10-9-1985

Closed Basin Landowners Asso. v. Rio Grande Water Conservation Dist.

SUPREME COURT, STATE OF COLORADO

CASE NO. 85SA214

APPEAL FROM THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 3

CLOSED BASIN LANDOWNERS ASSOCIATION,
Plaintiff-Appellant, and

A.Z.L. RESOURCES, INC., Plaintiff-Intervenor/Co-Appellant,

v.

RIO GRANDE WATER CONSERVATION DISTRICT, Defendant/Appellee, and

COLORADO WATER CONSERVATION BOARD and the UNITED STATES OF AMERICA,
Defendant-Intervenors/Appellees, and

STEVE VANDIVER as Division Engineer, Appellee.

BRIEF OF APPELLANT

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ASSOCIATION

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STATEMENT OF THE CASE

Appellant Closed Basin Landowners Association (hereinafter "Landowners") adopts the Statement of the Case provided by Co-Appellant A.Z.L. Resources, Inc., except that Landowners does not adopt A.Z.L.'s contention that the groundwater of the upper aquifer of the Closed Basin is non-tributary. Landowners would also bring the following additional facts to the attention of the Court.

1. In the fall of 1977 spring of 1978 a potential problem with the notice in Case W-3038 was brought to the attention of Appellee Rio Grande Water Conservation District (hereinafter "Rio Grande") by the Water Referee. Rec. Vol. II pp. 380, 389. They chose to contest the Referee's views instead of giving further notice. Rec. Vol. II p 380.

2. The Affidavit of Brent E. Spronk, P.E. (Rec. Vol. I, pp. 122-128) establishes the need for a high standard of accuracy in legal description of well locations, and after pointing out the standards in use by the State Engineer and the various water courts, concludes that "any description [of well location] even less precise than quarter section is totally inadequate notice to other owners of water rights."

3. The affidavit of Larry Nix (Rec. Vol. I, pp. 129-133) reports the results of a careful examination of legal descriptions of well locations in Division 3 in 1972, the year of filing of Case W-3038. Because of CRS 37-92-306 this was of course

the year of a massive number of such filings. Mr. Nix reviewed 2621 applications for underground water rights, in which 9779 wells were sought to be adjudicated. He further examined the ten cases where well location was vague or incomplete (not to a section). Out of this number, nine cases involving twelve wells had omitted the section number, but upon receipt of information a decree was issued specifying well location. Case W-3038 involving 150 wells gave no well locations in the application nor in the eventual decree. (Rec. Vol. II, pp. 352, 445)

4. In its Amended Complaint (Rec. Vol. I, pp. 137-145) Landowners allege that because of the failure of Rio Grande to state the amount of water to be withdrawn from of its wells (see W-3038 Application and Resumes at Rec. Vol. 2, pp. 352, 357, 361) no interested person would be able to ascertain whether his interests or water rights would be affected because he would not be able to ascertain the amount of water to be withdrawn from the local aquifer, the local depletion of the aquifer, or the local effect on the water table.

5. In his Affidavit of May 3, 1984 (Rec. Vol. I, p. 174), Mr. Spronk supports those factual allegations and states that a description in terms of the total amount of water claimed from all of the wells, collectively, does not meet the minimum standards which would allow owners of water rights to evaluate the application.

6. Copies of the Spronk May 28, 1982, Affidavit, the Nix Affidavit, and the Spronk May 3, 1984, Affidavit, are attached hereto as Appendices A, B and C respectively.

STATEMENT OF THE ISSUES

1. Whether summary judgment should have been denied since the pronk and Nix affidavits demonstrate the existence of issues f material fact regarding the adequacy of notice in W-3038?

2. Whether the lack of a legal description of well location, nd lack of well flow rate, in Rio Grande's application or in he Water Resume defeated the service of process requirement f due process under the United States Constitution, Colorado onstitution, and CRS 37-92-101 et seq?

3. Whether Rio Grande's failure to comply with statutory nd constitutional standards governing notice in its application or water rights destroys the water court's personal and subject atter jurisdiction and renders its judgment void?

