclusive, to the confluence of Park Gulch and Tarryall Creek. Applicant claims all of the rights set forth above for itself, its principal, its successors, assigns, lessees and contractors.

The water rights described in this Claim for Relief are part of a single integrated water system designed to provide a water supply to Applicant, which shall proceed in phases over an extended period of time. Applicant requests that the Court recognize the existence of this integrated system and the related phased development program for purposes of all required future determinations of reasonable diligence.

11. Remarks pertaining to uses and proposed uses:

See Item 11 of Applicant's First Claim for Relief.

12. Remarks pertaining to conditional water rights requested:

See Item 12 of Applicant's First Claim for Relief.

13. Names and addresses of owners or reputed owners of land upon which water storage systems will be located:

Please see Item 14 of Applicant's First Claim for Relief, and Items 13 and 29 of Applicant's Third Claim for Relief.

WHEREFORE, Applicant requests that this Court enter a decree granting the rights requested.

THIRD CLAIM FOR RELIEF

Absolute and Conditional Surface Recharge Reservoirs and Collection Systems Including Conditional Appropriative Rights of Exchange For South Park Formation Surface Recharge System

1. Name, address and telephone number of applicant:

a. See Item 1.a of First Claim for Relief.

b. Applicant seeks the determination of its water rights to all South Park Formation Surface Recharge System components both for itself and as agent in fact for City of Aurora, a municipal corporation of the counties of Adams, Arapahoe and Douglas, acting by and through its Utility Enterprise (hereinafter sometimes referred to as "City of Aurora"). As used herein, the term "Applicant" refers to Applicant acting for itself as well as in its capacity as agent in fact for City of Aurora. The components of Applicant's South Park Formation Surface Recharge System consist of certain Surface Recharge Reservoirs and Surface Recharge Collection Systems which are discussed more fully below:

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO

Case No. 96CW014

AMENDMENT TO APPLICATION FOR DETERMINATION OF CONDITIONAL UNDERGROUND WATER RIGHTS INCLUDING CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE, CONDITIONAL UNDERGROUND WATER STORAGE RIGHTS INCLUDING CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE, ABSOLUTE AND CONDITIONAL SURFACE RECHARGE RESERVOIRS AND COLLECTION SYSTEMS INCLUDING CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE AND APPLICATION FOR APPROVAL OF PLAN FOR AUGMENTATION INCLUDING CHANGE OF WATER RIGHTS AND CONDITIONAL APPROPRIATIVE RIGHTS OF EXCHANGE

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH, IN PARK COUNTY

Applicant, Park County Sportsmen's Ranch, a Colorado general partnership, by and through its attorneys, BAKER & HOSTETLER, and pursuant to Rule 15, C.R.C.P. and Rule 4 of the Uniform Local Rules for all State Water Court Divisions, hereby amends its application heretofore filed herein as follows:

1(a) Rewording the title of Item 2 in each of Applicant's First and Second Claims for Relief to read as follows:

Project or system component names and general locational information:

(b) Adding the following sentence to stand alone at the conclusion of each such Item:

All legal descriptions provided herein and all section lines depicted on the attached maps are keyed to a polyconic projection based upon the 1927 North American datum.

2. Adding the following language at the conclusion of the chart set forth in Item 3 of Applicant's Second Claim for Relief:

Applicant claims the rights to use of PCSR Springs Nos. 1, 2 and 3, inclusive, free of the call of the river pursuant to the futile call doctrine. Applicant also claims such rights as developed water rights pursuant to the rule of Pikes Peak Golf Club, Inc. v. Kuiper, 169 Colo. 309, 455 P.2d 882 (1969). PCSR Springs Nos. 1, 2 and 3 are described more fully in the decree entered in Case No. 93CW002, described below.

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96CW014
P.122
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3. Rewording the introductory section to Item 7 of its Second Claim for Relief to read as follows:

140,000 acre feet and 116.0 cfs, all conditional, with such volumetric storage amount being separated into two Reservoir Zones of 70,000 acre feet each (where the Link Springs Tuff Member is present) described as follows:

4. Rewording the title of Item 13 of its Second Claim for Relief to read as follows:

Names and addresses of owners or reputed owners of land upon which structures are to be located or upon the surface of which water is to be stored:

5(a) Rewording the titles of Items 2, 14 and 20 of Applicant's Third Claim for Relief to read as follows:

System component identification and general locational information:

(b) Adding the following sentence to stand alone at the conclusion of each such Item:

All legal descriptions provided herein and all section lines depicted on the attached maps are keyed to a polyconic projection based upon the 1927 North American datum.

6. Rewording Item 4.b of its Third Claim for Relief (setting forth the legal description for South Park Formation Recharge Reservoir No. 2) to read as follows:

Reservoir	Dam Location
b. South Park Formation Recharge Reservoir No. 2	Left abutment located in the NE¼NW¼ Section 19, T9S, R75W of the 6th P.M. at a point whence the NW corner of said Section 19 bears N82°W a distance of 2200 feet

7. By reflecting the range in pipeline capacities shown in Item 12 of its Third Claim for Relief as 461.25 to 479.67 cfs.

store and beneficially use the water sought to be stored . In this case, no facilities of any kind will be constructed on Plaintiffs' land, nor will the Defendant's use and operation of its underground storage activities take place on Plaintiffs' land. Plaintiffs have not alleged that their use, benefit and enjoyment of the estate will be invaded or compromised in any way. To the extent that the subsurface estate is utilized for storage of Defendant's water, it is analogous to the use of an unconfined aquifer or natural stream for transport. As a practical matter, artificial recharge benefits adjacent overlying landowners: recharge will temporarily raise the elevation of the water level in the aquifer, temporarily reducing of the cost of pumping.

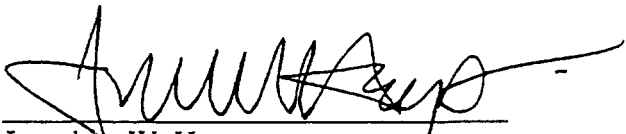
Artificial recharge may impact the quality of the water historically needed and used by senior appropriators. However, claims of diminished aquifer water quality are independent from claims of trespass, and are more properly addressed in a statement of opposition.

Additionally, the law encourages, rather than restrains, the efficient utilization of Colorado's scarce water resources. Legislative intent contemplates the artificial recharge of aquifers, and conjunctive use of stored groundwater, as a means for achieving maximum utilization. C.R.S. §§ 37-87-101(2); 37-90-137(4)(b)(II); 37-92-305(9)(c). 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.

In the court's view, the clear intent of the law is dispositive. In addition, however, the Court notes that the Plaintiffs' trespass claim injects nearly unfathomable factual issues . The evidentiary burdens of proving the exact hydrological boundaries of disputed underground formations; tracking the movement of specific water molecules within them; and, determining the effect of recharge upon the level of the aquifer would create a litigation quagmire that would unreasonably burden the resources of government and water rights holders alike.

In sum, the court concludes that the movement of underground water in an aquifer, resulting from artificial recharge, does not constitute a trespass. Accordingly, Plaintiffs' Motion for Summary Judgment is hereby **denied**.

So ordered, August 25, 2000:



Jonathan W. Hays
District Judge, Water Division I.

