12-6-1982

Aspen v. Colorado River Water Conservation Dist.

SUPREME COURT, STATE OF COLORADO

Case No. 82 SA 478

OPENING BRIEF OF APPLICANTS-APPELLANTS

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.

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

HONORABLE GAVIN D. LITWILLER, WATER JUDGE

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES PAGES

II. STATEMENT OF THE ISSUE

Have the City of Aspen and the Board of County Commissioners of Pitkin County taken a first step toward the beneficial use of Ruedi Reservoir refill water, even though they have not undertaken any physical work on the land?

III. STATEMENT OF THE CASE

This is an appeal from an order and decree entered by the Honorable Gavin D. Litwiller, Water Judge, which denied the application of the City of Aspen and the Board of County Commissioners of Pitkin County [hereinafter Aspen and Pitkin County] in Case No. 80-CW-565, District Court, Water Division No. 5, State of Colorado. This application sought a decree for a conditional water right to refill Ruedi Reservoir. (Volume 1, page 45).

Ruedi Reservoir is an existing reservoir with a capacity of about 102,400 acre feet which is located about 13 miles east of Basalt, Colorado on the Fryingpan River, a tributary of the Roaring Fork River. It was constructed by the United States Bureau of Reclamation as a component of the Fryingpan-Arkansas Project, and was completed in 1968. (Exhibit I). Aspen and Pitkin County have stipulated that any conditional decree which they obtain to refill Ruedi Reservoir will be subject to the federal ownership of the Reservoir, and to all state and federal laws which pertain to its operation. (Volume 1, page 17).

The application for a conditional decree was filed on December 31, 1980 after Aspen and Pitkin County ascertained that substantially more water could be stored at Ruedi Reservoir for beneficial use simply by refilling it, without any modification or enlargement of the existing reservoir. (Exhibits I, J, and K). This determination coincided with the efforts of Aspen and Pitkin County to install a hydroelectric power plant at the Reservoir, to preserve the flat water recreational use of the Reservoir, and to use the Reservoir to supply their burgeoning municipal water demands in the Upper Roaring Fork Valley by exchange. These efforts involved negotiations with the United States Bureau of Reclamation, the Colorado Water Conservation Board, and the Fryingpan-Arkansas Project Commission over the operation of the Ruedi Reservoir; long public deliberations; and the filing of an application on October 24, 1980 for a preliminary permit from the United States Federal Energy Regulatory Commission [hereinafter FERC] to conduct a feasibility study of the installation of a hydro electric power plant at Ruedi Reservoir. (Exhibits I, J, K, M, N, HH, JJ). On September 28, 1981 the FERC awarded a preliminary permit to Aspen and Pitkin County, over the competing application of the River District among others. (Exhibit O). This permit is prerequisite to the issuance of a license to install a hydroelectric power plant at the Reservoir, precludes the issuance of a license to another entity during its term, and gives Aspen and Pitkin County a preference over competing applications for a license.

Admittedly, these efforts did not include any on-the-ground survey or other construction work at the reservoir site. Such work would have done nothing at this point to further the application of Ruedi Reservoir refill water to beneficial use. The Reservoir had already been constructed; the proposed hydroelectric power plant would utilize existing outlet works and would not require a new afterbay; no additional recreational facilities were planned; and exchange releases for municipal purposes would be made with existing works. (Volume 1, page 45; Volume 3, page 26, lines 14-23; Exhibit N). The application of Ruedi Reservoir refill water to beneficial use is an operational, rather than a physical, problem.

The application was opposed by the Colorado River Water Conservation District [hereinafter River District] which had filed its own application to refill Ruedi Reservoir some three weeks after Aspen and Pitkin County had filed theirs. (Volume 3, page 28, lines 11-25). The River District conceded that there was water available for refilling Ruedi Reservoir, and did not dispute the need of Aspen and Pitkin County for Ruedi Reservoir refill water, or their efforts to put that water to beneficial use. 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 <u>on the land</u>. (Volume 1, pages 11, 16, 17). Essentially, the River District maintained that a conditional decree could not be granted unless

Aspen and Pitkin County had gone into the field and resurveyed Ruedi Reservoir or the like, as the River District had done in the winter of 1981 just before it filed its refill application.

