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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO  
JAN 14 1983

JAN 14 1983

SUPREME COURT, STATE OF COLORADO

Case No. 82SA478

David W. Brezina

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ANSWER BRIEF OF OBJECTOR-APPELLEE

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CITY OF ASPEN  
BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY,

Applicants- Appellants,

vs.

COLORADO RIVER WATER CONSERVATION DISTRICT,

Objector-Appellee,

UNITED STATES OF AMERICA  
EXXON COMPANY, U.S.A.

Appearants-Appellees,

LEE ENEWOLD,  
DIVISION ENGINEER FOR WATER DIVISION NO. 5,

Appellee.

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APPEAL FROM THE DISTRICT COURT, WATER DIVISION NO. 5, STATE OF  
COLORADO

HONORABLE GAVIN D. LITWILLER, WATER JUDGE

---

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Colorado River Water Conservation District

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## II. STATEMENT OF THE ISSUE:

The Colorado River Water Conservation District (sometimes referred to as River District) believes that a correct Statement of the Issue is as follows:

Have the Applicants, City of Aspen and Board of County Commissioners of Pitkin County (sometimes referred to as Aspen/Pitkin) taken the necessary "first step" to initiate a valid appropriation of over 100,000 acre feet of water for the proposed uses claimed by the Applicants?

## III. STATEMENT OF THE CASE:

Aspen/Pitkin have included many irrelevant facts and omitted many relevant facts in their Statement of the Case. The River District believes it is necessary to supplement the Statement of the Case in the following manner:

On December 31, 1980, Aspen/Pitkin filed an Application for Conditional Water Storage Right (Case No. 80CW565, Water Division No. 5). (Volume 1, pp. 45-47). The Application seeks a decree for a conditional water storage right for Ruedi Reservoir for 102,400 acre feet of water (by refill) with a claimed date of appropriation of September 30, 1980. The proposed use of the water is claimed to be "Hydro-power, fish, recreation and all other beneficial uses, including but not limited to, municipal, domestic, irrigation, commercial, game and wildlife propagation, mechanical, fire protection, maintenance of municipal storage reserves, and for exchange, augmentation, and replacement."

Contrary to the forms approved by this Court and the Water Judge in Water Division No. 5, the Application filed by Aspen/Pitkin contained no statement or reference concerning how the appropriation was initiated. The Application was verified by the Applicant's attorney.

The Application was timely opposed by the River District; entries of appearance were filed by the United States of America and Exxon Company, U.S.A. (Volume 1, pp. 38-44). Following a Pre-Trial Conference on January 26, 1982, a trial consisting solely of legal argument was held on July 9, 1982. (Volume 2 and 3).

On September 3, 1982, the Honorable Gavin D. Litwiller, Water Judge, Water Division No. 5, issued Findings of Fact, Conclusions of Law and Decree, denying Aspen/Pitkin's application. (Volume 1, pp. 9-15). This decision contains an excellent statement of the facts and law involved in this case.

Following the Pre-Trial Conference and prior to oral argument before the Water Judge, the Applicants and the River District signed a Stipulation entitled "Questions of Law and Stipulations of Fact." (Volume 1, pp. 16-25). Because of the importance of this stipulation to this case, and for the Court's convenience, a copy of this stipulation is attached as Appendix "A". The Stipulation provides that the sole issue to be determined by the Water Court was: "Have Applicants taken the necessary 'first step' towards initiating an appropriation of the water available for refilling Ruedi Reservoir?" (Volume 1, p. 16).

In the stipulation, the parties agreed that, as a matter of law, there is a two prong test to determine if a valid "first step" has been taken sufficient to support the issuance of a decree for a conditional water right. The parties recognized that one prong of the test is the intent to appropriate water. The parties stipulated that Aspen/Pitkin had an intent to appropriate water, as set forth in the application. The stipulation provides further that the parties disagreed as to the second prong of the test. Aspen/Pitkin asserted that the second prong of the test is that "the appropriator must give notice of the intent to apply water to beneficial use." (Emphasis added). The River District believed that the second prong of the test is "an open physical act on the land sufficient to constitute notice to third parties of the intent to apply water to beneficial uses." (Emphasis added).

With reference to the second prong of the "first step", the parties disagreed: 1) that there must be a physical demonstration on the land of the intent to appropriate; 2) as to what constitutes "physical" demonstration of intent to appropriate; 3) that an open physical demonstration of intent by Aspen/Pitkin occurred<sup>1</sup>; and 4) that any demonstration of intent by Aspen/Pitkin gave notice to third parties of the pendency of the appropriation. (Volume 1. pp. 16 and 17).