RECHARGE AS AUGMENTATION IN
THE SOUTH PLATTE RIVER BASIN

by

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March 1994

Groundwater Program Technical Report #21
prepared for
Colorado Water Resources Research Institute

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Preface

This study was conducted as a service to the citizens of the state of Colorado. Better water management in the South Platte River Basin has been identified as a major concern to the state. Of increasing interest are the augmentation/recharge projects being implemented in the South Platte River Basin. This report documents the current augmentation/recharge projects in the basin.

This report is one of a series of groundwater reports published by the Groundwater Program, Department of Civil Engineering, Colorado State University, and is an update of Report # 13 published in November, 1986.

ACKNOWLEDGEMENT

Special thanks go to Forrest Leaf of the Central Colorado Water Conservancy District and to Les Dalby of the State Engineers Office for providing some of the data required for this report. Their efforts are greatly appreciated.

We would also like to acknowledge the support the of the Groundwater Program Agricultural Experiment Station Project (#15-1101) at Colorado State University.

Abstract

Artificial recharge is a recently implemented method of basin water management along the South Platte River. Currently there are about 60 artificial recharge projects being conducted in the South Platte River Basin. This represents about three-fourths of all the artificial recharge projects in the State of Colorado. The purpose of almost all of these projects is for streamflow augmentation to the South Platte River. This is needed to offset the stream depletion caused by pumping of irrigation wells located in the alluvium of the South Platte River Basin. In 1975 the State Engineers Office issued a set of four rules specifically for the South Platte River Basin. These rules called for plans of augmentation and brought about the establishment of water-user organizations such as the Groundwater Appropriators of the South Platte River Basin (GASP). GASP is an important component of many of the artificial recharge projects in the South Platte River Basin. GASP does not implement its own recharge projects but instead encourages the development of recharge projects through purchase of recharge credits.

Two methods are currently used to calculate return flow to the river from these recharge/augmentation projects. One method is Glover's analytical solution for a well near a stream. The second, more commonly used method, is the Stream Depletion Factor (SDF) which is based on Glover's solution but uses a numerical groundwater model to compensate for varying aquifer properties and boundary conditions found in the field. Current research work at CSU is involved with verifying the results of return flow calculations using both Glover's solution and the SDF method.

The water supply situation along the South Platte River is a result of the combined effects of agricultural demands, limited water supply, legal, economic and engineering constraints. In response, the recharge/augmentation projects have evolved out of a progressive policy of basin water management in order to provide a plentiful water supply for the state, with its growing agricultural and urban water demands.

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I. INTRODUCTION

Currently there are about 60 artificial groundwater recharge sites located along the South Platte River from Denver to the Nebraska border. The purpose of almost all of these sites is augmentation of stream flow to the South Platte River Basin. This is needed to offset the stream depletion caused by pumping of irrigation wells located in the alluvium of the South Platte River Basin. It is the purpose of this study to document current artificial recharge operations in the South Platte River Basin and to describe the engineering methods used to calculate the return flows to the river. These augmentation/recharge projects along the South Platte River have evolved out of the quest for better basin water management in order to provide a constant, plentiful water supply for the region, with its growing agricultural and urban water demands.

The situation along the South Platte river is a result of the combined effects of agricultural demands, limited water supply, legal, economic and engineering constraints. The South Platte River below Denver is a gaining stream, because it receives return flow from the aquifer. This return flow is mostly due to deep percolation of applied irrigation water.

Before irrigation development, the South Platte River would be dry in the summer while now it flows continuously due to these return flows. Regulations have evolved to protect these return flows because water rights administration depends on the maintenance of adequate return flows.

1.1 Historical Background

Artificial groundwater recharge is a recently implemented method of basin water management along the South Platte River. It is the latest in a series of engineering attempts to provide water for agricultural use in the South Platte River basin. In chronological order of implementation, canals, reservoirs, wells, and most recently recharge/augmentation projects have been developed and used by the farmers along the South Platte River to improve water availability and reliability. The extensive canal system of the South Platte River Basin was built by the earliest settlers in the late 1800's (1). Later in the early 1900's reservoirs were constructed. These reservoirs were built to store excess water that flowed in the South Platte River during winter and spring. The stored water could then be released during the irrigation season, when flow in the river is low and the demand for water is high.

In the 1920s, farmers who had low priority surface water rights constructed wells to tap the groundwater in the alluvial aquifer of the South Platte River Basin. By 1970, 6,700 wells had been drilled (2), and it had become apparent that this groundwater pumping was depleting the supply of water in the river. Several cases were filed in water court, which brought about the need to consider the relationship between surface and groundwaters.

In 1969 the "Water Rights Determination Act" was passed, recognizing the interrelationship between surface and groundwaters. The act states that the policy of the State of Colorado is to integrate groundwater and surface water use in order to maximize beneficial use.

The following principles summarize the Water Rights Determination Act:

1. All previously vested rights and uses protected by law, including an appropriation from a well, shall be protected.
2. The present use of wells, either independently or in conjunction with surface rights shall be given the fullest possible recognition. However, this principle will be limited by existing vested rights. Each diverter must establish a reasonable means of diversion and he cannot command the whole flow to take his appropriation.
3. Use of a well may be an alternate or supplemental source for a surface decree.
4. No junior appropriator can be limited unless this reduction would result in an increased water supply available to the senior appropriator. This principle recognized the "futile call" concept as part of the overall concept of maximization of beneficial use.(1)

In 1975, the State Engineer instituted a set of four rules of regulations prepared specifically for the South Platte Basin. These four rules are listed in Appendix A of this report. In RULE 1, "underground water" is defined as water that is hydraulically connected to the South Platte River, and is considered different from designated groundwater. RULE 2 sets a three year schedule (beginning with 1974) for curtailment of pumping, ending with complete curtailment in the year 1976. It further states that no curtailment will occur if a decreed augmentation plan exists for the well. RULE 3 discusses temporary plans for augmentation, which must be reviewed by the state engineer's office every year. RULE 4 states the criteria by which the calculation of stream depletion is made.

These rules called for plans of augmentation and brought about the establishment of water-user organizations. These organizations charge membership fees which they use to develop augmentation plans and recharge projects. The Central Colorado Water Conservancy Ground Water Management Subdistrict (Central) and Ground Water Appropriators of the South Platte (GASP) are two water-user groups currently involved with augmentation throughout the lower South Platte River Basin.

1.2 Augmentation Plans

Plans of augmentation allow wells to be pumped at times and in amounts which would not otherwise be permitted under Colorado Law. These augmentation plans can take several forms but only augmentation plans concerned with artificial recharge are considered here. The basic concept is that groundwater pumping by wells from the alluvial aquifer of the South Platte River Basin causes a net depletion of streamflow in the river and resulting injury to senior water rights. In practice almost all of the surface water right holders on the South Platte are senior to almost all of the groundwater appropriators. Groundwater has an important role in the agricultural development of the river basin and to completely shut down all of the wells to prevent injury to the senior surface water rights would have drastic economic consequences.