The Honorable Gavin D. Litwiller, Water Judge, then heard legal argument on July 9, 1982 on the River District's sole objection. (Volume 3). In an order and decree dated September 3, 1982, Judge Litwiller adopted the River District's position, found that Aspen and Pitkin County had not undertaken an act on the land manifesting their intent to apply Ruedi Reservoir refill water to beneficial use, and denied the application. (Volume 1, pages 10-16).

IV. SUMMARY OF THE ARGUMENT

Aspen and Pitkin County's argument consists of two straightforward points. The first point is that one of the most common concerns in conditional water rights cases - the threat of speculation - is not a concern in this case. There is no dispute about the fixed and definite purpose of Aspen and Pitkin County to apply Reudi Reservoir refill water to beneficial use or about their need for this water. The second point is that where water can be put to beneficial use without any significant, physical modification or enlargement of an existing facility, the first step toward such beneficial use does not magically consist of on-the-ground survey or construction work. The central principle in Colorado water law is not whether a first step is ritualistically

taken on the ground, but whether a substantial, rather than token, step is taken toward the eventual beneficial use of water. Aspen and Pitkin have taken action on their fixed and definite purpose, and even though this action was not taken on the land, it was substantial, and manifestly related to the beneficial use of Ruedi Reservoir refill water. They have complied with the central requirements of the law, and are therefore entitled to a conditional decree.

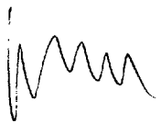
IV. ARGUMENT: ASPEN AND PITKIN COUNTY ARE ENTITLED TO A CONDITIONAL DECREE BECAUSE THEY HAVE TAKEN THE FIRST STEP TOWARD THE APPLICATION OF RUEDI RESERVOIR REFILL WATER TO BENEFICIAL USE.

The beneficial use of water is the cornerstone of a Colorado water right. But although beneficial use is a simple, brief phrase, it is no easy task to accomplish. It has increasingly become a complex engineering and financial problem, involving long periods of planning and large capital outlays. It is this difficulty that has given rise to the doctrine of relation back in which the priority of a water right can be related back to the date when the first step was taken toward the application of water to beneficial use. The doctrine effectively reserves a priority date against all others for one who is willing to incur the expense and risk of developing a water project. But while conditional water rights are fundamental to the often complex problem of beneficial use, they have sometimes invited attempts to tie up water for speculative purposes. A token step on the land is

taken, not as a step in a plan to put water to beneficial use, but in hopes of securing a decree which can then be sold.

The doctrine of conditional water rights must therefore balance the need to underwrite the difficult enterprise of putting water to beneficial use against the danger of speculation. The doctrine must test the mettle of a claimed first step and determine whether it is indeed taken with the application of water to beneficial use in mind. This Court has developed a two pronged test to this end. Most recently, in Rocky Mountain Power Company v. Colorado River Water Conservation District, 646 P.2d 383, 387 (Colo. 1982) this Court articulated this test as follows:

> The "first step" consists of two prongs: The formation of an intent to appropriate a definite quantity of water for beneficial use, and an overt manifestation of that intent through physical acts sufficient to constitute notice to third parties.



The River District would have this Court focus on the second prong of this test, and mechanically require some act on the land. Aspen and Pitkin County argue that these prongs should be considered together, and with a view to their underlying purpose of determining whether a first step toward the application of water to beneficial use has indeed been taken.

A. ASPEN AND PITKIN COUNTY HAVE A BONA-FIDE NEED FOR RUEDI RESERVOIR REFILL WATER, AND HAVE OTHERWISE FORMED A FIXED AND DEFINITE INTENT TO APPLY THIS WATER TO BENEFICIAL USE.

The intent to apply water to beneficial use is the first fundamental of a conditional water right. The knowledge of how water can be put to beneficial use, a plan for doing so, and the determination to execute that plan give substance to the first physical act toward the application of water to beneficial use. Without such an intent, a physical act on the land is only ostensible, and is not in fact an act which promotes the application of water to beneficial use. This Court has never hesitated to search behind a physical act which might otherwise be the starting point for a water project, and to carefully scrutinize the intentions of a claimant for a conditional water right. Three principal cases illustrate this point.

