1-23-1984

Broyles v. Ft. Lyon Canal Co.

IN THE SUPREME COURT FOR THE STATE OF COLORADO

Case No. 83 SA 456

SOUTHEASTERN'S ANSWER BRIEF

JAKE O. BROYLES,

Plaintiff-Appellant,

vs.

FORT LYON CANAL COMPANY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, ROBERT JESSE, DIVISION ENGINEER FOR WATER DIVISION NO. 2, STATE OF COLORADO NATURAL RESOURCES SECTION,

Defendants-Appellees.

The Honorable John R. Tracey, Water Judge

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STATEMENT OF ISSUE

Whether the water court correctly dismissed the Application based on the statute of limitations.

STATEMENT OF THE CASE

As an introductory summary, the Applicants, Broyles, failed to file in February 1979 for reasonable diligence of water rights. That date for filing was mandatory under the statute of limitations, C.R.S. § 37-92-301(4), their previous decree in W-2695, Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980), Simineo v. Kelling, Colo., 607 P.2d 1289 (1980), and other authorities of this Court. The water court properly dismissed the case on summary judgment in accord with these authorities, which mandate affirmance of the judgment.

This statement by Southeastern Colorado Water Conservancy District ("Southeastern") supplements Applicant Broyles' Statement of the Case. This is the third Supreme Court appeal arising from three water court orders dismissing Broyles' application for reasonable diligence and absolute decrees for four irrigation wells in Case No. 79CW73 (C/R W-2695). This Court upheld the water court dismissal in Broyles v. Fort Lyon Canal Company, Colo., 638 P.2d 244 (1981) ("Broyles I"), noting the water court had reserved "the question whether Broyles had exercised reasonable

diligence in the development of the conditional water rights decreed to wells number 2 to 5. See, section 37-92-301(4), C.R.S. 1973." Id. 247. This appeal is from the water court's dismissal of the application for failure to show reasonable diligence by filing within the mandatory time under this statute. R. 116-122, attached as Appendix A.

Broyles refused to abandon the wells after Broyles I and appealed the water court's order of abandonment in pending Case No. 83 SA 351. Southeastern moved for consolidation of that appeal with this one.

Jake O. Broyles and Mary O. Broyles, his wife, were awarded conditional decrees in 1975 in W-2695. That decree (R. 151, 154) ordered Applicants to file in February 1979, if they desired to maintain the decree, saying:

> It is further,
>
> ORDER, ADJUDGED AND DECREED, That as to any conditional right awarded hereunder, the owners thereof, if they desire to maintain the same, shall file an application for quadrennial finding of reasonable diligence with the water clerk of this court during the month of February 1979 and every four (4) years thereafter, until the rights are decreed final; such application to be filed pursuant to C.R.S. 1973, 37-92-302.

[Emphasis added here and in all subsequent quotations, unless specifically noted.]

The water court notified Jake and Mary Broyles of the necessity of filing by certified or registered letter

received December 13, 1978. R. 155-157, 159. Their attorney received the letter that day and ate dinner with Mary Broyles that day. R. 159. The Applicants' affidavit and Motion for Relief from Judgment, R. 159, said:

> That on said occasion the Attorney for Applicants pointed out to the Applicant, Mary A. Broyles, that the notice received that day was a very important notice and that proofs of the development of the conditional water rights must be filed with the Court on or before February, 1979, and requested said Applicant to draw the attention of the Applicant, Jake O. Broyles, to said notice.

Further, at R. 160-161, the affidavit says:

> 3. That on two separate occasions after December 13, 1978, the undersigned Attorney for the Applicants conversed with the Applicant, Jake O. Broyles, and told him that the notice meant that the application for proof of conditional water rights must be filed in February, 1979, and that on each occasion the Applicant, Jake O. Broyles, indicated to the undersigned Attorney that the matter was taken care of. That the Applicant, Jake O. Broyles, appeared to the undersigned Attorney to understand the situation and concluded that Applicants did not wish to pursue the matter further with him. . . .
>
> 6. That the personal business of the Applicant, Jake O. Broyles, required him to make a trip to the Koutz, Indiana area during the month of January, 1979, and that on at least one occasion during December, 1978, the Applicant, Jake O. Broyles, underwent minor surgery.

Applicants did not file in February 1979, and on March 15, 1979, the water court entered its "Order of

Cancellation of Water Rights." R. 158. Only after that is it said Jake Broyles "first realized the significance of the matter." R. 160. Nothing is said about Mary Broyles' reaction or any excuse for her inaction for four months, except that she had "little knowledge" of water matters. Little excuse is offered for Jake Broyles during much of the time. Their attorney thought Jake Broyles understood "the situation and concluded that Applicants did not wish to pursue the matter further with him." R. 160.

The Motion for Relief from Judgment said it was requested on grounds of inadvertence and excusable neglect. At no time was any letter from any doctor filed, contrary to the promise of the affidavit (R. 161), and at no time was any further motion or affidavit or offer of proof offered to show the Applicants were prevented from filing by reason of conditions beyond their control. The water court found many of the above facts. It discussed Town of De Begue v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980) and related that case to Broyles:

> Section 301(4) was interpreted very strictly, and the Supreme Court approved a summary judgment in that case, ruling that inadvertence was not an excuse. In the present case there was no finding that the Applicant was prevented by circumstances beyond his control, but only that he failed to file within the time period prescribed by statute through inadvertence and excusable neglect. Therefore, the Summary Judgment must be granted, and the application dismissed as

> to those conditional rights for which the Applicant seeks a quadrennial finding of due diligence and a continued conditional decree, or to make absolute and not dismissed pursuant to the order of May 5, 1980.

Appendix A to this brief is the water court's ruling, and Appendix B is the Town of De Beque decision.

Southeastern was not informed, nor was there any resume notice, of the water court's Order of Cancellation, or Order Setting Aside the Order of Cancellation. After discovering the situation in 1980, Southeastern moved for summary judgment at the time of the motions leading to Broyles I, but the water court reserved the matter, as this Court noted. Broyles I, 638 P.2d 247.

SUMMARY OF ARGUMENT

The statute of limitations, C.R.S. § 37-92-301(4), Town of De Beque v. Enewold, Appendix B, and similar authorities decided by this Court require affirmance of this case. These authorities were properly applied to Applicants, whose situation is indistinguishable from, or worse than, the situation of the parties in those cases.