The augmentation plans ensure that water is available to replace "the net groundwater extraction" caused by the wells and thus not diminish the flow in the South Platte during critical irrigation periods. The effect on stream flows caused by pumping wells is not immediate and results in a delayed response in the river. The effect can be calculated using mathematical methods. With augmentation by recharge, water is diverted during times of high flow for recharge to the groundwater. The South Platte River is a gaining stream and the recharged groundwater is returned at a later date. The concept is to time the recharge so that it will return and augment the river when needed during the critical period of the irrigation season. This returned recharge water is therefore available in the river by the senior surface water right holder to meet his irrigation needs. In addition, a created mound can be pumped down later for a net zero effect to the river. Several methods are used to calculate return flow to the river. The method of calculation is important in that errors may result in no water in the river when it is needed. The State Engineers office gives credit for the recharge water that is returned to the river which in effect reduces or eliminates the diminishment caused by the pumping wells covered under the augmentation plan. An example of an engineering report for an augmentation plan, along with the augmentation plan's water court decree, is given in Appendix B of this report.

2 SENATE COMMITTEE ON AGRICULTURE, NATURAL RESOURCES & ENERGY

3 March 13, 1979

4 SENATE BILL 481 - 79

5
6 TRANSCRIPT OF TAPE RECORDED PROCEEDINGS

7
8 SEN. HAROLD McCORMICK, Chairman

9 SEN. FRED ANDERSON, Sponsor

10
11 COMMITTEE ATTENDANCE

12 Sen. Polly Baca-Barragan; Sen. Tilman Bishop; Sen. Martin
13 Hatcher; Sen. Dan Schaefer; Sen. Richard Soash; Sen. Maynard Yost

14
15 SPEAKING TO THE BILL

16 Glenn Saunders, Esq., pro se.

17 Bob Welborn, Esq., representing CF&I, various water users
18 in Douglas County.

19 Bill Brown, Esq., representing Cachhe Le Poudre Water
20 Users Association.

21 David Miller, Esq., pro se, from Greeley, Colorado.

22 Harlan Erker, Water Resource Engineer, pro se.

23 Charles Beise, Esq., representing the Southeastern
24 Colorado Water Conservancy District.

25 App. D
26 Appellants'
Opening Brief
2001SA56

1 [The tape recorded proceeding as set forth on page one is
2 transcribed as follows:]

3 MR. CHAIRMAN: ...bill, not in any particular order, but
4 I think a priority over any of the other bills. Senate Bill 69, by
5 Sen. Anderson, concerning the administration of underground water,
6 a companion measure to that; Senate Bill 176 by Sen. Wham,
7 concerning permits to construct wells in deep aquifers; Senate Bill
8 410 by Sen. McCormick and Anderson, concerning the appropriation of
9 water; and Senate Bill 448, by Sen. Wham, concerning categories of
10 non-surface water; and Senate Bill 481, by Sen. Anderson,
11 concerning water subject to appropriation. And Fred, it's my
12 understanding that this is kind of an offset to Senate Bill 69.

13 Mr. Morandi, is the sign-up sheet out there?

14 MR. MORANDI: No, it's (inaudible)

15 MR. CHAIRMAN: We invite those who do wish to speak today
16 to sign up and speak in a -- generally, in conformance with the
17 following guidelines. We only have until about 3:25 this
18 afternoon, about another hour and 15 minutes for this committee
19 to meet.

20 And I would hope that the principal speakers -- and I
21 urge you to speak, those who are here, because we urge you to come
22 on up, because you have a competence in this critical area. And if
23 you'd try to confine your remarks, generally, let us say, to about
24 a five-minute parameter. And from that, we'll move into
25 consideration of the bills.

1 carrying out the 1969 legislative intent.

2 But I think once, assuming Senate Bill 481 is passed, and
3 I think we can deal with -- I think the legislature can provide
4 procedures under Senate Bill 213, without amending that statute
5 itself, and not create any problems. And I think it can do that in
6 the current sessions.

7 MR. CHAIRMAN: Thank you. Questions from the committee?
8 Thank you, Mr. Welborn. Mr. Brown.

9 MR. BROWN: Mr. Chairman, members of the committee. Let
10 me identify myself. My name is Bill Brown, and to the best of my
11 knowledge, I've never appeared before this committee.

12 I'm an attorney from Fort Collins, and I represent the
13 Cache La Poudre Water Users Association. That association is the
14 group of mutual irrigation companies in Fort Collins and Greeley
15 and the other users on the Poudre.

16 In the interest of your time, I will do nothing more
17 than to tell you I concur wholeheartedly with the comments of Mr.
18 Saunders and Mr. Welborn. I couldn't say it any better, and I
19 think any attempt to say more would be repetitive, and I might even
20 mess it up. So let me -- let me just say that I fully endorse what
21 they do say.

22 Sen. McCormick mentioned at the beginning of the hearing
23 that what we all know we're addressing are these massive water
24 filings. I will tell you this: a concern that we have with 481
25 is that it is addressing only one of three -- at least as we see

1 it, three major problems with that massive water filing. It is
2 addressing the deep water aquifers.

3 What we remain concerned with, at least up in our neck of
4 the woods, are two other problems. One of them has to do with the
5 attempt to appropriate huge amounts of water in what are known or
6 called, by the applicant, underground reservoirs, which are nothing
7 more than something under the ground. How we identify them, I
8 don't know. But we're talking about a lot of water.

9 In North Park, for example, my understanding is the
10 volume of water is something in excess of 191,000 acre feet, which
11 is, as we understand it, is a greater volume than is consumptively
12 used by all the irrigation up there.

13 A third problem we don't believe is addressed by 481,
14 and we'd like to see addressed, has to do with this business of
15 the attempt to appropriate the unused water from non-tributary
16 wells. We would like -- we think this is improper under the law,
17 and we'd like to see it addressed.

18 Specifically what -- well, we'd like to see considered is
19 legislation making it clear that there is no independent right of
20 appropriation to this type of water, that it becomes a part of the
21 natural stream.

22 My law partner, Ward Fisher, and I have discussed our
23 concerns and even drafted some proposed legislation. We've
24 discussed that with Sen. Anderson and with Glen and Bob.

25 If the -- I don't know what's appropriate. If the

1 committee would be interested in the language or our concerns, I'd
2 be more than happy to distribute it, or speak to it in more detail
3 later on.

4 MR. CHAIRMAN: We'd like to have the members have copy of
5 it, and any persons present who want to leave written testimony
6 with the staff, that will become part of our permanent record, and
7 I'd appreciate it very much.

8 MR. BROWN: I'll make sure to leave it before I leave.

9 MR. CHAIRMAN: Sen. Anderson, do you have questions for
10 Mr. Brown?

11 SEN. ANDERSON: No, I have those -- I have that
12 suggestion, and then speaking primarily to this -- I think that
13 was the part of the filing made reference to the (inaudible) --
14 serving as a dike.

15 MR. BROWN: That's right.

16 SEN. ANDERSON: And at that time, the water --
17 (inaudible) language suggests going into 37-87-101, and rights to
18 sole waters, put into paren two.

19 Underground aquifer is not reservoir within the meaning
20 of this section. We'll see -- I believe that that's (inaudible) --

21 MR. BROWN: That's right. That's one of them. And that
22 was -- I think that was a very simple amendment, and you said it.

23 SEN. ANDERSON: Could you see a reflection of
24 retrospective concerns with this language?

25 MR. BROWN: I think this, one, I think that probably that

1 language does nothing more than really clarify what -- and make
2 clear what existing Colorado law is. That's my opinion.