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<sup>1</sup>It should be noted that "[t]here has been no actual commencement of construction of facilities by the Applicants, no surveys have been made by the Applicants and the Applicants have



Most importantly, the stipulation (Volume 1, p. 17) established that the only way the second prong of the "first step" rule could have been accomplished in this case was on one of the following dates:

1. Notice of intent to file an application for preliminary permit on Project No. 3225 (Ruedi Dam and Reservoir) dated September 30, 1980, filed with the United States Federal Energy Regulatory Commission (FERC);
2. Application for a preliminary permit on Project No. 3225, dated and filed with the FERC on October 23 and 24, 1980, respectively; the notice of the pendency of the application was published in the Federal Register January 12, 1981, and in the Aspen Times December 25, 1980;
3. Application for water right in Case No. 80CW565 filed in Water Division No. 5 on December 30, 1980.<sup>2</sup>

Ruedi Reservoir was constructed as part of the Fryingpan-Arkansas Project by the United States pursuant to House Document No. 353, 86th Congress, 2nd Session; House

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admitted during oral argument that no work on the ground has been performed by the Applicants." See September 3, 1982, Opinion of Water Court at Paragraph 8 of Findings of Fact (Volume 1, p. 10).

<sup>2</sup>The undated application was verified on December 30, 1980, but not filed with the Water Clerk until December 31, 1980.

Document No. 130, 87th Congress, 1st Session; and Public Law 87-590, 87th Congress, August 16, 1972 (43 U.S.C. Section 616-616f). The River District is the owner of the first water rights decree, and only decree, for Ruedi Reservoir. (Volume 1, p. 29; Volume 2, pp. 6-8). In fact, it was through the efforts of the River District and in compliance with the provisions of C.R.S. 1973, 37-45-118 (1)(b)(IV) that Ruedi Reservoir was built. (Volume 2, p. 24). The River District also has a pending application for water storage right for a second filling of Ruedi Reservoir. (Volume 1, p. 35; Volume 2, pp. 9, 29; Volume 3, pp. 28, 31). The River District's application was filed in order to make certain that all the water stored in Ruedi Reservoir will be used for the benefit of the entire Western Slope, and not just for the Applicants. (Volume 2, pp. 10, 24, compare Volume 3, p. 27).

The statement by Aspen/Pitkin on page 3 of their Opening Brief that "the only objection which the River District pressed was that Aspen and Pitkin County had not manifested their intent to put this water to beneficial use through some physical act on the land" is incorrect. The River District also took the position in the Water Court and takes the position here that Aspen/Pitkin have undertaken no physical demonstration at all which gave notice to third parties of the pendency of their claimed appropriation of over 100,000 acre feet of water for a multitude of uses. In fact, the stipulation clearly provides that if any act was performed which might fulfill the requirement of a physical demonstration so as to give notice, it was

one of the three documents prepared or filed on September 30, 1980, October 23, 1980, or December 30, 1980.

Based upon the stipulation, the Water Judge examined the three items which Aspen/Pitkin agreed were the only acts which might constitute a physical act sufficient to give notice to third parties of the scope and proposed uses of the water right sought. See September 3, 1982, Opinion of the Water Court at Paragraphs 1(c), 8, 17 and 18 of the Conclusions of Law (Volume 1, pp. 11, 12 and 15). He concluded that none satisfied the legal standard required to constitute a "first step". (Volume 1, p. 15).

#### IV. SUMMARY OF THE ARGUMENT

Applicants have not taken the "first step" required to initiate the appropriation of a conditional water storage right.

A valid "first step" is established by the coexistence of an intent to take water, together with an open, overt act on the land giving notice of the intent to apply the water to beneficial use. Central Colorado Water Conservancy District v. City and County of Denver, 189 Colo. 272, 539 P. 2d 1270 (1975). Since Aspen/Pitkin did absolutely nothing on the land to give notice of the intent to apply over 100,000 acre feet of water to a myriad of beneficial uses, they have not made a valid appropriation and are not entitled to a conditional decree. Moreover, irrespective of the requirement for acts "on the land," the physical actions relied upon by Aspen/Pitkin were

insufficient to give notice of this intent or satisfy the second prong of the first step requirement.

V. ARGUMENT

ASPEN/PITKIN HAVE NOT TAKEN THE "FIRST STEP" REQUIRED TO INITIATE THE APPROPRIATION OF A CONDITIONAL WATER STORAGE RIGHT.

The Supreme Court has consistently held that in order to initiate an appropriation of water in the State of Colorado, there must be a legally sufficient "first step". In Central Colorado Water Conservancy District v. City and County of Denver, supra, this Court held:

A valid 'first step' is established when an intent to take water is formed, together with an open, overt action on the land giving notice of the intent to apply the water to beneficial use.

Id., 539 P. 2d at 1272 (Emphasis added, citations omitted). This fundamental principle of Colorado water law was enunciated by this Court many years ago and has been consistently followed and affirmed by this Court, in fact, as recently as eight months ago. Rocky Mountain Power Company v. Colorado River Water Conservation District, \_\_\_\_ Colo. \_\_\_\_, 646 P. 2d 383 (1982); Harvey Land and Cattle Co. v. Southeastern Colorado Water Conservancy District, \_\_\_\_ Colo. \_\_\_\_, 631 P. 2d 1111 (1981); Colorado River Water Conservation District v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P. 2d 566 (1979); Twin Lakes Reservoir and Canal Company v. City of Aspen, 192 Colo. 209, 557

P. 2d 825 (1977); Bunger v. Uncompahgre Valley Water Users Association, 192 Colo. 159, 557 P. 2d 389 (1976); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P. 2d 1211 (1971); Four Counties Water Users Association v. Colorado River Water Conservation District, 159 Colo. 499, 414 P. 2d 469 (1966); City and County of Denver v. Northern Colorado Water Conservancy District, 130 Colo. 375, 276 P. 2d 992 (1954); Fruitland Irrigation Company v. Kruemling, 62 Colo. 160, 162 P. 161 (1916); Larimer County Reservoir Company v. People ex rel. Luthe, 8 Colo. 614, 9 P. 794 (1886).