In City and County of Denver v. Northern Colorado Water Conservancy District, 130 Colo. 375, 276 P.2d 992 (1954) this Court reviewed Denver's long and sometimes intermittent field work on the so-called Blue River Project from 1914 to 1946, and found that Denver did not form an intent to apply water to beneficial use until it began actual construction on the east portal of the Roberts (then Montezuma) Tunnel in 1946. The Court rejected Denver's early survey work in the Fraser and William Fork River Basins as the first step for the Blue River Project because physical work on the land in these areas was not related to the beneficial use of water from the Blue River Basin. This Court said:

> In determining the date "when the first step was taken," a survey made on the Fraser River or on the

> Williams Fork would of itself be no evidence of intent to appropriate water from the Blue River. Certainly such a survey in a far distant basin supplying water to another stream would constitute no notice to another appropriator of such intent. The filing of a plat of method of diversion from the Fraser or Williams Fork would be no evidence of intent to appropriate water from the Blue or notice of such intent.

Id., 276 P.2d at 1000.

This Court also held that Denver's field work in the Blue River Basin did not constitute a first step toward the application of water from that basin until Denver settled on a fixed and definite plan for the diversion of water from the basin. Until Denver committed itself to such a plan, the amount of water to be diverted, the point of diversion, and ultimately the extent of beneficial use was indeterminate so that prior work on the land, even in the Blue River Basin, was not precedental to the specific beneficial use of water from that basin, and could not evidence an intent to take water for such a purpose. Id. 276 P.2d at 1000-1003.

This Court also addressed the claim of the City of Colorado Springs for a conditional water right to make transmountain diversions from the Blue River Basin in the Northern Colorado case. This claim was based on the early survey and construction work on a transmountain ditch and pipeline by engineers, who were not employed by Colorado Springs at the time the work was undertaken, and who later sold their rights in the project to Colorado Springs. This Court emphasized the inadequacy of even actual construction

work as a first step when such construction could not be linked to the intent to apply water to beneficial use. This Court said:

> Appropriation of water requires both diversion and use. In order to complete an appropriation, there must be an actual taking of water for beneficial use. In order to initiate an appropriation, there must be an intent and purpose by the appropriator, actually to take the water and to put it to beneficial use.
>
> * * *
>
> Here, neither Galloway nor George had any "claim of appropriation"; neither owned or intended to procure any land for irrigation or any power plant for power use. Neither represented any municipality for domestic use. Neither had an "enterprise" for "financing and construction." Neither attempted to finance or intended to build the system of ditches, reservoirs and tunnel which they platted. They did only token work to give pretense of a right which they might sell.

Id., 276 P.2d at 1008.

The fundamental importance of an intent to apply water to beneficial use was again made clear in Bunger v. Colordo River Water Conservation District, 192 Colo. 159, 557 P.2d 389 (1976). In that case, Mills Bunger claimed that he had taken the first step for a transmountain diversion project from the Roaring Fork River Basin by some survey work conducted in the field with a camera and altimeter. This Court found, however, that Mr. Bunger had no plans to build or finance the project himself, and that he did not know how the water would be put to beneficial use. Id., 557 P.2d at 394-395. If

Mr. Bunger had formulated such plans, his work in the field would have furthered these plans, and would have probably sufficed as a first step toward the beneficial use of water. But without such an intent, his field work was meaningless.

Finally, this Court's treatment of the detailed survey in Colorado River Water Conservation District v. Vidler Tunnel Water Company, 197 Colo. 413, 594 P.2d 566 (1979) should be considered. There, this Court recognized that an open physical act of appropriation took place on August 1, 1973 when professional surveyors commenced a detailed survey of Sheephorn Reservoir. But although such an on-the-ground, detailed survey has often been accepted as a first step toward the application of water to beneficial use, it was insufficient in this case because the Vidler Company did not have any firm contractual commitments for the use of water, and hence could not establish its intent to apply water to beneficial use. Id., 594 at P.2d 568.

In the instant case, there is no dispute about Aspen and Pitkin County's intent to apply water to beneficial use. Their purpose is fixed and definite. They need Ruedi Reservoir refill water for their own use: for hydroelectric power generation, recreation, and municipal supplies. It is clear that the concerns in the Northern Colorado, Bunger, and Vidler cases do not apply here, and that the efforts of Aspen and Pitkin County to apply Ruedi Reservoir refill water to beneficial use are not empty, speculative acts.