ARGUMENT

I. SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE THE SPRONK AND NIX AFFIDAVITS DEMONSTRATE THE EXISTENCE OF ISSUES OF MATERIAL FACT REGARDING THE ADEQUACY OF NOTICE OF THE APPLICATION IN CASE W-3038.

A. The Nature of Summary Judgment. The rationale for granting a motion for summary judgment is to save the litigants the time and expense of a trial when, as a matter of law based on admitted facts, one of the parties cannot prevail. Abrahamsen v. Mountain States Telephone & Telegraph Co., 177 Colo. 422, 494 P.2d 1287, 1288 (1972). Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583, 584 (1978). Further, summary judgment is a drastic remedy and should be granted only when evidentiary and legal prerequisites are clearly established. Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375, 377-78 (1979). General Insurance Co. of America v. City of Colorado Springs, 638 P.2d 752, 760 (Colo. 1981). Thus, a party should receive a motion for summary judgment only when there is no genuine issue as to any material fact and the moving party should prevail as a matter of law. O.C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628, 630-31 (1963). In re Bunger v. Uncompahgre Valley Association, 192 Colo. 159, 557 P.2d 389, 392 (1976). The burden of proof in a summary judgment action is on the moving party, in this case Rio Grande and the United States. Ginter v. Palmer and Co., 196 Colo. 203, 585 P.2d 583, 585 (1978). These moving parties have failed to meet this burden of proof since the facts

concerning the notice issue are either uncertain or support Landowners complaint, and further inquiry into the facts is necessary to clarify the operation of law. In considering the motion for summary judgment, the Court must accept the Plaintiff's pleadings as true for the purpose of the motion, Norton v. Leadville Corp., 43 Colo. App. 527, 610 P.2d 348 (1979) and Ridgewood Mobile Homes Park Inc. v. Alameda Water and Sanitation Dist., 159 Colo. 178, 410 P.2d 641 (1966), unless affidavits show an absence of material issues of fact. However, here no affidavits were filed by the moving parties.

B. The Spronk and Nix Affidavits. The matters set forth in the Spronk and Nix affidavits demonstrate that issues of fact exist regarding the adequacy of notice in W-3038 which contradict the positions expressed by Rio Grande, and preclude summary judgment. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305, 308 (1978).

In the Complaint, Landowners alleged that the description of the location of the wells in W-3038 did not satisfy constitutional standards concerning notice. Although, the Constitution does not directly address this point, Landowners described in their Complaint a number of physical and legal standards, as well as customary practices, against which the sufficiency of descriptions of well locations should be measured, and have alleged that the description in W-3038 falls short as to each of them. (Rec. Vol. I, p.9)

The issues of fact created by Rio Grande's application and the published resume include issues of whether the description in W-3038 meets any of the rational physical standards. Some of these issues stated more precisely include:

(1) Given the hydrologic facts of localized impact of well drawn-down as outlined in attached affidavit of Brent E. Spronk, P.E. (Rec. Vol. I, pp. 122 and 174 and Appendices A and C hereof), does the description in W-3038 allow owners of wells in or near Tracts A and B to know the impacts on the ground water levels under their property and upon their water rights?

(2) Measured against the customary standard of well location description existing in Water Division 3 in 1972 (the year the application in W-3038 was filed), does the description meet those standards and are the standards rational? The attached affidavit of Larry C. Nix (Rec. Vol. I, p.129, and Appendix B hereof) describes the practice at that time. The affidavit shows that with a few exceptions (cases in which descriptions were inadvertently omitted), W-3038 was the only case filed in 1972 where applicant failed to describe well locations. Mr. Nix's affidavit further shows that all the applicants who gave incomplete descriptions later furnished full legal descriptions, indicating that the descriptions were omitted by inadvertence. Mr. Spronk's affidavits show that the customary standard of well description in Water Division 3 is reasonable. The original Application in W-3038 is found at Rec. Vol. II, p. 352; the Resumes thereof are at Rec. Vol. II, pp. 357 and 361.