In every one of these cases, this Court found a valid step based upon an open and notorious action on the land or held that such an action was required. Aspen/Pitkin did not even visit the site! See September 3, 1982, Opinion of the Water Court at Paragraph 8 of the Findings of Fact (Volume 1, p. 10).

The first prong of the first step requirement is the intent to take a certain quantity of water and use it for defined and fixed beneficial purposes. As discussed supra, the parties have stipulated that Aspen/Pitkin have formed the intent to appropriate water as set forth in the application. The sole issue on appeal involves the second prong of the first step requirement and a determination of whether the Water Court correctly concluded that the second prong of the first step was not proven by Aspen/Pitkin. A definition of, and the policy and rational underlying, this requirement is:

[T]he first step demanded by the rule is nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue and, within a reasonable time, ultimately acquire a right to the use of water, and as its primary function is to give notice to those subsequently desiring to initiate similar rights, it must necessarily be of such a character that they may fairly be said to be thereby charged with at least such notice as would be reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and consequent demand upon the water supply involved.

Fruitland Irrigation Company v. Kruemling, supra, 162 P. at 163 (Emphasis added; citation omitted).

What constitutes a first step requires an examination of the facts of each case and is to be determined on an ad hoc basis in light of the circumstances and facts involved. See, e.g., Rocky Mountain Power Company v. Colorado River Water Conservation District, supra; Harvey Land and Cattle Co. v. Southeastern Water Conservancy District, supra. The burden of proof is on the applicant for a conditional water right to establish that a legally sufficient first step has been taken. C.R.S. 1973, Section 37-92-304(3); Rocky Mountain Power Company v. Colorado River Water Conservation District, supra; Colorado River Water Conservation District v. Vidler Tunnel Water Co., supra.

In this case, Aspen/Pitkin have clearly failed to sustain their burden of proof; they offered no proof whatsoever of an "open, overt action on the land giving notice of the intent to apply the water to beneficial use." In fact, they admitted "that no work on the ground has been performed." (Volume 1, p. 10).

Aspen/Pitkin's convoluted analysis of the case law on this subject is merely a smoke screen to hide this undisputed fact. Due to the complete absence of any open, overt, physical action giving notice to third parties of Aspen/Pitkin's intent, the River District submits that the Water Judge correctly denied the water right application; to conclude to the contrary would require that one of the primary precepts of Colorado water law be overruled.

Because of the complete failure to perform any physical act on the land, Aspen/Pitkin chooses to characterize such actions a "token steps" and a ritual (Appellants' Opening Brief, pp. 4-5), and argue that the three actions they did take should be adequate to provide notice and satisfy the second prong of the "first step" requirement. This Court has long held that actions, even on the land, which are a "mere token" are inadequate to satisfy the second prong. Fruitland Irrigation Company v. Kruemling, supra, 162 P. at 163; see also Denver v. Northern Colorado Water Conservancy District, supra; Bunger v. Uncompahgre Valley Water Users Association, supra. What Aspen/Pitkin are really saying is that they did not even take actions that could be charac-

terized as token.

Even the three actions Aspen/Pitkin did take do not support their position that they provided third parties with notice of their intent to appropriate over 100,000 acre feet of water for a multitude of beneficial uses. All three documents evidencing their three acts are contained in the record. (Volume 1, pp. 24-25, 45-47; Volume 4, Exhibits M and N). The filing of the December, 1980, application for conditional water storage right has been discussed supra. This document, until published<sup>3</sup> in the resume, gives notice only to the clerk of the Water Court. In Twin Lakes Reservoir and Canal Co. v. City of Aspen, supra, this Court made it clear that although the filing of a Water Court application is evidence of intent and satisfies the first prong, this act is not sufficient by itself to meet the requirements of the second prong, an open physical act on the land sufficient to constitute notice to third parties.

The September 30, 1980, Notice of Intent to File Competing Application for Preliminary Permit (Volume 4, Exhibit M) was filed in Washington, D.C. with the United States Federal Energy Regulatory Commission (hereinafter "FERC"). The two companies listed on the Certificate of Mailing attached to the Notice presumably also received a copy. The sole purpose of this document was to give FERC and two companies notice of Aspen/Pitkin's "intent to file a competing application for the site of a

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<sup>3</sup>Had Aspen/Pitkin claimed this date as their date of appropriation, they would have found themselves in the logically absurd position of claiming a date of appropriation subsequent



hydroelectric power generation project at the Ruedi Dam, owned by the United States Water and Power Resources Service in Pitkin and Eagle Counties, Colorado." There is no mention of water rights whatsoever. Although the use of water for hydroelectric power generation by Aspen/Pitkin may be implied from the document, because there is already a power decree for the water stored in Ruedi Reservoir (Volume 1, p. 29; Volume 2, pp. 6-8), this document does not even imply, let alone express, Aspen/Pitkin's intent to appropriate over 100,000 acre feet of water for power generation purposes or for the multitude of other uses<sup>4</sup> contained in the water rights application.