ARGUMENT

I. THE STATUTE OF LIMITATIONS AND AUTHORITIES OF THIS COURT REQUIRE DISMISSAL OF THE APPLICATION, AFFIRMANCE OF THE WATER COURT SUMMARY JUDGMENT, CANCELLATION OF THE WATER RIGHTS, AND ABANDONMENT OF THE WELLS.

The central fact in this case is that Applicants failed to file their case on time. They failed after statutory notice, after specific certified mail notice, after dinner conversation with counsel who told them of the necessity of filing on time, and after two additional specific conversations with counsel concerning the necessity of filing on time. In such circumstances, first the statute, second Applicants' previous decree, and third this Court's decisions require dismissal, cancellation of the water rights, and abandonment of the wells.

First, the statute is clear, unequivocal, and mandatory that the filing be on time. C.R.S. § 37-92-301(4) says:

> (4) In every fourth calendar year after the calendar year in which a determination is made with respect to a conditional water right, the owner or user thereof, if he desires to maintain the same, shall obtain a finding by the referee of reasonable diligence in the development of the proposed appropriation, or said conditional water right shall be considered abandoned. The ruling of the referee and the judgment and decree of the court determining a conditional water right shall specify the month in such calendar year in which application for a quadrennial finding of reasonable diligence shall be filed with

> the water clerk pursuant to section 37-92-302(1).

The statute is also mandatory that the conditional water rights "shall be considered abandoned" upon the failure to file. Id. This statute was passed in 1969, six years before the Applicants applied for this conditional water right, and ten years before they failed to file on time.

Second, Applicants' conditional water right in W-2695 correctly ordered timely filing, so Applicants' failed to comply with their own decree, as well as with the statute. The order is quoted in the Statement of the Case, and is in the Record. R. 154.

Third, this Court's decisions have repeatedly affirmed cancellation of the water rights of those with less notice and better excuses than these Applicants. Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980), is on all fours and is attached as Appendix B. The Town of De Beque and the Colorado River Water Conservation District (River District) both lost their conditional rights on summary judgment for failure of timely filing. Justice Lohr, then Water Judge in Division 5, found the statute "clear and unequivocal," and cancelled the water rights. At 52, Justice Lohr's ruling was quoted:

> The language of. . . [the] statute with respect to the effect of failure to file an application for a finding of

> reasonable diligence within the prescribed time is clear and unequivocal: ". . .said conditional water right shall be considered abandoned." C.R.S. (1973) 37-92-301(4).
>
> Taken together with the definition of abandonment of a conditional water right as found in C.R.S. (1973) 37-92-103, it is equally clear that an abandoned right is terminated. The intent of the legislature is clearly expressed: there is no room for interpretation. The statute must be held to mean what is clearly says. . . . Cancellation of the conditional right is the appropriate remedy.

Justice Rovira was equally clear in his holding, at 54:

> We. . . hold that the owner or user of a conditional decree must comply with sections 301(4) and 601 and that the failure to do so results in the loss of his conditional water rights.

Though the Court recognized the results may be "draconian and harsh" the Court said "Section 301(4) can be considered as a statute of limitations, and, as such, can be applied to existing rights. . ." Id. 52-53. De Beque was followed to cancel an 1899 conditional decree in Simineo v. Kelling, Colo., 607 P.2d 1289 (1980). Simineo was unaware the conditional decree had not been made absolute and inadvertently failed to file. This Court affirmed cancellation of the right.

This Court has been equally firm in cancelling other conditional water rights. E.g., Colorado Water Conservation

District v. City and County of Denver, Colo., 640 P.2d 1139 (1982), and Colorado River Water Conservation District v. City and County of Denver, Colo., 642 P.2d 510 (1982). Broyles I, supra. The Court has also been firm in upholding strict statutes of limitation. E.g., Mishek v. Stanton, Colo., 616 P.2d 135, 138 (1980).

Cancellation, loss of the conditional rights, and abandonment are expressly stated as the consequences for non-filing in the statute and the cases already quoted. Abandonment is defined, and the method for it is described in the Rules and Regulations through the State Board of Examiners, Water Well and Pump Installation Contracts § 5, C.R.S. § 37-91-101, 109. Full discussion is found in the Answer Brief of Southeastern Colorado Water Conservancy District in companion case 83 SA 351, with which we have moved to consolidate this case. Assuming the Court accepts our position, the Court should mandate abandonment in accord with the Rules and Regulations so clearly that Broyles cannot again quibble with the Court's intent and create a Broyles IV to go with Broyles I, II, and III.

II. APPLICANT'S PURPORTED DISTINCTIONS OF CASES AND EXCUSES FOR NON-FILING WITHIN THE STATUTE OF LIMITATIONS FAIL.

Page 4 of the opening Brief for Appellant says:

> Broyles respectfully contends that DeBeque should not control the case at

> bar for two reasons: (1) the decision was announced after Broyles had obtained an order permitting him to file an application for diligence; and (2) the facts and the statute are different.

Broyles argues that De Beque could be applied only prospectively and could not be applied to him.

The fallacy in the retroactivity argument is easily exposed. The statute, C.R.S. § 37-92-301(4), is unambiguous, mandatory, and existed for six years before Broyles obtained a conditional decree. The conditional decree also is mandatory. The De Beque case simply confirms the mandate of the other authorities. De Beque declared the law and did not change it or create it as the General Assembly does. Simineo, of course, was decided shortly after De Beque. The applicants in Simineo knew nothing of the De Beque decision, yet it was applied to them. In Simineo, applicants showed that, contrary to the Broyles, the water court notice of potential cancellation never reached them, and that the water court had indirectly recognized their decree by listing it in the 1974 tabulation of water rights. Here, the Court is faced with a similar estoppel argument, based on the Order Setting Aside the Order of Cancellation. In both cases the applicants "neither asserted nor proved they were prevented from filing an application for diligence because of reasons beyond their control. Section 37-92-601, C.R.S. 1973."

Simineo at 1290. Both argue, in somewhat different terms, the water court could not cancel the decree because the acts of the court were not based on previous precedent. This Court in Simineo responded that the act and De Beque required cancellation.

This Court requires its water decisions be applied to pending cases. In Rocky Mountain Power v. Colorado River Water Conservation District, Colo., 646 P.2d 383 (1982), this Court approved, over objection, application of its 1979 Colorado River Water Conservation District v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979), decision in a nine year old pending case. That 1979 decision correctly resulted in dismissal of the conditional water right claim pending nine years earlier.