B. ASPEN AND PITKIN COUNTY HAVE ADEQUATELY MANIFESTED THEIR INTENT TO APPLY RUEDI RESERVOIR REFILL WATER TO BENEFICIAL USE, EVEN THOUGH THEY HAVE NOT UNDERTAKEN ANY PHYSICAL WORK ON THE LAND.

The second prong of the test for a first step is an overt, physical manifestation of the intent to apply water to beneficial use which is sufficient to put third parties on notice of this intent to appropriate water. This prong has commonly been satisfied with on-the-ground survey or construction work. The issue in the instant case is whether this is the only way in which this second prong can be satisfied. Aspen and Pitkin County submit that where the intent to apply water to beneficial use through existing facilities is clearly established, and the beneficial use of water would not be furthered or noticed by a physical act on the ground, such an act is not required. This proposition follows from an inquiry into why on-the-ground survey or construction work has been held to satisfy the second prong of the test.

One reason why on-the-ground survey or construction work has been the benchmark for meeting the second prong of the test is that it is overt; it occurs in the field at the source of supply, not in an appropriator's mind or on a piece of paper. Still, the openness of such on-the-ground work cannot be the only reason why it satisfies the second prong. As discussed above, open, but empty acts in the field, which are not accompanied by any intent to put water to beneficial use, do not constitute first steps toward the application of

water to beneficial use; nor would such acts put anyone on notice of an intent to appropriate. At bottom, there must be something more. There must be a substantial relationship between the overt act and the eventual application of water to beneficial use. This is the critical attribute of on-the-ground survey or construction work which satisfies the second prong, and the reason why such field work can serve to put others on notice of an intent to put water to beneficial use.

The degree to which certain overt acts were related to the eventual application of water to beneficial use was the principal issue in Fruitland Irrigation Co. v. Kruemling, 62 Colo. 160, 162 P. 161 (1917). This Court was not so much concerned in that case with whether a proper intent to appropriate existed, but with the question of which of a number of overt acts constituted the first substantial act of appropriation. The claimants in that case had visited a reservoir site and paid $5.00 to have a rock and some earth moved at this site in the summer of 1900. Later that year, the claimants secured an option to buy the reservoir site, and employed surveyors to run lines to investigate the practical possibilities of the undertaking. Although all of these acts were overt acts in the field, this Court did not find any of them to be appropriative, and sufficient to put others on notice of an intent to apply water to beneficial use. This Court held that the $5.00 worth of earth moving, the land option, and the rough survey were all too prelimi-

nary, and did not evidence a fixed purpose to apply water to water beneficial use. Id., 162 P.2d at 163. The claimants had expended little money and effort, and could have very easily walked away from the project at this point. They had not made any real commitment to apply water to beneficial use, and there was not a strong relationship between these preliminary, yet overt acts on the land and the application of water to beneficial use.

The next year, the claimants in Fruitland employed another surveyor to undertake a detailed survey of the project, and then filed a detailed plat based on this survey with the State Engineer. This survey work was determined to be the first substantial act of appropriation. Id. It was more detailed, more definite, and no doubt more expensive than the prior work. This stronger commitment and relationship to the application of water to beneficial use, and not just the openness of the work on the land, was the important difference.

The formulation of a bona-fide intent to apply water to beneficial use prior to any work on the land also lends substance to that work and strengthens the relationship of that work to the beneficial use of water. The holdings of the Northern Colorado, Bunger, and Vidler cases, discussed above, can certainly be viewed in these terms. If the claimants in these cases had settled on a definite project, if they had sought to take water to meet their own needs or had secured contractual commitments for the beneficial use of

water prior to taking to the field, then the work on the ground would have probably been more appropriative, and would have better served to put others on notice. This is not to say that once an intent to appropriate is formed, any overt act will constitute an act of appropriation. It is not enough to simply broadcast or publish one's intentions; there must be a substantial undertaking toward the application of water to beneficial use. But where a claimant has made the effort to develop a definite plan to put water to beneficial use, it is reasonable to assume that his efforts in the field will be more purposeful and directed toward the realization of that plan than toward some speculative venture.