3 The second thing, I'd say this: I think our Supreme
4 Court, frankly, is a result-oriented court. If and when this issue
5 gets to the Supreme Court, I'd like the legislature to give it
6 whatever help it could. And I don't -- if it is retrospective,

7 [cracks and tears in legislative tape]

8 -- for no (inaudible) that we didn't consider and address
9 the question at all. I think the legislature should make clear
10 that these underground reservoirs are not storage (inaudible) --

11 MR. CHAIRMAN: (Inaudible) response? Thank you very
12 much. Mr. Kuiper, the state engineer is present in the chamber.
13 Mr. Kuiper, do you have any comments to the testimony thus far?
14 Why don't you come forward, Clarence.

15 MR. KUIPER: No, I have no comments. I'd be glad to
16 answer any questions (inaudible) --

17 MR. CHAIRMAN: Mr. Miller or Mr. Erker, do you have any
18 comments to make?

19 MR. MILLER: Mr. Chairman, members of the committee, my
20 name is David A. Miller. I'm a lawyer from Greeley, Colorado. I
21 spoke to the (inaudible) had an early session to this committee, in
22 which I simply suggested that further development of the deep
23 groundwater aquifer is being withheld.

24 I like Mr. Beise's comments, on page two of his letter,
25 in the middle of the third paragraph. Except, I think we're at the

1 that we can make other copies of Mr. Beise's letter of March 13th
2 available to interested people in the room.

3 [Adjournment discussion/action on Senate Bill 481.]

4 C E R T I F I C A T E

5
6 STATE OF COLORADO)
7) SS
8 COUNTY OF ARAPAHOE)
9

10 I, Laura M. Machen, an independent transcriber and
11 notary public within and for the State of Colorado, certify
12 the foregoing transcript of the tape recorded proceedings,
13 In Re: discussion/action on Senate Bill 481 - 79, Senate
14 Committee on Agriculture, Natural Resources & Energy, March
15 13, 1979, and as further set forth on page one, is reduced to
16 printed form by computer transcription, and dependent upon
17 recording clarity, is true and accurate, with special exceptions
18 of precise identification of any or all speakers and/or correct
19 spelling of any given or spoken proper name.

20 Dated this 13th day of April, 1999.

21
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23
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27
28



My commission expires May 23, 2000.

 ORIGINAL
[] CERTIFIED COPY OF ORIGINAL

STATE OF COLORADO

SENATE COMMITTEE ON AGRICULTURE, NATURAL RESOURCES & ENERGY

March 15, 1979

SENATE BILL 481 - 79

TRANSCRIPT OF TAPE RECORDED PROCEEDINGS

SEN. HAROLD McCORMICK, Chairman

SEN. FRED ANDERSON, Sponsor

COMMITTEE ATTENDANCE

Sen. L. Dwayne Woodard; Sen. Martin Hatcher; Sen. Ken Clark;
Sen. Dan Schaefer; Sen. Richard Soash; Sen. Maynard Yost.

SPEAKING TO THE BILL

Sen. Robert F. Wham

Glenn Saunders, Esq., pro se.

Bob Welborn, Esq., representing CF&I, various water users
in Douglas County.

Sen. Robert F. Wham, speaking to the bill.

Ward Fischer, Esq., water attorney.

Felix Sparks, Esq., Colorado Water Conservation Board.

Glenn Saunders, Esq., speaking to the bill.

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1 Tuesday, we've got four or five cases under that act, and none of
2 them mentioned Whitten versus Coit and none of them really get to
3 this issue.

4 But all I'm suggesting here, Mr. Chairman, is to
5 clear the statute. This came in, unhappily, through compromise
6 procedures in Senate Bill 81 in 1969, when certainly the only
7 intent in Senate Bill 81 was to deal with tributary water. And
8 the only thing that was needed in the legislative declaration, if
9 anything was needed, was to set forth the Constitutional concept
10 that tributary water is subject to appropriation.

11 MR. CHAIRMAN: Questions of the committee? Fred.

12 SEN. ANDERSON: No, I was just going to suggest that at
13 this point we take up these amendments I passed around. I think,
14 (inaudible) they get to some of the other points that (inaudible)

15 MR. CHAIRMAN: This is LD079, Amendment 481 stroke 1.
16 Mr. Fischer, did you want to speak to this?

17 MR. FISCHER: I would be honored to, Mr. Chairman. I
18 realize that you have a lot to do and you're running short. And I
19 will be very brief. But please understand that my brevity does not
20 indicate any lack of enthusiasm for my subject, because I'm deeply
21 interested in Senate Bill 41 and the amendments thereto.

22 I think the catalyst that brought this matter to the
23 committee's attention and the attention of many of us were the
24 Houston filings. But I agree with Bob Welborn's statement, that
25 there's much to be done.

1 While the Houston filings cause us to think about these,
2 the act that you can do will be of long term benefit to the state
3 of Colorado, and these acts should be considered in any event.

4 I think that the two amendments proposed are matters
5 which I fear did not have enough attention. I'm fearful that the
6 deep, underground wells, which affect everybody throughout the
7 state, receive so much attention that we've overlooked two other
8 things that Mr. Houston and others have done or will do that are
9 equally dangerous.

10 In fact, in my portion of the country, which is northern
11 Colorado, it is the latitude of matters that cause us the most
12 concern. I want not to labor the first part of Senate Bill 481
13 concerning the redefinition of what is appropriated.

14 I agree with everything that Bob Welborn said. And
15 I don't disagree with what Sen. Wham has said, either, but I do
16 agree that the legislature could, if they wanted, do whatever is
17 needed to. And I agree with Bob Welborn that this does not touch
18 your problem. It does not adversely affect your position. I do
19 believe that.

20 MR. CHAIRMAN: (Inaudible)

21 MR. FISCHER: Well, I think not -- the reason I think,
22 that you can take it home, and for your consideration is that, all
23 this, as I understand it, is to recognize the supremacy, as far as
24 the (inaudible) non-tributary wells, defined by 231. It merely
25 recognizes the supremacy of Senate Bill 213, and does not confuse

1 the thing, perhaps in artful language, in general definitions. And
2 that was the way I looked at it.

3 Going to these other things, may I briefly tell you the
4 other two things that Mr. Houston has done, and what others have
5 done or will do. They're immediately for our correction, because
6 again, we have a situation where the legislation is not 100
7 percent clear.

8 I believe that what Mr. Welborn has proposed, and this
9 481 covers and the amendments offered this time by Sen. Anderson,
10 merely re-declare existing laws. Why I'm not asking for any change,
11 look at Colorado water law. But there are these areas where
12 obviously different interpretations can arise.

13 The first is, that in addition to these waters that Bob
14 Welborn mentioned that Mr. Houston is going to try to capture by
15 deep, underground wells, there are other types of waters related to
16 these underground wells that he's also going to try to capture.

17 He has filed, in division one, for example, the claim
18 that all waters developed by others -- wells of others which tap
19 the non-tributary groundwater, can be recaptured by him. It is not
20 necessarily limited to water from those wells that seeps back into
21 the deep, underground aquifer.

22 He claims, instead, that these waters from the deep,
23 underground aquifers through wells developed by others, which
24 escape back to the Platte River, or flow into the groundwaters
25 tributary to the Platte River, are also capturable by him.