The final "act" relied on by Aspen/Pitkin is the October, 1980 application filed in Washington, D.C. with FERC by Aspen/Pitkin for a preliminary permit and the Notice of the pendency of the FERC Application. (Volume 4, Exhibit N; Volume 1, pp. 20-22, 24).

As with the Notice of Intent to File Competing Application, the latter document (Notice of pendency), published in the Federal Register on January 12, 1981 and in the Aspen Times on December 25, 1980, never mentions water rights or even implies the use of water for any purpose other than for hydroelectric power generation. Moreover, the statement that "[t]he proposed project would utilize an existing government dam" does not

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to the date of the application for that water right.

<sup>4</sup>It is interesting to note that, following the filing of the application, counsel for Aspen/Pitkin advised his clients at their joint meeting held on January 12, 1981, that the purpose

suggest any intent to appropriate water or seek a new water rights decree. (Volume 4, Exhibit M).

The preliminary permit application, which was not published anywhere, was filed with FERC to secure and maintain priority for a license for the project "while obtaining the data and performing the acts required to determine the feasibility of the project and to support an application for the project." (Volume 4, Exhibit N). Again, there is no mention of any intent to seek a new water right for this or any other purpose.

In fact, the only reference to water rights is in Exhibit 2 to the FERC application entitled "Plan of Study for Proposed Project." (Volume 4, Exhibit N). One element of the proposed feasibility study to be undertaken if the application is approved is stated to be: "review of existing and future water rights." Other elements of the proposed feasibility study include: "subsurface investigations for soils and geology"; "review of historic hydrology"; "projections of future hydrology"; and a "topographic survey of site".

The River District submits that the preliminary FERC permit application is no different than their filing a map and state-

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of the Water Court application for Ruedi refill water "is for the hydro application so they would have a right to refill the reservoir to use it for any hydro power facility." See page 2 of the Aspen City Council Minutes of Joint Meeting with County Commissioners of January 12, 1981 (Volume 4, Exhibit HH).

ment with the State Engineer; such an action has been held to be evidence of intent to satisfy the first prong, but does not satisfy the second prong (i.e., the open and physical demonstration on the land to provide notice to third parties of the intended appropriation). Central Colorado Water Conservancy District v. City and County of Denver, supra; City and County of Denver v. Northern Colorado Water Conservancy District, supra.

The River District believes that the actions relied upon by Aspen/Pitkin cannot possibly have satisfied the requirement, irrespective of any requirement of acts "on the land," that third parties receive notice of Aspen/Pitkin's intent to appropriate over 100,000 acre feet of water for a multitude of beneficial uses. In fact, Aspen/Pitkin concede that "it is not enough to simply broadcast or publish one's intentions." (Appellants' Opening Brief, p. 14). Aspen/Pitkin's actions do not even do this much.

Contrary to their assertion that the two "prongs should be considered together" (Appellants' Opening Brief, p. 6), "[t]he physical act and manifestations in pursuance of the intention and the intention itself are separate and distinct." Bunger v. Uncompahgre Water Users Association, supra, 557 P. 2d at 394; Fruitland Irrigation Co. v. Kruemling, supra. What Aspen/Pitkin seem to be saying is that they are entitled to a conditional decree because the first prong of the test, the intent to take water and use it for beneficial purposes has been met. However, "[i]t is not sufficient that there was an intent

to divert....." City and County of Denver v. Northern Colorado Water Conservancy District, supra, 276 P. 2d at 1001; see also Fruitland Irrigation Co. v. Kruemling, supra, ("The matter does not rest upon the intent of the claimant...."), 162 P. at 163.

Aspen/Pitkin are not correct in their assertion that no actions on the land would have been meaningful. The Plan of Study attached to the preliminary FERC permit application reveals, as part of any hydro-electric power generation use, the need for subsurface investigations for soils and geology, a topographic survey of the site and an inspection of present facilities. The record also does not support their claim that their appropriation can be used without modification or enlargement of existing facilities. On the contrary, the preliminary FERC permit application shows the proposed power use will require the construction of a penstock, turbines, a powerhouse, enlarged stilling basin, switchyard, auxiliary intake structure, outlet works, and transmission lines. (Volume 4, Exhibit N, including the map labeled Exhibit 4). Whether Aspen/Pitkin (as opposed to the facility's owner) can use the water for the other purposes claimed in the application through the existing facilities is not clear from or supported by the record.

Aspen/Pitkin assert that a field survey would have been meaningless. Field surveys have been approved as satisfying the requirements of an open, notorious physical demonstration providing notice to third parties. See, e.g., Four Counties Water Users Association v. Colorado River Water Conservation District,

supra. However, even if Aspen/Pitkin's assertion is correct, the record as discussed above clearly establishes that other open and notorious actions could have been taken. This is precisely why this Court has required the facts of each case to be examined and determined on an ad hoc basis. See, e.g., Rocky Mountain Power Company v. Colorado River Water Conservation District, supra.