II. THE LACK OF A FULL, LEGAL DESCRIPTION AND THE LACK OF A STATEMENT OF FLOW RATES IN RIO GRANDE'S APPLICATION AND IN THE WATER RESUME DEFEATED THE NOTICE REQUIREMENTS NECESSARY FOR DUE PROCESS.

A. Notice must be reasonable under the circumstances of the case. The Supreme Court announced the constitutional standard against which the adequacy of notice must be measured in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865 (1950). In Mullane, the Court held that the due process notice requirement did not depend on the classification of an action as in personum or in rem. Instead, the Court declared a general standard of notice.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * The notice must be of such nature as reasonably to convey the required information * * * and it must afford a reasonable time for those interested to make their appearance * * * The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Id., 339 U.S. at 314-15, 70 S.Ct. at 657-58. (Emphasis supplied).

The test for notice is "reasonableness under the circumstances of the case," and notice by publication is insufficient when a more effective means of notice, such as mailing or personal service, is available. Id., 339 U.S. at 319, 70 S.Ct. at 660. Schroeder v. City of New York, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed 2d 255 (1962). Mennonite Board of Missions v. Adams,

462 U.S. 791, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983). See Co-Appellant A.Z.L.'s brief, pgs. 5-6, on the effect of Mullane v. Central Hanover Bank & Trust as applied recently by the Supreme Court in Mennonite Board of Missions v. Adams on the unique facts of this case.

The adequacy of the notice provided in pending applications for the determination of water rights under the 1969 Act, Colo. Rev. Stat. 37-92-101 et seq. (Supp. 1984), has always been a concern to the Colorado Bar. Some of those concerns were expressed in a memorandum printed in the official text of the Colorado Statutes following C.R.C.P. Rule 89. The context of the concern that adequate notice be given to holders of water rights can be found in the Adjudication Act of 1943 and its predecessors. Prior to 1969, Colorado water law required each owner of a water right in a water district to be notified by registered mail that a supplemental adjudication proceeding had been commenced. Colo. Rev. Stat.(1963) 148-9-5(1)(c), 148-9-6. This type of notice was a form of personal service. Now, under the 1969 Act, service by publication alone is allowed. Colo. Rev. Stat. 37-92-302 (Supp. 1984). Since publication is the sole form of notice in water applications, it is necessary that the information published be truly adequate so as to inform readers about the effect of the application. "When notice is a person's due, process which is a gesture is not due process." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314, 70 S. Ct. at 657. The Colorado water law system, through detailed resume-notice

provisions and strict enforcement of those provisions by the Colorado Supreme Court, recognizes the potential constitutional problems associated with notice solely by publication. However, Rio Grande does not. Instead of complying with the strict resume-notice provisions, Rio Grande provided potential objectors with constitutionally inadequate notice by not including a "legal description of the diversion or proposed diversion" and "the amount of water claimed" as required by law. Colo. Rev. Stat. 37-92-302 (2) (Supp. 1984).

B. The statute requires notice of well location and flow rates. The first indication that the resume-notice provisions were meant to be followed exactly is found in the strict language of the statute. The forms to be supplied by the water judges of the various water divisions for a determination of a conditional water right "shall require, among other things, a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the proposed appropriation, the amount of water claimed, and the proposed use of the water." Colo. Rev. Stat. 37-92-302(2)(Supp. 1984). The statutory language is mandatory, not discretionary. The application form adopted by the Water Judge for Division No. 3 requires that the location of a well be specified in terms of numbers of feet from north-south and east-west section lines. (Rec. Vol. I, p. 14, paragraph 2.) The application thus defines a legal description in terms of section lines. This is the ordinary meaning of the phrase "legal description" and fits with the statutory purpose of providing notice to

holders of current water rights. In Colorado, statutes must be construed to carry out their purposes. Bedford v. Colorado Fuel & Iron Corp, 102 Colo. 538, 81 P.2d 752, 756 (1938). Fastenau v. Asher 124 Colo. 161, 235 P.2d 587, 590 (1951). Thus, while construing a statute requiring that all real property subject to taxation be listed by "proper legal description," the Illinois Supreme Court held that a description for notice purposes must at least specify in what quarter-section of the section the property could be found. People ex rel. Republican Reporter Corp. v. Holmes, 98 Ill. App. 2d 11, 239 N.E. 2d 682, 686 (1968).