1 There's some 444 cubic feet per second. I cannot tell
2 you from the resume, because it's not clear to me how much of this
3 is actually flowing in the Platte or tributary to it, and how much
4 gets back into the deep, underground aquifers.

5 But we're talking about substantial amounts of water
6 flowing in the Platte, produced by non-tributary wells and not
7 owned by Mr. Houston that he is trying to capture. And to take
8 these flows of water out of the Platte, or out of the underground
9 flows tributary to the Platte, would affect not only the Platte
10 River and all the other appropriators on there, it would affect
11 the Poudre and the Thompson and all the other streams that are
12 tributary to the Poudre.

13 The law is, now, I am confident, exactly as stated in
14 Section 2 of the proposed amendment, 37-82-106, subsection 2,
15 which is the proposed addition, that while a person who makes --
16 who is a developer of water, can use that water till it's totally
17 consumed by its succession of uses or reuse or otherwise, once the
18 (inaudible) is out of water and goes back to the stream, it belongs
19 to the other appropriators on the stream. And that is existing law.

20 But there is one Colorado case that applies to the
21 contrary. In a letter that I addressed to some of you, I cited
22 that case. I pointed out that there were subsequent -- in one
23 subsequent Supreme Court case, which came to (inaudible)
24 conclusion, and said exactly what this 4th Amendment now states.

25 But you still have this argument. And I really would

1 like something to clear up the fact that developed waters,
2 abandoned by the developer, are part of the stream and subject
3 to appropriation.

4 Now this is -- I mentioned that this is not necessarily
5 directed solely to the Houston problem, though this did raise a
6 question in my mind. To take the Cache la Poudre River for
7 example, we have there a ditch company, a water supply and storage
8 company, which diverts waters from the Colorado River, from the
9 North Platte River and from the Laramie River.

10 I suppose that if the total diversion could be brought in
11 at 40 or 50 thousand acre feet a year, these three sources. For
12 100 years, the return flow from these sources have been used by
13 other water users on the Cache la Poudre River.

14 If Mr. Houston is right on his claims, as I have
15 outlined, then anybody could come into the Cache la Poudre Basin
16 and could make claims for the return flows of water supplies water.
17 And I just don't want that argument to come up.

18 What Sen. Anderson's bill suggests in this amendment to
19 37-82-106, is existing law, but it would be a great comfort to all
20 of us, if it were associated by statutes.

21 Glenn Saunders is, in his proposed bill, which I believe
22 you discussed last Tuesday, also adds language that addresses this
23 question. If you prefer his language to mine, I have no pride of
24 authorship. My intent is to call the matters to your attention and
25 urge some legislation. As an egotist, of course, I prefer my

1 language to all others.

2 One of the most important things, which I fear will get
3 lost, and which requires legislative attention, is again the matter
4 where the legislation adopted in 1969, simply is not quite unfair
5 enough to avoid arguments on things that should not be argued
6 about. And that's concerning the right to store water. And there
7 are several suggestions in this regard.

8 Basically, what has been done up there by Houston and
9 others in the past -- this isn't the first time that this has come
10 up, which again, leads me to say that you don't need to look at
11 this just to solve one particular problem, and it's something that
12 I'm getting tired of arguing about, with people up in our area.

13 People are coming in and they're just drawing a circle
14 around a piece of land, and they're saying, within this circle that
15 I've drawn, and underneath the ground, is tributary underground
16 waters, which I claim that I have now appropriated, because I have
17 defined it.

18 And this is a great concern to us, because in Houston's
19 filing, for instance, we don't have, in Northern Colorado, any of
20 these deep wells that he's filing on. We do have, in North Park,
21 119,500 acre feet of water claimed by these underground reservoirs.
22 There's not a single reservoir that Houston's constructed, but he's
23 drawn 12 circles around the ground, and claimed 119,500 acre feet
24 of water.

25 I do not know the extent to which he's gone around the

1 state and done this. There's more water claimed by him than is
2 consumed in North Park right now, with all of our uses up there.

3 The North Parkers, when we talk about this -- while
4 everybody up there is a pretty good water user, so we have a decent
5 showing at our meetings. So we had a meeting with, many, many
6 people. Some of the North Parkers are sufficiently concerned that
7 they're -- here's Jay from North Park, to support this amendment to
8 the statute.

9 Basically what we need is to make clear which they can --
10 and certainly the law now is, that in order to get a stored water,
11 a right to store water, an appropriative right by storing water,
12 you've got to develop and build some structure that's captured and
13 reduce the water to your control. And you can't go out and point a
14 stick at a piece of ground and say, "I appropriate the water."
15 That's the whole purpose of this.

16 He has also done the same thing on -- there's two
17 reservoirs on the Cache la Poudre River, by drawing lines. There
18 are two claimed reservoirs on the Thompson River. There are some
19 reservoirs on Boulder Creek. So all of Northern Colorado is more
20 affected by these reservoir claims than they are by the deep, non-
21 tributary well claims.

22 This statute, as I say, merely expresses what I believe
23 to be absolutely provable existing law. And I don't think that
24 I'm asking you to consider any amendments, as far as concepts are
25 concerned. But the 1969 Act does not go to the extent of defining

1 some of the things when we talk about traditional rights and
2 storage rights, and these things should be defined.

3 I probably, before I close, should state that -- for whom
4 I speak, and perhaps address some of the questions that Sen. Soash
5 has, and which Mr. Beise mentioned. I represent the Jackson County
6 Water Conservancy District, which is supporting this legislation;
7 the Cache la Poudre Water Users, and the Thompson Water Users also
8 support it. These water users associations represent all the
9 ditches on the Cache la Poudre River and on the Thompson River, and
10 they're all very deeply concerned.

11 Now, on the question of the reserved rights, the statutes
12 of any of this legislation, whether it's in the original bill or
13 otherwise, would not, in my judgment, have any adverse effect upon
14 defense against the United States reserved rights, in which case
15 I am involved. And I would not be concerned about it. That's a
16 good question.

17 Mr. Beise, who I highly regard and highly respect, has
18 suggested to the committee that possibly no legislation should be
19 passed. That might -- I do not quite understand his position,
20 because I did not have the opportunity to listen to him Tuesday.

21 The only way I can respond to it is to suggest that
22 possibly he does not have the same types of concerns that we have
23 in Northern Colorado, because the concerns that we have are ones
24 that really do cry for solution. I'm afraid I've taken up enough
25 time, Mr. Chairman.

1 MR. CHAIRMAN: Wait a second. With regard just to one
2 brief section, on page 2, line 5, paren 2 states, "underground
3 aquifers are not reservoirs in the meaning of this section."

4 There's no effective date on the action to become
5 effective on signature. There's a Constitutional provision against
6 retrospective legislation. Can you speak to that issue?

7 MR. FISCHER: I will be happy to, sir. It has been
8 suggested occasionally, that if the legislature did anything in
9 regard to anybody's problems, particularly the Houston problems,
10 Houston, at least, would argue that there is retrospect activity
11 on the matter, and that this is a matter in which the legislature
12 should probably be concerned with, and properly should.