A statute of limitations defense may be raised after the initial pleadings. Griffin v. Pate, Colo.App., 644 P.2d 51 (1982). Here Southeastern had no notice of the defense until after discovery of Court documents not described in the resume notice.

The general law is also that court decisions are applied from the time of their announcement, unless the Court states otherwise in the announced decision. Retroactivity is a concern in civil cases only where a precedent is overruled, and parties have relied on the prior precedent. Neither is

true here. The rule is correctly stated in 20 Am.Jur.2d Courts, § 233:

> The general rule in civil cases seems to be that unless the overruling decision declares that it shall have only prospective effect, which the court overruling its prior decision generally has the power to do, the judicial overruling of a precedent has both prospective and retroactive effect. [Footnotes omitted.]

An argument that a civil case should not be applied to pending cases is hardly ever accepted. See Mills & Co. v. Hegeman-Harris Co., 94 N.J.Eq. 802, 122 A. 127 (1932), which was overruled by a 5-2 decision in Arrow Builders Supply Corp. v. Hudson Terrace Apartments, 15 N.J. 418, 105 A.2d 387 (1954). Even though the parties to the Arrow Builders case relied on the Mills case, when Mills was overruled the new rule was applied to the very parties who relied on the old case. Arrow Builders Supply Corp. v. Hudson Terrace Apartments, 10 N.J. 47, 106 A.2d 271 (1954).

Broyles argues Judge Statler's Order Setting Aside Order of Cancellation eliminated Judge Tracey's jurisdiction to change it. However, Judge Statler never ruled on the statute of limitations issue and issued his ruling ex parte. Only with the filing of a request for diligence did the statute of limitations become relevant. Judge Tracey had to rule on the new issue. It would be absurd to say Judge Statler's order

allowing the due diligence case to be filed somehow disposed of a statute of limitations defense which did not arise until the due diligence case was filed.

Even if the law of the case is considered, Judge Tracey had power to review the previous ruling of Judge Statler after opposing parties first had notice, entered, and could be heard. Moore v. 1600 Downing St., Ltd., Colo.App., 668 P.2d 16 (cert. denied 1983). Denver Electric & Neon Service Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1968).

Broyles has had more than his share of days in court and had years to produce evidence in the record that he had any statutory excuse for not complying with the statute of limitations. Broyles made no showing of "the applicant was prevented from filing by reason of conditions beyond his control," under § 37-92-601, and even that excuse applies only to cases pending on June 1, 1972. Id. The statute of limitations was not tolled. The issue of tolling and, indeed the issue of legal disability was not raised in the water court, so may not be properly raised here. Broyles does not go so far, even now, to claim he was mentally incompetent or under a legal disability under C.R.S. § 13-81-103(1), but that statute covers situations like adjudicated insanity, incompetency, and guardianship. "Idiocy, lunacy, infancy,"

and the like and what is meant by "legal disability." Meeks v. Vassault, 16 Fed.Cas. 1314, 1317.

Statutes of limitation are construed liberally to put an end to litigation. Exceptions to the statutes are construed strictly, so "exceptions with regard to the personal disability of a party must be strictly construed and cannot be enlarged from considerations of apparent hardship or inconvenience. 51 Am.Jur.2d Limitation of Actions, § 178.

Jake Broyles was attending to business in Indiana and repeatedly consulting with his attorney. No doctor's letter or additional evidence was ever tendered. His wife, co-applicant, was in good health throughout, for all the record shows. No sufficient excuse exists. The water court properly applied the statute of limitations.

CONCLUSION

Southeastern respectfully submits the water court correctly dismissed the application. This Court should affirm the dismissal and clearly mandate abandonment of the wells under the applicable rules and regulations.

The Court should award double costs and damages, including attorneys' fees for a groundless and frivolous appeal. C.A.R. 38. In re Estate of Perini, 34 Colo.App. 201, 526 P.2d 313 (1974). See newly amended F.R.C.P. Rule 11.

Respectfully submitted,

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DISTRICT COURT, WATER DIVISION NO. 2, COLORADO

Case No. 79CW73

ORDER

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF:

JAKE O. BROYLES,

IN THE ARKANSAS RIVER OR ITS TRIBUTARIES
IN BENT COUNTY, COLORADO

This matter came on for hearing September 13, 1983. Carl M. Shinn appeared on behalf of the Applicant, Jake O. Broyles; Kevin B. Pratt, for Southeastern Colorado Water Conservancy District; David C. Hallford, for the Fort Lyon Canal Company; and Paula C. Phillips, for the State Engineer and Division Engineer. The Court heard the Motion for Summary Judgment filed on May 5, 1980, by Southeastern Colorado Water Conservancy District, took the matter under advisement, and finds and concludes as follows:

I.

C.R.C.P. 56(c) provides that a summary judgment should be granted, "if the pleadings ... together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This Court has considered the pleadings and Orders in this case, 79CW73, and its Case No. W2695, Water Division No. 2, together with the verified Motion for Relief From Judgment filed in that latter case on April 3, 1979.

APPENDIX A

II.

On May 13, 1980, nunc pro tunc May 5, 1980, the Honorable John C. Statler, who was Water Judge of this Division at that time, entered an Order on the motion of Objector, Fort Lyon Canal Company, for partial summary judgment. In that Order, summary judgment was granted as to the matter of conditional decrees being made absolute, and the application to make absolute the conditional water rights decreed to Well Nos. 2, 3, 4, and 5 was denied and dismissed. The Court did not decide at that time whether the conditional water rights decreed to Well Nos. 2, 3, 4, and 5 should be forfeited, or whether they should remain in full force and effect for another four years.

The Court further ordered that the Motion for Partial Summary Judgment should be denied with regard to changing the decreed legal descriptions for some or all of Well Nos. 1 through 5. This Order was appealed and affirmed in Broyles v. The Fort Lyon Canal Company, 638 P.2d 244 (1981). In that opinion, the history relating to the Broyles' wells is set out in some detail.

III.

In the motion under consideration at this time, Southeastern Colorado Water Conservancy District ("District") has moved for summary judgment, urging that this Court lacks jurisdiction over the claims in the application for four separate reasons:

1. Applicants failed to file their application for reasonable diligence within the statute of limitations.
2. Applicants have not specified in their application

the action requested with regard to Wells 2, 4, and 5; therefore, the published resume inadequately notifies interested parties of the subject matter of those claims.