Rio Grande's description of the location of its wells is not sufficient to satisfy the notice provisions of the 1969 Act or the form used in Water Division No. 3. Instead of describing the location of its wells in terms of section lines, Rio Grande gives a description stating no more than that its wells are somewhere in the 51,000 acres of Tract A or the 70,000 acres of Tract B. Record, Vol. II, pg. 352-353, 359, 362. Under Rio Grande's reasoning, an application could give as a legal description "a strip three miles wide each side of the Arkansas River from Buena Vista to the State line," thus placing everyone within the reach on notice of a potentially adverse claim. If the statute requires no more than a description of large tracts of land for well placement, it is meaningless as a means of providing notice. Statutes should be interpreted to give force and effect to the legislative mandate and not interpreted in a manner which produces absurd results. Public Service Company

v. City of Loveland, 79 Colo. 216, 245 P. 493, 500 (1926). General Electric Co. v. Webco Construction Co., 164 Colo. 232, 433 P. 2d 760, 762 (1967). The legislative mandate of Colo. Rev. Stat. 37-92-302(2) (Supp. 1984) is to provide notice to holders of water rights. Given the constitutional requirements of notice, a statute requiring publication of a "legal description" for notice purposes and defined by the Division No. 3 Water Judge as a description in terms of section lines for well placement should be construed strictly. Otherwise, due process will not be satisfied for Landowners specifically and for water law generally.

Rio Grande makes much of its position that its application was not "standard" and so the standard forms do not apply. Yet, the application is not really so unusual. It simply requested adjudication of 130 or so wells. In the same year, 1972, an application for water rights was filed in the same water court by Mapco, Case W-3247, for 362 wells in the unconfined aquifer and 75 wells in the confined aquifer of the San Luis Valley, and each well was described by quarter section. A few years ago, over 7,000 wells were precisely described in the so-called Huston cases. These were applications by people who, like Rio Grande, wished to pump large amounts of water from extensive aquifers, but who did provide adequate notice.

C. The Colorado Supreme Court has construed the resume-notice provisions of C.R.S. 37-92-302 strictly. According to the Colorado Supreme Cour, "the Water Right Act provides the sole method of determining a water right to underground tributary

water, and its provisions must be adhered to in seeking a judgment and decree pertaining to a water matter." Danielson v. Jones, 698 P.2d 240, 244 (Colo.1985). Adhering to the 1969 Act protects the public's vital interest in knowing that the correct rules for the allotment and administration of water are being followed. Wadsworth v. Kuiper, 193 Colo. 95, 562 P.2d 1114, 1116 (1977). Nowhere is this public interest stronger than in the area of the resume-notice provisions. "Because the judicial determination of a water right may potentially affect the vested rights of others utilizing the same source of water, compliance with the statutory notice provisions is essential to provide a meaningful opportunity to those who might be injuriously affected by the decree to oppose the application." Danielson v. Jones, 698 P.2d at 245. The Colorado Supreme Court has recognized the significant interests which the statutory notice provisions of the 1969 Water Right Act are intended to safeguard and, as a result, has consistently construed those provisions strictly.

In the most recent case before the Colorado Supreme Court, the applicant had not included fish culture and storage uses in his original application for underground water rights, and notice of those uses were never published in the resume. Danielson v. Jones, 698 P.2d at 242-243. Under the resume-notice provisions of the 1969 Water Right Act, a person seeking a decree for a right to divert underground tributary water by means of a well must file an application with the water clerk setting forth

facts to support the ruling sought, including "a legal description of the proposed diversion. . . and the proposed use of the water." Colo. Rev. Stat. 37-92-302(2) (Supp. 1984). The Colorado Supreme Court agreed with the state engineer that by failing to list all of his proposed uses, the applicant did not substantially comply with the notice provisions of the statute. Danielson v. Jones, 698 P.2d at 246. As a result the decree was entered without jurisdiction and was void as to those provisions which authorized a water right for fish culture and storage purposes. Id at 246.