This is also not to say that work on the land can never be appropriative unless the intent to appropriate is formed before taking to the field. This Court has made it clear in Elk-Rifle Water Company v. Templeton 173 Colo. 438, 484 P.2d 1211 (1971) and in Twin Lakes Reservoir and Canal Company v. City of Aspen, 192 Colo. 209, 557 P.2d 825 (1977) that the relationship between work on the ground and the beneficial use of water is not to be so narrowly defined. In Elk-Rifle, Clifford Jex engaged in the following activities between May 23, 1963 and June 18, 1963, individually and in the company of officials of the Socony Mobil Oil Company:

> [He] compiled water supply information from published records of the U.S. Geological Survey; obtained and examined maps and other publications;

> obtained aerial photographs from the U.S. Department of Agriculture; investigated alternate pipeline routes and determined upon the one subsequently claimed; made several visits to the Main Elk Reservoir site; determined upon a proposed location for the axis of the dam; located U.S. Government Survey Monuments, which were subsequently used in making statements of claim and maps; by use of the hand level and published topographic maps, extended out the contour lines of the reservoir basin, where the same were not covered by the topographic map, and computed the carrying capacity of the reservoir at various elevations; and also determined the capacity of 32,400 acre feet at a dam height of 172 feet between elevations of 5748 and 5920 feet.

Elk-Rifle, 484 P.2d at 1214.

This Court noted that as soon as this work was completed, Mr. Jex meet with Mobil officials, who after reviewing this work, decided to proceed with the water project, and directed Mr. Jex to make a detailed survey of the project, and to file a plat with the State Engineer based on that survey. Id. At the time that Mr. Jex was in the field, then, Mobil had yet to fix its intent to proceed with the project. Moreover, it is not clear whether Mr. Jex did much at all in the field. Most of his work appears to be based on the examination of existing maps and other publications. He did visit the reservoir site, but it does not appear that he left one lasting mark on the land which other appropriators might notice. He did locate some pre-existing USGS survey monuments, and he did make rough contour measurements with a hand held instrument, but it does not appear that he staked any monuments himself, or otherwise disturbed one clod of earth.

Nevertheless, this Court held that his acts were sufficient to demonstrate an appropriative intent, and that when the actual decision to proceed with the project followed immediately on the heels of these acts, a first step toward the beneficial use of water was taken. Id., 484 P.2d at 1215. At first glance, this seems to be a most anomolous result. How could Mr. Jex's work manifest an intent to appropriate which had yet to be formed? Why was Mr. Jex's reconnaissance work more substantial than the early reconnaissance work in Fruitland, or more appropriative than Mr. Bunger's field trip with altimeter and camera in hand?

The difference in these holdings is not to be found in a bald comparison of what each claimant did in the field. It lies in a more qualitative assessment of the relationship of those acts to the beneficial use of water. While Mobil did not decide to proceed with the project before Mr. Jex undertook his reconnaissance work, it endorsed that work the day after it was finished. There was a close temporal relationship between this work and the intent to appropriate. And while Mr. Jex's reconnaissance work appears virtually indistinquishable from the work which was found inadequate in Fruitland and Bunger, its immediate endorsement by Mobil and the conviction with which Mobil proceeded based on this work make it different and more substantive. It was apparent that this work was a step toward beneficial use of water. The existence of this relationship, and not whether some act was actually taken in the field, is properly the basis for the holding in the Elk-Rifle case.

The holding in Twin Lakes also appears at first glance to be anamolous, and to take Elk-Rifle to an untenable extreme. In Twin Lakes, an engineer for the Twin Lakes Reservoir and Canal Company ascertained, some 40 years after the Company had begun the construction of its transmountain diversion system, that this system was capable of diverting 100 cfs more than the Company had previously thought. Not knowing whether an additional 100 cfs had actually been diverted and put to beneficial use, the Company then filed an application for a conditional, rather than absolute, water right for the 100 cfs of newly discovered capacity. Not knowing exactly when the extra capacity had been built in, the Company sought a priority date only as of the date of its application. This Court reversed the denial of this application, holding that the application itself established an intent to put another 100 cfs of water to beneficial use, and that the construction of the transmountain diversion system over the years sufficed to openly manifest that intent, even though this work could have preceded the formation of the intent to appropriate the additional 100 cfs of water by as much as 40 years. Twin Lakes, 557 P.2d at 829.