3. Applicants have not requested in their application a change of water right with reference to the location of Wells 1, 2, and 3; therefore, the published resume gives inadequate notice to interested parties of the subject matter of those claims.

4. Applicants have not requested in their application a change of water right by reason of additional points of diversion with reference to all 5 wells; therefore, the published resume does not adequately inform interested parties of the subject matter of those claims.

On February 14, 1975, Judgment and Decree was entered in Case No. W2695, in this Water Division, decreeing absolute and conditional underground water rights to Jake O. Broyles and Mary A. Broyles for the five (5) wells under consideration. In that Order, there was the following provision:

> "That as to any conditional right awarded hereunder, the owners thereof, if they desire to maintain the same, shall file an application for quadrennial finding of reasonable diligence with the water clerk of this court during the month of February 1979 and every four (4) years thereafter, until the rights are decreed final; such application to be filed pursuant to C.R.S. 1973, 36-92-302."

On December 11, 1978, notice pursuant to C.R.S. 1973, 37-92-305(7) was sent by certified mail, return receipt requested,

to Jake O. Broyles and Mary A. Broyles, notifying them of the necessity to file an action for quadrennial finding of reasonable diligence during the month of February 1979. The notice was receipted by Mary A. Broyles on December 13, 1978. On March 15, 1979, the conditional water rights were ordered cancelled, no application for quadrennial finding of reasonable diligence having been filed. On April 3, 1979, the Applicants, Jake O. Broyles and Mary A.Broyles, filed their Motion for Relief From Judgment, which was considered ex parte and granted on April 17, 1979. The motion to set aside was filed pursuant to C.R.C.P. 60(b) upon the grounds of inadvertence and excusable neglect, and in its Order of April 17th, the Court made a finding "that the application was not filed due to inadvertence and excusable neglect." The Order of Cancellation of Conditional Water Rights entered March 15, 1979, having been set aside, the Applicants were granted to May 10, 1979, to file an application for quadrennial finding of reasonable diligence, or to make the conditional water rights absolute. On May 9, 1979, such application was filed in the case, 79CW73. Thereafter, statements of opposition were filed by the District and the Fort Lyon Canal Company, and an entry of appearance was made by the Attorney General for the State of Colorado.

IV.

The first ground relied upon by the District for the granting of the Motion for Summary Judgment is that the statute of limitations, 37-92-301(4), applies and bars the application in this case. The Order in W2695 setting aside the cancellation

was made ex parte and before the decision in Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48. Section 301(4) was interpreted very strictly, and the Supreme Court approved a summary judgment in that case, ruling that inadvertence was not an excuse. In the present case there was no finding that the Applicant was prevented by circumstances beyond his control,' but only that he failed to file within the time period prescribed by statute through inadvertence and excusable neglect. Therefore, the Summary Judgment must be granted, and the application dismissed as to those conditional rights for which the Applicant seeks a quadrennial finding of due diligence and a continued conditional decree, or to make absolute and not dismissed pursuant to the order of May 5, 1980.

V.

Although the ruling on the first ground urged by the District disposes of the Motion, the Court has considered the other arguments presented.

VI.

With respect to the second ground urged by the District in its Motion for Summary Judgment, it is apparent from the application, which is entitled "Application to Make Absolute a Conditional Water Right and Application for Quadrennial Finding of Reasonable Diligence," and from the body of the application, read as a whole, what the purpose of the application was and what the relief sought was, namely, to make absolute conditional water rights and for quadrennial findings of reasonable diligence. This is sufficient to avoid the dismissal sought by

the District.

VII.

With respect to the Districts' other arguments, C.R.S. 1973, 37-92-302(2), as amended, provides as follows:

> "In the case of applications for a change of water right, the forms shall require ... a description of the water right or conditional water right for which the change is sought, the amount and priority of the water right or conditional water right, and a description of the proposed change of water right. In the case of applications for approval of a plan for augmentation, the forms shall require a complete statement of such plan."

If by the application as to Well Nos. 1, 2, and 3, the Applicant does seek changes of water rights or conditional water rights, or to enlarge their usage, then the application is incomplete, the resume is a nullity, and the Court has no jurisdiction as to those matters. Stonewall Estates v. CF&I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979). However, amendment and republication appear to provide the more appropriate remedy, rather than dismissal.

Lastly, failure to attach valid well permits to the application would not require dismissal on a motion for summary judgment. C.R.S. 1973, 37-92-302(2) provides only that "no decision, ruling, or order granting a water right shall be entered until the application shall be supplemented by a permit to construct a well or evidence of its denial ... or ... failure to grant or deny such a permit within six months after application ...."

For the reasons stated, it is hereby Ordered that the

Summary Judgment be granted and the application is dismissed in its entirety to the extent not previously dismissed by Order of the Court on May 13, 1980, nunc pro tunc May 5, 1980.

It is further Ordered that the conditional water rights granted on February 14, 1975, in Case No. W2695 be and are cancelled, to wit: conditional underground water rights awarded with regard to Well No. 1 in the amount of 1,600 g.p.m.; Well No. 2 in the amount of 1,290 g.p.m.; Well No. 3 in the amount of 1,100 g.p.m.; Well No. 4 in the amount of 975 g.p.m.; and Well No. 5 in the amount of 1,300 g.p.m.

It is further Ordered that the Court finds and determines under C.R.C.P. 54(b) that there is no just reason for delay and directs the entry of judgment upon the foregoing Order.

Done and dated this 19th day of September, 1983.

BY THE COURT:

John R. Tracey, Water Judge

c: Carl M. Shinn
Kevin B. Pratt
David C. Hallford
Paula C. Phillips
Division Engineer
State Engineer

respondent shall not be readmitted unless he can show by clear and convincing evidence that he has complied with all applicable discipline or disability orders, and shows, by such procedures as then may be required, that he possesses the requisite fitness and competence to practice law.

Nos. 28464, 28465, 28466 and 28467

The Town of De Beque v. Lee R. Enewold, Division Engineer of Water Division No. 5, State of Colorado; The Colorado River Water Conservation District, The Middle Park Water Conservancy District, The City of Aspen, The Board of Commissioners of the County of Pitkin, The Basalt Water Conservancy District, The West Divide Water Conservancy District, and The Bluestone Water Conservancy District v. Northern Colorado Water Conservancy District and Municipal Subdistrict, Northern Colorado Water Conservancy District, City and County of Denver, acting by and through its Board of Water Commissioners, Vidler Tunnel Water Co., The United States of America, and Lee R. Enewold, Division Engineer of Water Division No. 5, State of Colorado

(606 P.2d 48)

Decided January 21, 1980. Rehearing denied February 25, 1980.