13 In my judgment there is no problem, as far as the
14 Houston filings are concerned, in any retrospective effect of
15 this legislation. For two reasons, I think:

16 One, I am convinced that all of Senate Bill 481 as
17 originally submitted or with the amendments, is merely a
18 legislative codification of existing law. I'm absolutely
19 confident of that.

20 And therefore I think it will serve only to remind the
21 court that the legislature has no disagreement with what the
22 Supreme Court has, in the past, said. And gives the court comfort
23 in assuring that it is -- it is in effect in existing law.

24 I think that it is merely a codification, so that we
25 don't -- we can look specifically to a statute, and do not have to

1 argue the interpretation melding in effect with perhaps 100 cases,
2 with the developing concepts.

3 Secondly, the idea of retrospection, basically as I have
4 understood it, says you cannot, by legislative action, interfere
5 with somebody's vested rights. In Colorado, the right that you
6 have to use the water is an appropriative right. The way you get
7 into an appropriative right is to divert and use water. When you
8 have diverted and used the water, you have a vested right. There's
9 no doubt about it.

10 Mr. Houston hasn't diverted or used a drop of water. All
11 he has is an idea. It is an idea that has not gone so far as to
12 even receive court recognition in the form of a decree; that he
13 can argue that he has a conditionally vested right. So he has no
14 vested right to protect, and the statute has no retrospective
15 application.

16 MR. CHAIRMAN: Sen. Clark.

17 SEN. CLARK: I have a couple of questions, things that
18 occurred to me on reading this language. In the language that
19 you're adding on page one, in the (inaudible) titles, the question
20 occurs to me, is what -- what questions arise in interpretation of
21 language, "...said right is personal to the developer or his
22 successors or assigns."

23 And I'm wondering, in thinking about the projects that
24 may be developed by a water conservancy district, where the
25 proposal, (inaudible) that the lawyers which is to be developed,

1 such as imported water -- take the Big Thompson project, for
2 example -- what is within the term, "personal developer or his
3 successors or assigns," and where, if this includes the situation
4 where the developer can turn around and sell the water to others
5 for use. How far does that go?

6 MR. FISCHER: Well, I think that under existing law, the
7 developer of water could make a use and sell the right to reuse to
8 another. And I --

9 SEN. CLARK: Well, I'm wondering if this language,
10 though, might limit that?

11 MR. FISCHER: I thought it did not. I tried to say the
12 right is personal to the developer or his successors or assigns.
13 And what I was trying to say is that he could sign the right to
14 reuse. But -- the point being that if he did not use it himself, or
15 assigned the right to use it, but merely abandon it to the stream,
16 then the water belonged to all appropriators on the river, in order
17 of their priority.

18 SEN. CLARK: And I think that's appropriate. And I agree
19 with the theory of what you're trying to do. I have a little
20 trouble with how that language might be interpreted.

21 First of all, whether it would include, if the developer
22 himself made a use of it, and then attempted to sell it to somebody
23 else for re-use, whether this might be used to prevent that.

24 MR. FISCHER: Well, I --

25 SEN. CLARK: Or whether, on the other hand, if a

1 person is -- and I presume that this was beyond the intent of
2 this -- if the person is simply wanting to acquire a water right
3 for speculative purposes, without a specific use in mind with the
4 idea of transferring it, this, of course -- I mean, you couldn't
5 say yes to one and no to the other.

6 MR. FISCHER: Well, of course, I put it under the section
7 (inaudible) right to reuse imported water. The implication is that
8 what we're talking about here -- I guess the (inaudible) is that
9 what we're talking about the re-use of water. There's no -- you
10 can't, of course, interfere with it's first use, or to either
11 restrict or enlarge what all that is, to what one must do to make
12 an appropriation to make its first use of water.

13 SEN. CLARK: Right. Well, I'm --

14 MR. CHAIRMAN: Yes.

15 SEN. CLARK: -- a little concerned how that might --

16 MR. FISCHER: I would hate to have it -- any effect here
17 for (inaudible) as I read it.

18 SEN. CLARK: And that's the question I had, is on this
19 line 5 and 6 on page 2. Is it intended by this to do away with any
20 concept of underground storage?

21 MR. FISCHER: No. (Inaudible) -- this question about
22 these recharges, and so forth. And then you thought -- what you're
23 doing is (inaudible) charging, recharging. And it is not.

24 Let me just -- it's not intended to do away with the
25 concept of recharging underground aquifers or anything of that

1 nature. I put it under this 37-81-101, the right to store waters,
2 which says "persons desiring to construct and maintain reservoirs."

3 To me that says, in order to have a storage right as this
4 section is talking about, you've got to construct the (inaudible).
5 This makes it clear that an underground reservoir is not something
6 that is constructed, and therefore, is not a storage reservoir,
7 within the definition there.

8 I have -- I don't know how one would actually develop an
9 underground storage reservoir, in my concept of what a storage
10 reservoir is, without construction something. I don't think you
11 can just dump water on the ground and then go down and claim the
12 right to necessarily recapture just what you want to, with this
13 tributary water, which all of this is, because you'll take it at
14 a time when somebody else is in priority, and that water is
15 furnishing the stream.

16 Now, there's all kinds of ways through augmentation
17 plans. You can use underground aquifers and do pumping and all
18 kinds of things, so that you make better use of your water. And
19 none of this is intended to, nor in my opinion, does interfere with
20 any of that.

21 SEN. CLARK: I worry about a statement such as this,
22 however, not being construed exactly in accordance with your
23 intent. And I worry about whether or not there should be some
24 clarification there.

25 MR. FISCHER: Well, that's why I said, in the meaning of

1 this section, the meaning of the reservoir storage section --
2 within the meaning of section 37-87-101. I honestly do not
3 believe that an underground reservoir is a reservoir that ever
4 was or is now intended by the legislature to be included within
5 the definition of what they would find in that section.

6 This says persons desiring to construct and maintain
7 reservoirs can do this and that. They can condemn lands for the
8 construction and maintenance of the reservoirs.

9 It just says -- when we're talking about these
10 (inaudible) in that section, we're not talking about underground
11 aquifers. I don't believe you are.

12 SEN. CLARK: I'm not sure. For example, let's take Mr.
13 Houston's claim. As I understand what he's trying to do with
14 respect to the underground reservoirs, is simply to say that an
15 area which has, at least the ones I'm familiar with, at one end
16 of it, underground glacial moraines is being taken as a -- some
17 means of (inaudible), offers a space wherein there is water, I'm
18 going to appropriate that water.

19 Well, that's, you know, completely different from, in my
20 opinion, as you say, constructing a reservoir. And independently
21 acquiring the water right to supply the capacity that you have
22 constructed.

23 That's not to say that a person could not, if he located
24 that underground structure, which was so located, that it was
25 possible to charge the alluvium behind the moraine, and withdraw

1 the water, in a way that could be separated from the administration
2 of the stream, again, which is another part or use of application
3 of that, which makes it completely unworkable.

4 If I understand that at all, there's no way to separate
5 that from the stream itself, would keep from rerouting the stream,
6 as you withdraw water from this so-called reservoir.

7 But if there were a kind of formation which I'm talking
8 about, which physically could be administered separately from that,
9 I see nothing wrong with the idea of calling that an underground
10 reservoir. But in addition to that, you have to have an independent
11 appropriation of water to build that.