In Elk-Rifle the appropriative acts preceded the formation of an appropriative intent by only a matter of days. Their close temporal relationship and the commitment to undertake the water project were apparent. The temporal relationship in Twin Lakes is anything but clear. Still there is a significant relationship between the construction of the

Twin Lakes transmountain diversion system and the Company's later determination that this system could be used to divert an additional 100 cfs.

The pivotal fact is that the Company had already gone to the expense and difficulty of constructing this system when it discovered this extra capacity. With the system already in place, it is difficult to question whether the Company would indeed make use of its full capacity. This is the underlying reason why the construction of the Twin Lakes system suffices as an appropriative act for the additional 100 cfs of capacity in the system. The construction start and obscure work on the system during the intervening 40 years satisfied the second prong of the test for a first step toward the appropriation of the additional 100 cfs, not because this construction occurred on the land, but because there was a strong relationship between the already constructed system and the eventual beneficial use of the additional 100 cfs of water. The most difficult part of the enterprise had been completed and the company only had to determine how to fully utilize its system. This relationship is stronger and more straightforward than the relationship between a detailed on-the-ground survey and the beneficial use of water. It is the common thread between the seemingly disparate holdings of the Elk-Rifle and Twin Lakes cases. It was not necessary for Mobil or the Twin Lakes Company to resurvey their respective projects on the ground because their commitment and intent to apply water to beneficial use was otherwise apparent.

This same thread runs through the efforts of Aspen and Pitkin County to apply Ruedi Reservoir refill water to beneficial use. As in Elk-Rifle, these efforts did not leave any mark on the land, and the determination that Ruedi Reservoir could be refilled was made coincidently, and not well in advance of these efforts. As in Twin Lakes, it was not necessary to physically enlarge Ruedi Reservoir, it was only a matter of fully utilizing an already constructed facility. As in both Elk-Rifle and Twin Lakes, there was a strong relationship between the efforts of Aspen and Pitkin County and the eventual benefical use of Ruedi Reservoir refill water. As in both Elk-Rifle and Twin Lakes, the resurvey of Ruedi Reservoir or some other act on the ground would have accomplished nothing and would not have provided any greater evidence of appropriative intent than was already apparent.

Aspen and Pitkin County's negotiations over the operation of Ruedi Reservoir, their public deliberations, and the expense and effort that went into their application to the FERC had to be undertaken if they were ever going to be able to put Ruedi Reservoir refill water to beneficial use. These were not just token efforts. They were substantial, they were related to the beneficial use of Ruedi Reservoir refill water, and they were as much appropriative acts, sufficient to put third parties on notice, as the appropriative acts in Elk-Rifle and Twin Lakes. The rejection of Aspen and Pitkin County's actions to put Ruedi Reservoir refill water to beneficial use, and the rigid insistence on some act on the land,

repudiates Elk-Rifle and Twin Lakes and exhalts the ritual of going into the field over the substance of appropriating water for beneficial use.

In his order Judge Litwiller did cut to the nub of an initial appropriative act and succintly explained why such an act often consists of an on-the-ground survey. He said:

> A water right is based on the physical act of diverting water and putting it to a beneficial use. Even a decree adjudicating water right only confirms pre-existing rights. Cline v. Whitten, 144 Colo. 126, 355 P2d 306. If the water right is acquired by actual diversion and use then any relation back is to the commencement of work aimed at ultimate use. That commencement not unusually begins with a survey.

(Volume 1, page 14, emphasis added).

But Judge Litwiller erred in concluding without qualification that any step toward the application of water to beneficial use which is not taken on the land, such as an effort to obtain an essential permit or to work out a beneficial operational plan, cannot be a step in the actual appropriation of water. Such an absolute rule may have been proper in earlier times where the construction of new diversion structures was the only way in which water could be applied to beneficial use. But it unnecessarily restricts the beneficial use of water where the key to the end of beneficial use is not the construction of new facilities, but the utilization of existing ones.