In Stonewall Estates v. C. F. & I. Steel Corp, 197 Colo. 255, 592 P.2d 1318 (1979), an applicant for underground water rights for five wells failed to state in the body of the application that the water rights involved were non-tributary, although the caption stated that the subject waters were non-tributary. Id at 1319. As a result, the resume did not mention that the water rights were non-tributary. The Colorado Supreme Court ruled that the application did not substantially comply with the notice provisions of the statute, and the decree resulting from the application was void and subject to collateral attack. Id. at 1320.

In the same manner, Rio Grande's application, by failing to provide a legal description of the well locations, did not substantially comply with the notice provisions of Colo. Rev. Stat. 37-92-302(3) (Supp. 1984). In Danielson v. Jones, the lack of notice went to the uses of the water. In Stonewall

Estates v. C.F. & I. Steel Corp., the lack of notice went to the character of the water claimed. Here, the failure of notice is similar, and perhaps even more basic. If a potential objector does not know how a claimed water right will be used, its non-tributary character, or its proposed diversion point for lack of a legal description, that potential objector will not know whether or not his own water rights will be injuriously affected. Without knowing the location of the wells involved in an application for a water right, a potential objector is denied a meaningful opportunity to oppose the application. As a result, the strong public interest in the adjudication of water rights combined with the constitutional due process aspects of notice, require the Court to construe the notice provision of a "legal description" strictly. This means describing the location of wells according to section lines under the Division No. 3 application form, a standard of notice that Rio Grande's application does not achieve.

When strictly construing a mandatory water statute, the Colorado Supreme Court should not take economic considerations into account through a balancing test. Thus, the owner or user of a conditional water right must comply with the statutory mandate that he obtain findings of reasonable diligence every four years or lose his conditional water right. Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48, 54 (1980) (consolidated case that included Colorado River Water Conservation District v. Northern Colorado Water Conservancy District.) Colorado

River Water Conservation District v. City and County of Denver, 640 P.2d 1139, 1142 (Colo.1982). Colo. Rev. Stat. 37-92-301(4), 37-92-601 (Supp. 1984). In essence, the Court stated that a holder of a conditional water right must comply with the statutory mandates and that failure to do so may result in detriment to the priority of an important water project. The same should hold true in the case of failure to supply adequate notice through a legal description of the proposed diversion in an application for water rights.

D. Rio Grande has failed to satisfy the good faith test of the Mullane case. The final sentence of the quote from Mullane (supra) at page 9 of this brief, "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," can be characterized as a good faith test to be applied to Rio Grande. In the context of the foregoing discussion, the following distilled test questions may be asked. If Rio Grande had desired to actually inform others as to the nature of its claim, would it have failed to state the locations and flow rates of its wells? If Rio Grande had desired to actually inform others as to the nature of its claim, would it have resisted the Water Referee's suggestion that further notice be given? If Rio Grande had desired to actually inform others as to the nature of its claim, would it have seriously claimed a diversion "point" of 121,000 acres? Landowners respectfully suggests that the answer to these questions

must be in the negative, and that Rio Grande has failed the Mullane test.

III. SPECIFIC LEGAL DESCRIPTIONS HAVE BEEN REQUIRED IN OTHER PROCEEDINGS WHICH ARE BASED ON A STATUTORY NOTICE PROCESS. A water right is in the nature of an interest in real property. Yet, proceedings affecting this property interest can, under the 1969 Water Right Act, be commenced solely with notice by publication. Yet, in most actions affecting real property interests, any person whose interest appears of record must be personally served or, if not possible, served by mail at his last known address. Only for persons who cannot be reached, or for "unknown persons" is publication a valid form of process. Gardner v. State, 614 P.2d 357 (Colo. 1980). Given that publication is the sole form of process in water applications, despite the normal requirement for personal service, and given the concerns expressed following C.R.C.P. Rule 89, over the constitutional adequacy of this notice, the notice provision requiring a legal description of the proposed diversion should be meticulously followed. The following proceedings which require a legal description as part of a statutory notice process are brought to the Court's attention:

A. Historic Standards of Water Adjudications. The Court is asked to take judicial notice that since Statehood persons seeking adjudication of their water rights in Colorado have been precise in setting forth locations. Even in the oldest original adjudications, description of headgate location by

distance and bearing from a section corner are not uncommon, and descriptions which fail to locate a headgate in the nearest quarter of a quarter section, or at the very least nearest quarter section, are rare. The same has been true for wells.