12 MR. FISCHER: That's right. Let me say, just so you
13 don't misunderstand me. I'm not saying that water in an
14 underground reservoir cannot be appropriated. The way you
15 ordinarily appropriate the water in an underground reservoir
16 is you dig a well, you pump it out. That's a direct right.

17 Now, then, you can take that right, you can irrigate with
18 it, therefore, you can store it. And all this says is that this is
19 not a structure into which you can get a storage right in the sense
20 that by making a statement of intent, that he has created a storage
21 right, which is an appropriative right in Colorado, to claim that
22 water, not for direct use, but for later use, whenever he wants to,
23 which is exactly what he's trying to do.

24 So if he can claim these things as underground
25 reservoirs, and claim that the water in there is subject to his

1 future use, he's got a (inaudible) -- because nobody will ever get
2 any more water out of North Park --

3 SEN. CLARK: I agree, I agree.

4 MR. FISCHER: Yeah, right.

5 SEN. CLARK: I'm trying to draw between that situation
6 and another.

7 MR. FISCHER: All right.

8 SEN. CLARK: I'm wondering if what you're doing here
9 strikes out both.

10 MR. FISCHER: I don't think so. For several reasons I
11 don't think so. One is that I think it refers to this section.
12 The other thing I'd done, when I sent this out, I sent one to Mr.
13 Kuiper. I would hope that he would have been perceptive enough, if
14 he'd have seen a problem -- he knows me well -- he could have
15 called me up and said, Ward, you're making a terrible mistake
16 because of this -- then I would have reworded it.

17 You know, I'm not stuck on language, but this just
18 isn't -- the way I've got it structured, I honestly don't see --
19 and there's no more (inaudible) to having storage rights in various
20 places in Northern Colorado than I am, because all of my clients
21 want it.

22 SEN. CLARK: Right.

23 MR. FISCHER: So I wouldn't -- I wouldn't consciously
24 interfere with it.

25 SEN. CLARK: We're always talking about how somebody else

1 can (inaudible) --

2 MR. CHAIRMAN: Mr. Fischer, did I see your hand awhile
3 ago?

4 MR. FISCHER: You did. But I think very probably that
5 the comment is now mooted.

6 MR. CHAIRMAN: Mooted?

7 MR. FISCHER: Rather than take the committee's time on
8 this, talk to Sen. Soash.

9 MR. CHAIRMAN: Sen. Anderson, they're singing a song
10 about your bill. Do you have any comments.

11 SEN. ANDERSON: No. I think Ward has raised some valid
12 points, and I --

13 MR. CHAIRMAN: Mr. Fischer, you said that you had sent
14 this language to Mr. Kuiper.

15 MR. FISCHER: Yes, sir.

16 MR. CHAIRMAN: Mr. Kuiper, do you have comments on it?

17 MR. KUIPER: (Speaking away from microphone) (Inaudible)
18 Ward, what was that last comment?

19 MR. FISCHER: I had said, there's a question raised by
20 Sen. Wham on --

21 MR. CHAIRMAN: This is Senate Bill 481.

22 [Multiple comments -- inaudible.]

23 MR. CHAIRMAN: Okay. Well, we'll take a couple minutes.
24 While we're doing that, Senate Bill 481 has Section 1, 37-82-101;
25 Section 2 is 37-92-102; Senate Bill 410 is 37-92-103, in the

1 record, that on the tape of these proceedings, one of the things
2 that we're trying to do step by step, is to establish a clear,
3 legislative intent to examine the alternatives. And once the
4 decision is made, proceed with that decision as the one we will
5 take to the Floor in good faith. And I hope that we're doing this.
6 Certainly we're trying to do so, and I regard the answers both by
7 Mr. Fischer and Mr. Sparks as important to this type of concept.

8 Questions from the committee for Mr. Sparks? Thank
9 you very much, John, I hope you'll be able to stay with us for
10 awhile longer. I wish you'd stay with us for a long time, Ward,
11 come to think of it. We'd like to commend many of your recent
12 declarations.

13 MALE VOICE: Mr. Chairman, I've been told that Mr. Kuiper
14 may have a couple of words on certain sections that he thinks would
15 improve the (inaudible) concerns that Sen. Wham has expressed.

16 MR. CHAIRMAN: All right. Mr. Kuiper, we'll come back to
17 Senate Bill 481, and put before the committee, again, the Fischer
18 Amendment to 481 that we've been discussing. Do you have some
19 suggestions for us?

20 MR. KUIPER: I have the (inaudible) -- and I'll try to
21 state them for Felix.

22 MR. CHAIRMAN: Sen. Soash.

23 SEN. SOASH: Mr. Chairman, so that we can discuss this
24 amendment and amend it if necessary, I would move the Fischer
25 Amendment to Senate Bill 481.

1 MR. CHAIRMAN: That's a proper motion. I'd like to get
2 that adopted so we could proceed with amendments to it. To that
3 end, if the committee's in favor, please say "Aye."

4 VOICES: Aye.

5 MR. CHAIRMAN: Opposed "No." That's carried unanimous.

6 MR. FISCHER: I have three Fischer Amendments.

7 Which one?

8 SEN. ANDERSON: All of them.

9 MR. FISCHER: All of them?

10 SEN. ANDERSON: Yeah. His committee amendment.

11 MR. CHAIRMAN: The one that's before us, right now, Mr.
12 Glenn Saunders is denominated LDO 70 Amendment, 481 stroke 1.

13 MR. SAUNDERS: I go by the laws of Colorado and I have
14 here Amendment 37-87-101, Amendment to 37-92-103 and Amendment to
15 37-92-305, furnished by our division.

16 MR. CHAIRMAN: And this is 37-82-106.

17 SEN. ???: All of those included.

18 SEN. SOASH: Not (inaudible) --

19 MR. CHAIRMAN: All right. Now, then, we're back to the
20 one that is LDO 79, amendment to 481 stroke 1, by the legislative
21 drafting office. This has been proposed properly as an amendment
22 to Senate Bill 481 by Sen. Soash, and this has been adopted. Now,
23 Mr. Fischer, I'll recognize you to speak to the proposals that have
24 been suggested by the state engineer.

25 MR. FISCHER: Thank you, sir. On page 2 of the

1 amendments, under subsection 2 on page 5, this goes to Sen. Wham's
2 concern. We dealing with the phrase, the amendment, underground
3 aquifers are not reservoirs within the meaning of the section.

4 Mr. Kuiper suggests, to avoid Sen. Wham's concern, that
5 we add the words, after the word "aquifers" "naturally filled by
6 tributary waters." "Naturally filled by tributary waters."

7 And the section, if it would read (inaudible)
8 "underground aquifers naturally filled by tributary waters are not
9 reservoirs within the meaning of this section," and certainly seems
10 to be improved.

11 MR. CHAIRMAN: Sen. Soash.

12 SEN. SOASH: I so move.

13 MR. CHAIRMAN: All right. Is there discussion to that
14 amendment? Seeing none, as many in favor please say "Aye."

15 VOICES: Aye.

16 MR. CHAIRMAN: Opposed, "No." Unanimous vote. Let
17 the record show that seven members of the committee are present.
18 Mr. Fischer.