Consolidation on appeal of four conditional water right diligence applications originally filed in Water Division No. 5. From cancellation of conditional water rights of town and river district on the ground that both had failed to file their diligence applications within the statutory time, appeals were taken.

Affirmed

1. **WATER RIGHTS** — *"Considered Abandoned" — "Abandonment of a Conditional Water Right" — "Abandonment of a Water Right"*. The use of the phrase "considered abandoned" in section 37-92-301(4), C.R.S. 1973, cannot be considered in a vacuum but must be viewed alongside the statutory definitions of "abandonment of a conditional water right" and "abandonment of a water right" in section 37-92-103(1) and (2), C.R.S. 1973; the former is defined as meaning "the termination of a conditional water right as a result of the failure to develop with reasonable diligence the proposed appropriation upon which such water right is to be based", and the latter is defined as "the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder."

2. *Abandonment — Conditional Water Right — Absolute Water Right — Different Tests*. The legislature clearly intended different tests to be applied in determining when a conditional water right is abandoned and when an absolute water right is abandoned; the difference is the element of intent, which must be shown before an abandonment of an absolute water right can be decreed, but which is not necessary in establishing the abandonment of a conditional water right; the test applicable to determining whether a conditional water right has been abandoned is whether there has been a "failure to develop with reasonable diligence."

3. *"Failure to Develop With Reasonable Diligence" — Conditional Right — Finding of Reasonable Diligence*. In considering section 301(4) in juxtaposition with section 103(1), it is evident that the legislature was drawing a clear connecting line between "failure to develop with reasonable diligence" and the requirement that the owner or user of a conditional water right obtain a finding of reasonable diligence; in effect, the General Assembly equated a failure to obtain a finding of reasonable diligence with a failure to develop with reasonable diligence.

4. *Statute — Considered — Statute of Limitations — Diligence Findings — Timely Manner*. Section 301(4) can be considered as a statute of limitations for obtaining findings of reasonable diligence with respect to conditional water rights, and, as such, can be applied to existing rights so long as a reasonable period of time is provided for exercise or protection of those rights; moreover, when the General Assembly exercised its power to extend the filing date, thereby giving the holders of conditional water rights the opportunity to protect their interests, it demonstrated a legislative recognition of the effect of failure to file and obtain diligence findings in a timely manner.

5. *Use of Water — Legislature — Provide — Means — Determination of Rights — Requirements*. The legislature has the power to provide reasonable means for determining rights to the use of water, and to require all persons claiming such rights to present them in a prescribed manner, within a prescribed period, and to provide that all such claims not so presented be barred.

6. *Statutes — Failure to Timely File — Application — Finding of Reasonable Diligence — Loss of Rights*. Under the Water Right Determination and Administration Act of 1969, and specifically pursuant to section 37-92-301(4), C.R.S. 1973, failure to timely file an application for a quadrennial finding of reasonable diligence in the development of a conditional water right, absent evidence that the holder of the right was prevented from filing by reason of conditions beyond his or her control, mandates cancellation of the right; in short, the owner or user of a conditional decree must comply with sections 301(4) and 601, and failure to do so results in the loss of his conditional water rights.

7. *Application — Inadvertent Omission — Conditional Water Right — Findings — Non-Correctible Clerical Error*. Inadvertent omission of a conditional water right from an application for a finding of reasonable diligence under section 301(4) of the 1969 Act, and the consequent omission of the conditional right from the trial court's findings based on that application did not constitute correctible clerical error.

APPENDIX B

8. *Correction of Clerical Errors — Statute Purpose.* The rule of law allowing correction of clerical errors is governed by section 37-92-304(10), C.R.S. 1973, and was designed to enable the trial court to amend its judgments "to speak the truth and show the judgment of the court which was actually pronounced."

9. *Clerical Error Rule — Inapplicable Conditional Right — Never Mentioned — Never Properly Before Court.* The clerical error rule does not apply to allow the amendment of a finding and decree — in a case relating to reasonable diligence in the development of conditional water rights — to include a water right never mentioned in the application and never properly before the water court for its consideration.

10. **JUDGMENT** — *Summary — When Appropriate — Rules.* Under C.R.C.P. 56(c), summary judgment is appropriate only where there exists no "genuine issue as to any material fact."

11. *Summary — Conditional Water Rights — Grant — Findings — Failure to Meet Statutory Requirements — Lack of Error.* Where the only issue germane to summary judgment motion was whether river district had or had not complied with statutory requirements for obtaining findings of reasonable diligence with respect to conditional water rights, and where undisputed facts before trial court showed that the river district failed to meet the statutory requirements, *held,* under these circumstances, trial court did not err in granting the motion for summary judgment.

Appeal from the District Court of Water Division No. 5, Honorable George E. Lohr, Judge.

Holland & Hart, John U. Carlson, Robert M. Pomeroy, Jr., for the Town of De Beque, Colorado River Water Conservation District, The Basalt Water Conservancy District, the West Divide Water Conservancy District, and the Bluestone Water Conservancy District.

Baker and Cazier, Stanley W. Cazier, for The Middle Park Water Conservancy District.

Musick, Williamson, Schwartz, Leavenworth & Cope, P.C., Loyal E. Leavenworth, for the City of Aspen and The Board of Commissioners of the County of Pitkin.

Davis, Graham & Stubbs, John M. Sayre, Robert V. Trout, for Northern Colorado Water Conservancy District and Municipal Subdistrict and Northern Colorado Water Conservancy District.

Wayne D. Williams, Michael L. Walker, for City and County of Denver.

Holme, Roberts & Owen, Glenn E. Porzak, Michael F. Browning, for Vidler Tunnel Water Co.

Joseph F. Dolan, United States Attorney, Hank Meshorer, Trial Attorney, for the United States of America.

En Banc.

JUSTICE ROVIRA delivered the opinion of the Court.

This case consolidated, on appeal, four conditional water right diligence applications originally filed in Water Division No. 5: Case No. W-2118-77, the diligence application of the Town of De Beque (De Beque), and Case Nos. W-44, W-789, and W-789-76, which are the successive diligence applications in 1970, 1972, and 1976 of the Colorado River Water Conservation District (River District).