Finally, River District submits that the Water Judge correctly determined that the initial construction of Ruedi Reservoir cannot satisfy the second prong. See, September 3, 1982, Opinion of the Water Court at Paragraph 18 of the Conclusions of Law (Volume 1, p. 15). In this case, as in Bunger and Colorado River Water Conservation District v. Rocky Mountain Power Co., supra, the second prong cannot be satisfied by actions on the land taken by a third party where there is no privity based upon an assignment or other conveyance of the third party's rights. Bunger v. Uncompahgre Water Users Association, supra, 557 P. 2d at 394.

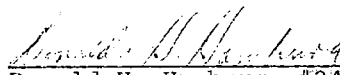
It is well established that a water right may relate back to the date when the first step is taken. See, e.g., Denver v. Northern Colorado Water Conservancy District, supra. However, the doctrine is a legal fiction and should be strictly construed. Id., 276 P. 2d at 1001. To allow Aspen/Pitkin, in the absence of any physical action on the ground or actual diversion and use, to apply the doctrine and relate back to any of three dates claimed would fly in the face of this rule since

"it is clear that only when both elements are present that the first step is effected." Central Colorado Water Conservancy District v. City and County of Denver, supra, 539 P. 2d at 1270.

#### CONCLUSION

It is respectfully requested that the opinion of the Water Judge denying the Application for a Conditional Water Right be affirmed because the Applicants have made no open, physical act on the land sufficient to constitute notice to third parties of the intent to apply water to beneficial use.

DATED this 12<sup>th</sup> day of January, 1983.

  
Donald H. Hamburg, #2422  
General Counsel, Colorado River Water  
Conservation District  
P. O. Box 1120  
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CERTIFICATE OF MAILING

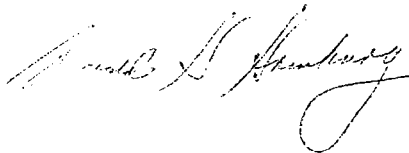
I hereby certify that a true and correct copy of the foregoing ANSWER BRIEF OF OBJECTOR/APPELLEE was placed in the United States Mails at Glenwood Springs, Colorado, first class, postage prepaid, on the 12<sup>th</sup> day of January, 1983, addressed as follows:

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APPENDIX "A"

DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO

Case No. 80-CW-565

QUESTIONS OF LAW AND STIPULATIONS OF FACTS

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE CITY OF ASPEN AND THE COUNTY OF PITKIN ON THE FRYINGPAN RIVER IN PITKIN AND EAGLE COUNTIES

COME NOW Applicants and Objector, Colorado River Water Conservation District, and submit to the Court the following questions of law, stipulations of facts, and other stipulations relative to the issues set forth in paragraph 3 of the pretrial order in this case:

1. Issue A in the pretrial order is stated as follows: Have Applicants taken the necessary "first step" towards initiating an appropriation of the water available for refilling Ruedi Reservoir? The stipulations with regard to this issue are set forth below:

a. The parties acknowledge that there is a two-pronged test to determine if a "first step" exists. The parties recognize that one prong of the test is an intent to appropriate water. The parties agree that Applicants had and still have an intent to appropriate water, as set forth in the application.

b. The parties disagree as to the second prong of the test to determine if a "first step" exists. Applicants state that the second prong of the test is that the appropriator must give notice of the intent to apply water to beneficial use.

c. The Objector believes that the second prong of the test is "an open physical act on the land sufficient to constitute notice to third parties of the intent to apply water to beneficial uses."

d. The parties disagree on four points regarding the demonstration of intent to appropriate. First, the parties disagree whether there must be a physical demonstration on the land of the intent to appropriate. Secondly, the parties disagree as to what constitutes "physical" demonstration of intent to appropriate. Thirdly, the parties disagree that an open physical demonstration of intent occurred.



Fourthly, the parties disagree that any demonstration of intent gave notice to third parties of the pendency of the appropriation.

e. The parties agree that Applicants performed the following acts upon which the date of appropriation might be based:

(1) Notice of intent to file an application for preliminary permit on Project No. 3225, (Ruedi Dam and Reservoir) dated September 30, 1980, and filed with the United States Federal Energy Regulatory Commission (FERC) on October 2, 1980. Applicants' Exhibit M.

(2) Application for a preliminary permit on Project No. 3225, dated and filed with the FERC on October 23 and 24, 1980, respectively. Applicants' Exhibit N. The notice of the pendency of the application was published as shown on Appendix A attached hereto. Applicants' Exhibit O contains a copy of the notice as published.

(3) Application for water right in Case No. 80-CW-565 filed in Water Division No. 5 on December 30, 1980.

f. The parties agree that the only dates upon which an appropriation might have existed are represented by the dates set forth in (1), (2), and (3) above.

g. Applicants performed additional acts leading up to (1), (2), and (3) above. These acts are represented by Applicants' Exhibits I, J, K, HH and JJ.

2. The parties will not argue issues B, C, D, F, G, H, I, and J in the pretrial order and agree that they are no longer at issue in this case, and are not decided by this case.

3. Issue E in the pretrial order is determined by the following stipulation:

a. Any refill right awarded herein shall be exercised subject to all applicable and regularly promulgated statutes, laws, and administrative rules and regulations of the United States or of the State of Colorado, which pertain to the operation of Ruedi Reservoir.

b. No right in or to land or facilities owned or controlled by the United States can or shall be granted in this proceeding.