Judge Litwiller's suggestion in his order that there

were meaningful steps which Aspen and Pitkin County could have taken on the ground to initiate the refill appropriation is spurious, speculative, and not supported by the record. He suggests that "if a new spillway is to be constructed to serve the [hydroelectric power] generating facilities, a survey of its location would no doubt serve as a first step . . . as would a survey of the foundation works for the generating facilities." (Volume 1, p. 15). In fact, Aspen and Pitkin County's proposed hydroelectric power plant does not require a new spillway, a new afterway, or any other significant modification of the existing facility. (Exhibit N). A resurvey of a particular part of Ruedi Reservoir would have been just as useless as a resurvey of the entire facility. Judge Litwiller further suggests that Aspen and Pitkin County could have taken a first step by commencing construction of the hydroelectric power generating facilities. (Volume 1, p. 15). But without a license from the FERC, such a construction start would have been illegal. The first step in the construction of the hydroelectric power facility and in the use of Ruedi Reservoir refill water for this purpose was an application for a preliminary permit from the FERC. In taking this step, Aspen and Pitkin County took a much more substantial step toward the application of Ruedi Reservoir refill water to beneficial use than if they had resurveyed all or part of Ruedi Reservoir.

In every case involving conditional water rights, the Water Court can speculate about what more could have been

done to manifest an appropriative intent. However, it is not for the Court to deny an application for a conditional decree because more could have been done, rather the Court is bound to grant the application if enough was done to make it apparent that the first step toward the beneficial use of water has been taken.

Judge Litwiller also erred in holding that Aspen and Pitkin County's efforts to put Ruedi Reserovir refill water to benefical use were no different than the filing of survey plat with the State Engineer in Central Colorado Water Conservancy District v. City and County of Denver, 189 Colo. 272, 539 P.2d 1270 (1975). In that case, as Judge Litwiller correctly notes, the Central Colorado District disavowed the on-the-ground survey work of the United States Bureau of Reclamation on a number of proposed reservoirs and sought conditional water rights for these as yet constructed projects based just on its filing of map and statements. This Court held that while such a filing with the State Engineer established the appropriative intent of the Central Colorado District, it did not meet the second prong of the test for a first step because such a filing did not reveal this intent through an open demonstration on the land. Id., 539 P.2d 1272. Judge Litwiller reasoned that:

> [If an] appropriator need only give notice of the intent to apply the water to a beneficial use . . . then Central would have obtained its decree. Surely the filing of a map and statement would constitute such notice, even more so than filing an application for an FERC permit.

> The problem was that the filing of a map and statement was not work "on the land."

(Volume 1, page 12).

Aspen and Pitkin County's position, however, is not that they only need to put others on notice of their appropriation of Ruedi Reservoir refill water, but that the first step toward the beneficial use of this water is not necessarily some act on the land. The Central Colorado District was not seeking a decree for the utilization of existing facilities and had to undertake a great deal of new construction. The Central Colorado District's filing with the State Engineer did not, in itself, have anything to do with such new construction and was not therefore a step toward the application of water to beneficial use. Refilling Ruedi Reservoir, on the other hand, does not require any physical modification or enlargement of the existing reservoir. An on-the-ground survey or new construction would not necessarily be an appropriative act in these circumstances. Aspen and Pitkin County's action to obtain a license to use this existing facility, however, is prerequiste and directly related to the beneficial use of water. This is the reason why Aspen and Pitkin are entitled to a conditional decree, while the Central Colorado District was not.

VI. CONCLUSION

The true test of the mettle of Aspen and Pitkin's first step toward the beneficial use of Ruedi Reservoir refill water is not whether they undertook a survey or some other

kind of construction work on the land. Ruedi Reservoir has already been surveyed and constructed; it can be refilled, and the additional water so impounded can be put to beneficial use, without any modification or alteration of the existing facility. In these circumstances, on-the-ground survey or construction work is a meaningless ritual. In these circumstances, the substance of the test is whether Aspen and Pitkin County's first step was taken with a fixed and definite purpose, and whether the step was manifestly and overtly a substantial step towards the beneficial use of water. These essential requirements have been met in this case and the denial of Aspen and Pitkin County's application for a conditional decree should therefore be reversed.

Respectfully submitted this 6th day of December, 1982.

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Certificate of Mailing

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