After separate hearings, the trial court entered its orders on September 15, 1978, cancelling the conditional water rights of De Beque and the River District on the ground that both had failed to file their diligence applications within the statutory time period. We affirm.

I.

The facts in these cases were not in dispute and can be briefly stated.

De Beque is the holder of a conditional water right decreed in 1959 with an appropriation date of 1952. No application for a periodic finding of reasonable diligence was made until 1977. In 1978, the water referee granted the application for a quadrennial finding of reasonable diligence in the development of the proposed appropriation. Upon reviewing the ruling of the referee, the trial court entered an order requiring De Beque to show cause why its conditional water right should not be cancelled for failure to timely file its application. After a hearing, the trial court entered an order cancelling the conditional water right on the ground that De Beque had failed to file its application within the time prescribed by section 37-92-301(4), C.R.S. 1973.

The River District's conditional water rights present a more complex situation. The first of these rights was decreed for the Azure Power Plant in 1962, with an appropriation date of 1958. The Azure Power Plant was a part of the Gore Project.

In 1970, the River District, in Case No. W-44, filed an application for findings of reasonable diligence as to a number of conditional water rights relating to the Gore Project, but inadvertently omitted the Azure Power Plant right. As a result, the findings and decree of May 1972 did not include the Azure Power Plant conditional water right.

In 1972, in Case No. W-789, the River District filed an application for findings of reasonable diligence as to approximately seventy-five conditional water rights in connection with fourteen separate projects, including those previously considered in Case No. W-44. At the time of this filing, the River District not only failed to include the Azure Power Plant right, but also failed to include two conditional water rights known as the Una Power Conduit, decreed in 1970, and the Pabst Power Conduit, decreed in 1971. These latter two conditional water rights were a part of the River District's Bluestone and Snowmass projects. The diligence findings and decree of March 1975 did not include the Azure Power Plant, the Una Power Conduit, and the Pabst Power Conduit.

In July 1975, after discovery of the omission of the Azure Power Plant conditional water right, the River District sought to amend the findings and decree in Case No. W-789. The request was denied in January 1977 on the grounds of lack of jurisdiction to consider water rights not listed in the application and failure to satisfy the public notice requirement for a finding of diligence as to the Azure Power Plant right.

In May 1976, the River District, in Case No. W-789-76, filed its required quadrennial application for a finding of diligence and included the previously omitted Azure Power Plant right, but once again failed to include the Una and Pabst conditional water rights. As to this application, Northern Colorado Water Conservancy District (Northern) and Vidler Tunnel Water Company (Vidler) filed statements of opposition, a motion for a declaration of abandonment and cancellation of the Azure Power Plant right, and a motion for partial summary judgment. These two motions raised substantially similar issues and were considered together as motions for summary judgment by the trial court.

In the spring of 1978, having discovered the omission of the Una and Pabst Power Conduit rights from the diligence applications in W-789 and W-789-76, the River District filed a motion to amend the pending diligence application to include the two missing conditional water rights in W-789-76 and a petition to correct clerical errors with respect to the Azure, Una, and Pabst conditional water rights in Case Nos. W-44 and W-789. Northern and Vidler filed statements of opposition to the motion and petition and requested a declaration of abandonment and cancellation of the Una and Pabst Power Conduit rights.

In September 1978, the trial court denied the River District's petition to correct clerical omissions. It granted the summary judgment motion of Northern and Vidler on the grounds that failure to file diligence

applications within the time permitted by the statute terminated those rights, even assuming that reasonable diligence had been exercised in developing the conditional water rights. Section 37-92-301(4), C.R.S. 1973.

The issues raised in this appeal by the River District and De Beque are:

1. Whether, under the Water Right Determination and Administration Act of 1969, section 37-92-101 *et seq.*, C.R.S. 1973, failure to timely file an application for reasonable diligence mandates cancellation of a conditional water right absent any evidence that the holder of the conditional water right was prevented from filing by reason of conditions beyond his control.

2. Whether the inadvertent omission of certain conditional water rights in filing an application for reasonable diligence may constitute a correctible clerical error.

3. Whether the entry of summary judgment was proper.

II.

At the outset, it should be noted that the River District failed to file for or obtain required diligence findings for the Azure Power Plant in 1970 and 1972 and for the Una and Pabst Power Conduits in 1972 and 1976 because its counsel and staff inadvertently failed to include those conditional water rights in the respective applications. As to De Beque, its officials were unaware, until 1977, of the requirement that diligence findings be obtained.

Further, the allegations of the River District and De Beque that they had in fact been diligent in the development of the conditional water rights at issue were accepted as true, for the purposes of these proceedings, by Northern, Vidler, and the trial court.

Having established the reason for the failure to include the conditional water rights in diligence applications and having accepted De Beque's and the River District's statements that they had in fact exercised due diligence in the development of the proposed appropriations, the question to be decided is what consequences should attach to a failure to obtain reasonable diligence findings at the times required by section 301(4) of the Water Right Determination and Administration Act of 1969 (1969 Act).

III.

Prior to the adoption of the 1969 Act, the legislative scheme permitted showings of reasonable diligence as to conditional decrees to be made every two years. C.R.S. 1963, 148-10-8(4). In the event that the appropriator failed to make such a showing, the conditional decree could be cancelled if the appropriator failed to respond within six months to an order of court "directing him to show cause why such conditional decree should not be cancelled."

The permissive nature of this statute resulted in holders of conditional decrees not filing applications for findings of diligence and, in effect, allowing holders of conditional decrees to hold their decrees until other appropriators might initiate proceedings to place the decrees in issue. *See Colorado River Water Conservation District v. Twin Lakes Reservoir and Canal Co.*, 171 Colo. 561, 468 P.2d 853 (1970).

In the 1969 Act, the legislature mandated that holders of conditional water rights would be required to obtain findings of reasonable diligence every two years (amended in 1973 to every four years) or lose their rights.

Section 37-92-301(4), C.R.S. 1973, provides that:

"In every fourth calendar year after the calendar year in which a determination is made with respect to a conditional water right, the owner or user thereof, if he desires to maintain the same, shall obtain a finding by the referee of reasonable diligence in the development of the proposed appropriation, or said conditional water right shall be considered abandoned . . . ."

The trial court in interpreting section 301(4) concluded that:

"The language of . . . [the] statute with respect to the effect of failure to file an application for a finding of reasonable diligence within the prescribed time is clear and unequivocal: '. . . said conditional water right shall be considered abandoned.' C.R.S. (1973) 37-92-301(4).