WHEREFORE, the parties request that the Court resolve the questions of law based on the stipulation of facts and other stipulations set forth herein.

Respectfully submitted this \_\_\_\_ day of July, 1982.

Wesley A. Light, 6020  
County Attorney  
Pitkin County  
506 E. Main  
Aspen, CO 81611

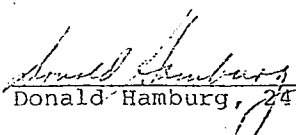
Paul Taddune, 10824  
City Attorney  
City of Aspen  
130 South Galena  
Aspen, CO 81611

MUSICK AND COPE

By   
John D. Musick, Jr., 341

P. O. Box 4579  
Boulder, CO 80306  
Telephone: (303) 499-3990  
1-800-332-2140

SPECIAL COUNSEL TO APPLICANTS,  
CITY OF ASPEN AND PITKIN COUNTY

  
Donald Hamburg, 2422

Suite 204  
Mid-Continent Building  
201 Centennial Street  
Glenwood Springs, CO 81601

GENERAL COUNSEL TO OBJECTOR,  
COLORADO RIVER WATER  
CONSERVATION DISTRICT

## APPENDIX A

### Publication of Application of Preliminary Permit Pursuant to Section 4(f) of the Federal Power Act, 16 U.S.C. §797(f)

1. Notice of Application for Preliminary Permit:  
December 10, 1980
2. Publication of Notice in Eagle Valley Enterprise, Eagle,  
Colorado: December 22, 1980
3. Publication of Notice in Aspen Times, Aspen, Colorado:  
December 25, 1980
4. Publication of Notice in Federal Register: January 12,  
1981

**Project No. 3603-0001**  
**Aspen and Pitkin County;**  
**Application for Preliminary**

January 10, 1980.

Take notice that the City of Aspen and Pitkin County (Applicant) filed on January 24, 1980, an application for preliminary permit pursuant to the Federal Power Act, 16 U.S.C. §§ 791(a)-791(f), for proposed Project No. 3603 to be known as the Ruedi Project located on the Ruedi River at the existing dam owned by the United States and Power Resources Service in Aspen and Pitkin Counties, Colorado. Application is on file with the Commission and is available for public inspection. Correspondence with the Applicant should be directed to: Mr. Kenneth F. Plumb, Secretary.

Kenyon, Schwartz & Cope, P.C., Attorneys at Law, P.O. Box 4579, Aspen, Colorado 80608. Any person who wishes to file a response to this notice should read the entire notice and comply with the requirements specified for the particular kind of response that person wishes to file.

**Project Description**—The proposed project would utilize an existing powerhouse with three turbines. The project has a total rated capacity of 12 MW. A transmission line with a maximum length of one mile would be constructed. The Applicant estimates that the average annual energy output would be 63,500,000 kWh, which would save the equivalent of 43,000 barrels of oil or 10 tons of coal.

**Purpose of Project**—Power generated by the project would be sold to either the City of Aspen, Public Service Company of Colorado, Colorado-Ute Electric Association or the Holy Cross Electric Association, Inc.

**Proposed Scope and Cost of Studies under Permit**—The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, Applicant will decide whether to proceed with a detailed studies and the preparation of an application for license to construct and operate the project. Applicant estimates that the cost of work to be performed under this preliminary permit would be \$235,000.

**Purpose of Preliminary Permit**—A preliminary permit does not authorize construction. A permit, if issued, gives Permittee, during the term of the permit, the right of priority of application for license while the

Permittee undertakes the necessary studies and examinations to determine the engineering, economic, and environmental feasibility of the proposed project, the market for power, and all other information necessary for inclusion in an application for a license.

**Agency Comments**—Federal, State, and local agencies that receive this notice through direct mailing from the Commission are invited to submit comments on the described application for preliminary permit. (A copy of the application may be obtained directly from the Applicant.) Comments should be confined to substantive issues relevant to the issuance of a permit and consistent with the purpose of a permit as described in this notice. No other formal request for comments will be made. If an agency does not file comments within the time set below, it will be presumed to have no comments.

**Competing Applications**—This application was filed as a competing application to the Ruedi Project No. 3225 on June 24, 1980, by Harrison Western Corporation, under 18 CFR 4.33 (1980), and, therefore, no further competing applications or notices of intent to file a competing application will be accepted for filing.

**Comments, Protests, or Petitions to Intervene**—Anyone desiring to be heard or to make any protests about this application should file a petition to intervene or a protest with the Commission, in accordance with the requirements of its Rules of Practice and Procedure, 18 CFR § 1.8 or § 1.10 (1980). Comments not in the nature of a protest may also be submitted by conforming to the procedures specified in § 1.10 for protests. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but a person who merely files a protest or comments does not become a party to the proceeding. To become a party, or to participate in any hearing, a person must file a petition to intervene in accordance with the Commission's Rules. Any comments, protest, or petition to intervene must be received on or before January 23, 1981.