19 MR. FISCHER: On the next one is 37-92-103 on page 2.

20 Line 17 where the present amendment stops with the words,
21 "controlled by the appropriator." Mr. Kuiper would suggest adding
22 the words, "and put to a beneficial use." "And put to a beneficial
23 use." Period.

24 MR. CHAIRMAN: So your motion would be then to strike the
25 period as it appears after the word "appropriator," and insert in

C E R T I F I C A T E


STATE OF COLORADO)
) ss
COUNTY OF ARAPAHOE)

I, Laura M. Machen, an independent transcriber and notary public within and for the State of Colorado, certify the foregoing transcript of the tape recorded proceedings, **In Re: discussion/action, Senate Bill 79 - 481, Senate Agriculture Committee, March 15, 1979**, and as further set forth on page one, has been reduced to printed form by computer transcription, and dependent upon recording clarity, is true and accurate, with special exceptions of precise identification of any or all speakers and/or correct spelling of any given or spoken proper name.

Dated this 10th day of May, 1999.



My commission expires May 23, 2000.

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March 15, 1979

Date

Agriculture,
Natural Resources and Energy
Committee

Chairman

The committee recommends that S.B. No. 481
be amended as follows and, as so amended, be referred to the
Committee of the Whole with favorable recommendation:

1 Amend printed bill, page 1, after line 11, insert the
2 following:

3 *SECTION 2. 37-82-106, Colorado Revised Statutes 1973,
4 is amended to read:

5 37-82-106. Right to reuse of imported water.

6 (1) Whenever an appropriator has lawfully introduced foreign
7 water into a stream system from an unconnected stream system,
8 such appropriator may make a succession of uses of such water
9 by exchange or otherwise to the extent that its volume can be
10 distinguished from the volume of the streams into which it is
11 introduced. Nothing in this section shall be construed to
12 impair or diminish any water right which has become vested.

13 (2) TO THE EXTENT THAT THERE EXISTS A RIGHT TO MAKE A
14 SUCCESSION OF USES OF FOREIGN OR NONTRIBUTARY OR OTHER
15 DEVELOPED WATER, SUCH RIGHT IS PERSONAL TO THE DEVELOPER OR
16 HIS SUCCESSORS OR ASSIGNS. WATERS NOT LAWFULLY CONSUMED BY
17 HIM BECOME PART OF THE WATERS OF THE STATE AND THE PROPERTY OF
18 THE PUBLIC, SUBJECT TO USE OR APPROPRIATION AND TO THE RIGHTS
19 OF EXISTING USERS OR APPROPRIATORS IN ACCORDANCE WITH ARTICLES
20 90 AND 92 OF THIS TITLE, AND SUCH UNCONSUMED WATERS ARE NOT
21 SUBJECT TO INDEPENDENT APPROPRIATION OR USE BY THIRD PARTIES.

22 SECTION 3. 37-87-101, Colorado Revised Statutes 1973, is
23 amended to read:

24 37-87-101. Right to store waters. (1) Persons desirous
25 DESIRING to construct and maintain reservoirs for the purpose
26 of storing water have the right to store therein any of the
27 unappropriated waters of the state not thereafter needed for
28 immediate use for domestic or irrigating purposes, and to
29 construct and maintain ditches for carrying such water to and
30 from such reservoirs, and to condemn lands required for the
31 construction and maintenance of such reservoirs and ditches in
32 the same manner as now provided by law; except that after

1 April 18, 1935, the appropriation of water for any reservoirs
2 hereafter constructed, when decreed, shall be superior to an
3 appropriation of water for direct application claiming a date
4 of priority subsequent in time to that of such reservoirs.

5 (2) UNDERGROUND AQUIFERS NATURALLY FILLED BY TRIBUTARY
6 WATERS ARE NOT RESERVOIRS WITHIN THE MEANING OF THIS
7 SECTION."

8 . Renumber succeeding sections accordingly.

9 Page 2, line 4, strike the comma;

10 line 5, strike "whether found on the surface or underground,"
11 and substitute "~~whether found on the surface or~~
12 ~~underground~~";

13 after line 13, insert the following:

14 "SECTION 5. 37-92-103 (3) and (6), Colorado Revised
15 Statutes 1973, are amended, and the said 37-92-103, as
16 amended, is further amended BY THE ADDITION OF A NEW
17 SUBSECTION, to read:

18 37-92-103. Definitions. (3) "Appropriation" means the
19 application of a certain portion of the waters of the state,
20 WHETHER SURFACE OR UNDERGROUND, to a beneficial use; EXCEPT
21 THAT NO APPROPRIATION OF WATER, EITHER ABSOLUTE OR
22 CONDITIONAL, SHALL BE HELD TO OCCUR EITHER WHEN THE PROPOSED
23 APPROPRIATION IS BASED UPON THE SPECULATIVE SALE OR TRANSFER
24 OF THE APPROPRIATIVE RIGHTS TO PERSONS NOT PARTIES TO THE
25 PROPOSED APPROPRIATION OR WHEN THE PURPORTED APPROPRIATOR OF
26 RECORD DOES NOT HAVE EITHER A LEGALLY VESTED INTEREST IN THE
27 LANDS OR FACILITIES TO BE SERVED BY SUCH APPROPRIATION OR IS
28 NOT A GOVERNMENTAL AGENCY OR AN AGENT IN FACT FOR THE PERSONS
29 PROPOSED TO BE BENEFITED BY SUCH APPROPRIATION. NO
30 APPROPRIATION EXISTS UNLESS THE WATER IS DIVERTED, STORED, OR
31 OTHERWISE CAPTURED, POSSESSED, AND CONTROLLED BY THE
32 APPROPRIATOR AND PUT TO A BENEFICIAL USE.

33 (6) "Conditional water right" means a right to perfect a
34 water right with a certain priority upon the completion with
35 reasonable diligence of the appropriation upon which such
36 water right is to be based. NO CONDITIONAL WATER RIGHT EXISTS
37 EXCEPT UNDER A SPECIFIC PLAN TO DIVERT, STORE, OR OTHERWISE
38 CAPTURE, POSSESS, AND CONTROL A SPECIFIC QUANTITY OF WATER FOR
39 SPECIFIC BENEFICIAL USES.

40 (10.5) "Storage" or "store" means the impoundment,
41 possession, and control of water by means of a dam. Waters in
42 underground aquifers are not in storage or stored.

43 SECTION 6. 37-92-305, Colorado Revised Statutes 1973, as

1 amended, is amended BY THE ADDITION OF A NEW SUBSECTION to
2 read:

3 37-92-305. Standards with respect to rulings of the
4 referee and decisions of the water judge. (9) (a) No claim
5 for a water right may be recognized or a decree therefor
6 granted except to the extent that the waters have been
7 diverted, stored, or otherwise captured, possessed, and
8 controlled and have been applied to a beneficial use.

9 (b) No claim for a conditional water right may be
10 recognized or a decree therefor granted except to the extent
11 that it is established that the waters can be and will be
12 diverted, stored, or otherwise captured, possessed, and
13 controlled and will be beneficially used and that the project
14 can and will be completed with diligence and within a
15 reasonable time.

16 (c) No water right or conditional water right for the
17 storage of water in underground aquifers shall be recognized
18 or decreed."

19 Renumber succeeding section accordingly.

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