"Taken together with the definition of abandonment of a conditional water right as found in C.R.S. (1973) 37-92-103, it is equally clear that an abandoned right is terminated. The intent of the legislature is clearly expressed: there is no room for interpretation. The statute must be held to mean what it clearly says . . . . Cancellation of the conditional right is the appropriate remedy."

The River District and De Beque contend that the trial court's rationale converts section 301(4) into a forfeiture statute and that, while permitting abandonment, Colorado law has never countenanced a water rights forfeiture rule. In support of this argument, they submit that the words "considered abandoned" in section 301(4) cannot be and should not be interpreted as meaning cancelled or forfeited, but should be interpreted to require proof, in an evidentiary hearing, of facts which conclusively demonstrate an intent to abandon water rights. In addition, they argue that the legislature, in adopting the 1969 Act, along with the 1971 and 1975 amendments to section 37-92-601, C.R.S. 1973, endorsed the intent concept as to abandonment and recognized the viability of conditional water rights for which no diligence filings had been made.

[1] The use of the phrase "considered abandoned" in section 301(4) cannot be considered in a vacuum but must be viewed alongside the statutory definitions of "abandonment of a conditional water right" and "abandonment of a water right" in section 37-92-103(1) and (2), C.R.S. 1973. The former is defined as meaning "the termination of a conditional water right as a result of the failure to develop with reasonable diligence the proposed appropriation upon which such water right is to be based." The latter is defined as "the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder."

[2] The legislature clearly intended different tests to be applied in determining when a conditional water right is abandoned and when an absolute water right is abandoned. The difference is the element of intent, which must be shown before an abandonment of an absolute water right can be decreed, but which is not necessary in establishing the abandonment of a conditional water right. The test applicable to determining whether a conditional water right has been abandoned is whether there has been a "failure to develop with reasonable diligence."

[3] In considering section 301(4) in juxtaposition with section 103(1), it is evident that the legislature was drawing a clear connecting line between "failure to develop with reasonable diligence" and the requirement that the owner or user of a conditional water right obtain a finding of reasonable diligence.

In effect, the General Assembly equated a failure to obtain a finding of reasonable diligence with a failure to develop with reasonable diligence. While the result of this analysis of the pertinent legislative provisions may be, in the words of the River District and De Beque, draconian and harsh, it is for the General Assembly and not the courts to remedy the situation as was done in 1975.[1]

The 1971 amendment,[2] referred to by the River District and De Beque, amended section 601 to extend the time for initial showings of diligence as to existing conditional water right decrees from 1970 to 1972 and added a tolling provision.[3]

The River District and De Beque argue that, by extending the time for filing applications for diligence findings in 1971, the legislature demonstrated that it did not intend that conditional water rights would be lost because of failure to timely file.

[4] Section 301(4) can be considered as a statute of limitations and, as such, can be applied to existing rights so long as a reasonable period of time is provided for exercise or protection of those rights. *See Oberst v. Mays*, 148 Colo. 285, 365 P.2d 902 (1961). The 1969 Act originally re-

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[1] Section 37-92-305(7), C.R.S. 1973 (1978 Supp.):
"Prior to the cancellation or expiration of a conditional water right granted pursuant to a conditional decree, the court wherein such decree was granted shall give notice . . . to all persons to whom such conditional right was granted . . . ."

[2] Colo. Sess. Laws 1971, ch. 377, 148-21-44 at 1339.

[3] Neither the River District nor De Beque argues that they were prevented from filing the required applications for findings of reasonable diligence by conditions beyond their control. Thus the tolling provision is not applicable and merits no further discussion.

quired that the application for a diligence finding be filed in 1970, one year after the passage of the act. Recognizing that failure to comply with this filing date could result in serious consequences, *i.e.*, the conditional water right would be considered abandoned, the General Assembly exercised its power to extend the filing date, thereby giving the holders of conditional water rights the opportunity to protect their interests. This act on the part of the legislature did not, in our view, demonstrate any legislative intent to weaken the effect of section 301(4). To the contrary, it demonstrated a legislative recognition of the effect of failure to file and obtain diligence findings in a timely manner.

The 1975 amendment, adding section 305(7) to the 1969 Act, required notice prior to cancellation or expiration of a conditional water right and again demonstrates the legislative recognition of the serious consequences that would befall the owner or user of a conditional water right who failed to obtain a diligence finding. De Beque's and the River District's argument that section 305(7) is meaningless, if, at the time of its enactment, a conditional water rights holder had no right to an evidentiary hearing prior to any judicial cancellation of such right, is not without merit under a different factual situation.

As previously noted, however, the River District and De Beque failed to file their diligence applications in 1972. The notice provision of section 305(7) is not applicable to this case, since it was adopted after the time periods set out in sections 301(4) and 601 had already expired and cannot be applied retroactively to revive a conditional water right considered abandoned in 1972.

[5] There can be little doubt that the legislature "had the power to provide reasonable means for determining rights to the use of water, and to require all persons claiming such rights to present them in a prescribed manner, within a prescribed period, and to provide that all such claims not thus presented should be barred." *The Fort Lyon Canal Company v. The Arkansas Valley Sugar Beet and Irrigated Land Company*, 39 Colo. 332, 338, 90 P. 1023, 1025 (1907).

More recently, in *Kuiper v. Warren*, 195 Colo. 541, 580 P.2d 32 (1978), we recognized that the holder of a conditional permit to construct a well in a designated ground water basin who failed to file his statement of beneficial use within the time required by the statute lost his right to divert.

[6] The River District and De Beque claim that they are entitled to their conditional water rights because they have proceeded with due diligence, regardless of their failure to comply with the provisions of the 1969 Act. We reject that contention and hold that the owner or user of a conditional decree must comply with sections 301(4) and 601 and that the failure to do so results in the loss of his conditional water rights.

IV.

[7] We turn now to the issue of whether inadvertent omission of a conditional water right from an application for a finding of reasonable diligence under section 301(4) of the 1969 Act, and the consequent omission of the conditional right from the trial court's findings based on that application, constitute correctible clerical error. We affirm the trial court in its determination that that the omission of the Azure Power Plant, Una Power Conduit, and Pabst Power Conduit conditional rights from the findings in Case Nos. W-44 and W-789 did not constitute such correctible error.