**Filing and Service of Responsive Documents**—Any comments, protests, or petitions to intervene must bear in all capital letters the title "Comments," "Protests," or "Petition To Intervene," as applicable. Any of these filings must also state that it is made in response to this notice of application for preliminary permit for Project No. 3603. Any comments, protests, or petitions to intervene must be filed by providing the original and those copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy

Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Fred E. Springer, Chief, Applications Branch, Division of Hydropower Licensing, Federal Energy Regulatory Commission, Room 208, 400 First Street, N.W., Washington, D.C. 20426. A copy of any notice of intent, competing application, or petition to intervene must also be served upon each representative of the Applicant specified in the first paragraph of this notice.

Kenneth F. Plumb,  
 Secretary.

(FR Doc. 81-971 Filed 1-9-81; 8:45 am)  
 BILLING CODE 6450-05-M

**Project No. 3704-0001**  
**City of Redding; Application for**  
**Preliminary Permit**

January 5, 1981.

Take notice that the City of Redding (Applicant) filed on November 12, 1980, an application for preliminary permit pursuant to the Federal Power Act, 16 U.S.C. §§ 791(a)-825(r) for proposed Project No. 3704 to be known as the American River North Fork Dam Power Plant located on the North Fork of the American River in Placer County, California. The application is on file with the Commission and is available for public inspection. Correspondence with the Applicant should be directed to: Mr. W. Brickwood, City Manager, City of Redding, 760 Parkview Avenue, Redding, California 95614 with copies to Martin McDonough, Esquire, 555 Capitol Mall, Sacramento, California 95814. Any person who wishes to file a response to this notice should read the entire notice and must comply with the requirements specified for the particular kind of response that person wishes to file.

**Project Description**—The proposed project, to be located at the base of the existing U.S. Army Corps of Engineers' North Fork Dam, would consist of: (1) a 300-foot long, 6-foot diameter penstock serving; (2) a powerhouse with a rated capacity of 12 MW; and (3) 300 feet of transmission line to connect to existing transmission facilities.

The Applicant estimates that the average annual energy output would be 63.5 million kWhs.

**Purpose of Project**—The power generated at the project would be used to serve the electrical need of the Applicant's customers in the City of Redding.

**Proposed Scope and Cost of Studies under Permit**—The Applicant has conducted some reconnaissance studies of the site. The Applicant now seeks

## Public notice

### UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

City of Aspen and Pitkin County, Project  
No 3603-000

#### NOTICE OF APPLICATION FOR PRELIMINARY PERMIT (December 10, 1980)

Take notice that the City of Aspen and Pitkin County (Applicant) filed on October 24, 1980, an application for preliminary permit (pursuant to the Federal Power Act, 16 USC §§791(a) - 825(r)) for proposed Project No 3603 to be known as the Ruedi Project located on the Fryingpan River at the existing Ruedi Dam owned by the United States Water and Power Resources Service in Eagle and Pitkin Counties, Colorado. The application is on file with the Commission and is available for public inspection. Correspondence with the Applicant should be directed to: Mr. William T. Smith Jr., Musick, Williamson, Schwartz & Cope, P.C., Attorneys at Law, PO Box 4579, Boulder, Colorado 80306. Any person who wishes to file a response to this notice should read the entire notice and must comply with the requirements specified for the particular kind of response that person wishes to file.

**Project Description** — The proposed project would utilize an existing government dam and would consist of a powerhouse with three turbine-generators with a total rated capacity of 5 MW. A transmission line with a minimum length of one mile would be required. The applicant estimates that the average annual energy output would be 25,600,000 kWh, which would save the equivalent of 43,000 barrels of oil or 11,900 tons of coal.

**Purpose of Project** — Power generated by the project would be sold to either the City of Aspen, Public Service Company of Colorado, Colorado-Ute Electric Association or the Holy Cross Electric Association, Inc.

**Proposed Scope and Cost of Studies under Permit** — The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on results of these studies, Applicant would decide whether to proceed with more detailed studies and the preparation of an application for license to construct and operate the project. Applicant estimates that the cost of work to be performed under this preliminary permit would be \$265,000.

**Purpose of Preliminary Permit** — A preliminary permit does not authorize construction. A permit, if issued, gives the Permittee, during the term of the permit, the right of priority of application for license while the Permittee undertakes the necessary studies and examinations to determine the engineering, economic, and environmental feasibility of the proposed project, the market for power, and all the other information necessary for inclusion in an application for a license.

**Agency Comments** — Federal, State, and local agencies that receive this notice through direct mailing from the Commission are invited to submit comments on the described application for preliminary permit. (A copy of the application may be obtained directly from the Applicant.) Comments should be confined to substantive issues relevant to the issuance of a permit and consistent with the purpose of a permit as described in this notice. No other formal request for comments will be made. If an agency does not file comments within the time set below, it will be presumed to have no comments.

**Competing Applications** — This application was filed as a competing application to the Ruedi Project No 3225 on June 24, 1980, Harrison Western Corporation, under 18 CFR 4.33 (1980), and, therefore, no further competing applications or notices of intent file a competing application will be accepted for filing.