[8] The correction of clerical errors in such findings is governed by section 37-92-304(10), C.R.S. 1973, which provides, in pertinent part, that "[c]lerical mistakes in said judgment and decree may be corrected by the water judge on his own initiative or on the petition of any person . . . ." The River District seeks to characterize the omission of the three conditional rights in question from the findings in Case Nos. W-44 and W-789 as "clerical mistakes" within the meaning of section 304(10).

It was established in *Bessemer Irrigating Company v. West Pueblo Ditch and Reservoir Company*, 65 Colo. 258, 176 P. 302 (1918), that the rule of law allowing correction of clerical errors in trial court findings and judgments encompasses:

"not only errors made by the clerk in entering the judgment, but also those mistakes apparent on the face of the record, whether made by the court or counsel during the progress of the case, which cannot reasonably be attributed to the exercise of judicial consideration or discretion." 65 Colo. at 259, 176 P. at 303.

The rule is designed to enable the trial court to amend its judgments "to speak the truth and show the judgment of the court which was actually pronounced." *Id.*, 65 Colo. at 263, 176 P. at 304. *Accord, Telluride Company v. Division Engineer in and for Water Division No. 4*, 195 Colo. 143, 575 P.2d 1297 (1978); *Base Line Land and Reservoir Company v. Boulder and Weld Reservoir Company*, 116 Colo. 548, 182 P.2d 898 (1947). In *Telluride, supra*, we held that the clerical error rule, as applied through section 37-92-304(10), C.R.S. 1973, mandated the amendment of a water referee's ruling with respect to certain conditional water rights, when, through inadvertence, the ruling omitted three conditional rights which were properly before the referee for his consideration and which the referee had intended to include within the purview of his ruling.

[9] In the case before us, however, the Azure Power Plant, Una Power Conduit, and Pabst Power Conduit conditional water rights were never properly before the trial court in Case Nos. W-44 and W-789, by virtue of the fact that the applications filed by the River District in those cases did not mention the three conditional rights. This case does not

present the problem of a conditional water right included, but incorrectly described, in an application for a finding of reasonable diligence under section 301(4) of the 1969 Act. Nor does this case concern the omission from a trial court's findings of a conditional water right properly included in an application under section 301(4). The trial court correctly ruled that it was limited to consideration of the conditional rights and related issues actually presented by the applications in Case Nos. W-44 and W-789, and that "[t]o characterize as 'clerical error' the omission from a decree of a finding of reasonable diligence with respect to a conditional water right never mentioned in the application and never considered by the Court would be to expand the definition of clerical error beyond the bounds of precedent and of reason."

V.

[10,11] The River District agrees that the trial court correctly treated Northern's and Vidler's motions together as a motion for summary judgment, subject to the provisions of C.R.C.P. 56. *See Bunger v. Uncompahgre Valley Water Users Association,* 192 Colo. 159, 557 P.2d 389 (1976). Under C.R.C.P. 56(c), summary judgment is appropriate only when there exists no "genuine issues as to any material fact."

As noted in Part III of this opinion, *supra,* section 301(4) of the 1969 Act can be considered as a statute of limitations for obtaining findings of reasonable diligence with respect to conditional water rights. Pursuant to our construction of section 301(4), as it applies specifically to the conditional water rights involved in this case, the only issue germane to Vidler's and Northern's summary judgment motion was whether the River District had or had not complied with section 301(4)'s filing requirements as thus construed; *i.e.,* were the Azure Power Plant, Una Power Conduit, and Pabst Power Conduit conditional rights included in the appropriate applications for findings of reasonable diligence actually filed by the district in Case Nos. W-44 and W-789.

The undisputed facts before the trial court showed that the River District failed to meet these requirements. The allegation of the River District that its failure to meet the filing requirements was the result of inadvertence, as well as the allegation that it had in fact been diligent in the development of the conditional water rights at issue, accepted by the trial court as true, were simply not germane to the issues before the trial court on the motion for summary judgment. Therefore, the trial court did not err in granting the motion for summary judgment. *Norton v. Dartmouth Skis, Inc.,* 147 Colo. 436, 364 P.2d 866 (1961); *Kanarado Mining and Development Company v. Sutton,* 36 Colo. App. 375, 539 P.2d 1325 (1975); *Valenzuela v. Mercy Hospital,* 34 Colo. App. 5, 521 P.2d 1287 (1974).

The judgment is affirmed.

JUSTICE LOHR does not participate.

No. 28360

Wesley Massey v. William Wilson, superintendent, Colorado State Penitentiary, and John Vernetti, Sheriff, Fremont County, Colorado

(605 P.2d 469)

Decided January 21, 1980. Petition for modification granted January 28, 1980. Opinion modified accordingly.

Extradition proceedings. Petitioner appeals from an order of the district court discharging a writ of habeas corpus.

Reversed

1. **EXTRADITION AND DETAINERS** — *Letter — Written by Secretary — Return of Papers — Termination — Withdrawal of Demand.* Letter written by Nebraska Extradition Secretary — stating it was written at request of Governor of Nebraska and asking for return of extradition papers and termination of the extradition proceedings as soon as possible — was effective to withdraw the extradition demand.

2. *Termination of Proceedings — Demanding State — Unilateral Decision.* Nothing in the law of extradition prevents demanding state from making a unilateral decision to terminate extradition proceedings.

3. *Return of Fugitive — Right — Constitution.* The United States Constitution (art. IV, §2) gives the demanding state the right to obtain the return of a fugitive who has fled to a sister state.

4. *Colorado Extradition Act — Procedures — Return of Fugitive — Sister State.* The Colorado Extradition Act, sections 16-19-101, *et seq.,* C.R.S. 1973 (1978 Repl. Vol. 8), provides the procedures to be followed in Colorado to implement Nebraska's constitutional right to obtain the return of a fugitive who has fled to a sister state.

5. *Right to Obtain — Fugitive — Demanding State — Decision — Not to Exercise Right.* Since the right to obtain extradition of a fugitive rests with the demanding state, that state can also decide that it does not want to exercise its right at any time before the prisoner is returned.

6. *Proceeding — Underway — Withdrawal — Demand — Proper — Termination.* The fact that an extradition proceeding was well underway does not prevent the demanding state from deciding to withdraw its extradition demand;

CERTIFICATE OF SERVICE

I served the attached SOUTHEASTERN'S ANSWER BRIEF and MOTION FOR CONSOLIDATION by mailing copies to:

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