Comments, Protests, or Petitions to Intervene — Anyone desiring to be heard or to make any protests about this application should file a petition to intervene or a protest with the Commission, in accordance with the requirements of its Rules of Practice and Procedure, 18 CFR 51.8 or 51.10 (1980). Comments not in the nature of a protest may also be submitted by conforming to the procedures specified in 51.10 for protests. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but a person who merely files a protest or comments does not become a party to the proceeding. To become a party, or to participate in any hearing, a person must file a petition to intervene in accordance with the Commission's Rules. Any comments, protest, or petition to intervene must be received on or before January 26, 1981.

**Filing and Service of Responsive Documents** — Any comments, protests, or petitions to intervene must bear in all capital letters the title "COMMENTS", "PROTEST", or "PETITION TO INTERVENE" as applicable. Any of these filings must also state that it is made in response to this notice of application for preliminary permit for Project No 3603. Any comments, protests, or petitions to intervene must be filed by providing the original and those copies required by the Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426. An additional copy must be sent to: Fred E. Springer, Chief, Applications Branch, Division of Hydropower Licensing, Federal Energy Regulatory Commission, Room 209, 400 First Street, NW, Washington, DC 20426. A copy of any notice of intent, competing application, or petition to intervene must also be served upon each representative of the Applicant specified in the first paragraph of this notice.

Kenneth F. Plumb  
Secretary

Published in the Aspen Times December 25, 1980.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

City of Aspen and Pitkin County

Project No. 3603-000

NOTICE OF APPLICATION FOR PRELIMINARY PERMIT

(December 10, 1980)

Take notice that the City of Aspen and Pitkin County (Applicant) filed on October 24, 1980, an application for preliminary permit [pursuant to the Federal Power Act, 16 U.S.C. §§791(a) - 825(r)] for proposed Project No. 3603 to be known as the Ruedi Project located on the Fryingpan River at the existing Ruedi Dam owned by the United States Water and Power Resources Service in Eagle and Pitkin Counties, Colorado. The application is on file with the Commission and is available for public inspection. Correspondence with the Applicant should be directed to: Mr. William T. Smith Jr., Musick, Williamson, Schwartz & Cope, P.C., Attorneys at Law, P.O. Box 4579, Boulder, Colorado 80306. Any person who wishes to file a response to this notice should read the entire notice and must comply with the requirements specified for the particular kind of response that person wishes to file.

Project Description - The proposed project would utilize an existing government dam and would consist of a powerhouse with three turbine-generators with a total rated capacity of 5 MW. A transmission line with a minimum length of one mile would be required. The applicant estimates that the average annual energy output would be 25,600,000 kWh, which would save the equivalent of 43,000 barrels of oil or 11,900 tons of coal.

Purpose of Project - Power generated by the project would be sold to either the City of Aspen, Public Service Company of Colorado, Colorado-Ute Electric Association or the Holy Cross Electric Association, Inc.

Proposed Scope and Cost of Studies under Permit - The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on results of these studies, Applicant would decide whether to proceed with more detailed studies and the preparation of an application for license to construct and operate the project. Applicant estimates that the cost of work to be performed under this preliminary permit would be \$285,000.

Purpose of Preliminary Permit - A preliminary permit does not authorize construction. A permit, if issued, gives the Permittee, during the term of the permit, the right of priority of application for license while the Permittee undertakes the necessary studies and examinations to determine the engineering, economic, and environmental feasibility of the proposed project, the market for power, and all other information necessary for inclusion in an application for a license.

Agency Comments - Federal, State, and local agencies that receive this notice through direct mailing from the Commission are invited to submit comments on the described application for preliminary permit. (A copy of the application may be obtained directly from the Applicant.) Comments should be confined to substantive issues relevant to the issuance of a permit and consistent with the purpose of a permit as described in this notice. No other formal request for comments will be made. If an agency does not file comments within the time set below, it will be presumed to have no comments.

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Comments, Protests, or Petitions to Intervene - Anyone desiring to be heard or to make any protests about this application should file a petition to intervene or a protest with the Commission, in accordance with the requirements of its Rules of Practice and Procedure, 18 C.F.R. §1.8 or §1.10 (1980). Comments not in the nature of a protest may also be submitted by conforming to the procedures specified in §1.10 for protests. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but a person who merely files a protest or comments does not become a party to the proceeding. To become a party, or to participate in any hearing, a person must file a petition to intervene in accordance with the Commission's Rules. Any comments, protest, or petition to intervene must be received on or before January 26, 1981.

Filing and Service of Responsive Documents - Any comments, protests, or petitions to intervene must bear in all capital letters the title "COMMENTS", "PROTEST", OR "PETITION TO INTERVENE", as applicable. Any of these filings must also state that it is made in response to this notice of application for preliminary permit for Project No. 3603. Any comments, protests, or petitions to intervene must be filed by providing the original and those copies required by the

- 3 -

Commission's regulations to: Kenneth F. Plumb, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. An additional copy must be sent to: Fred E. Springer, Chief, Applications Branch, Division of Hydro-power Licensing, Federal Energy Regulatory Commission Room 208, 400 First Street, N. W., Washington, D.C. 20426. A copy of any notice of intent, competing application, or petition to intervene must also be served upon each representative of the Applicant specified in the first paragraph of this notice.

Kenneth F. Plumb  
Secretary