B. Foreclosure or Quiet Title. As mentioned, service of process involving real property may be obtained by publication under certain circumstances. The Court may take judicial notice that when a summons is published in a foreclosure or quiet title case, a legal description is given. There appear to be no Colorado cases discussing this matter, which indicates that the Colorado Bar has recognized the need to provide this information with specificity and has done so. The legal principle, as stated in CJS Quiet Title, Sec. 64, Location and Description of Land, is that "Plaintiff's pleading must also contain a pertinent description of the property in controversy . . . Such description must be definite and accurate." Examples of descriptions which have been held inadequate are: "A vacant lot or parcel of land bought from J. M. Tayloe for $405," Deans v. Deans, 241 N.C. 1, 84 S.E.2d 321, 322, 325 (1954); description by means of complex references to book and page of numerous recorded documents, Brown v. Sohn, 276 So. 2d 501, 502 (Fla. App.1973); "rights of way, terminal lands, and all the property known as "Ocean Shore Railway property' more particularly described (at book and page of public record)" Aalwyn's Law Institute v. Mertin, 173 Cal. 21, 159 P. 158 (1916).

C. Condemnation. According to CRS 38-1-115(1)(a) Supp. 1984), the final report of the commissioners or the verdict f the jury in a condemnation proceeding must include "an accurate lescription of the land taken." The Colorado Courts have construed his requirement strictly. Thus, "It is not a sufficient description o merely refer to the land as the land described in the petition, or as the land 'tinted pink' on the map." Norris v. City of ueblo, 12 Colo. App. 290, 55 P. 747, 749 (1898).

D. Mechanic's Lien. A mechanic's lien statement filed ith the county clerk must contain "a description of the property to e charged with the lien sufficient to identify the same. CRS 8-22-109 (1)(e) (Supp. 1984). The statutory language relating to roperty descriptions for liens is not as strict as the 1969 Water ights Act's requirement of a "legal description." Thus, stating hat the only question is accurate identification, it has been held hat a legal description of property by metes and bounds in a lien tatement serves the function of accurate identification of the roperty, even though the property has been subdivided. McIntire Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. pp. 398, 576 P.2d 1026, 1027, 1028 (1978). As a result, when a tatute, such as CRS 37-92-302(2), requires a legal description, othing else but an effective, specific legal description of ne location of defendant's wells will suffice.

E. Special District Formation. A petition for organiza- ion of a special district must set forth "a general description f the boundaries of the special district . . . with such certainty

"(i) This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160 acre quadrant of the section (quarter section), or sections, if more than one is involved, and the township, range, meridian and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable.

(ii) The location of the claims or sites shall be depicted on either a topographic map published by the U.S. Geological Survey or by a narrative or a sketch describing the claim or site with reference by appropriate tie to some topographic, hydrographic, or man-made feature. Such map, narrative description, or sketch shall set forth the boundaries and position of the individual claim or site with such accuracy as will permit the authorized officer of the agency administering the lands or mineral interest in such lands to identify and locate the claims or sites on the ground.

(6) In place of the requirements of paragraph (b)(5) of this section, an approved mineral survey may be supplied. A mining claim described by legal subdivisions, section, of paragraph (b)(5) of this section." 43 CFR 3833.1-2(b)(5)(i)(ii), and (b)(6).

Thus, a legal description requires specificity down to the section and quarter section lines. Although Rio Grande points to the "peculiarities and particulars" of the placement of their wells, the natural location of a mineral deposit is often ambiguous and yet a description is required with particularity. For example, a "claimant . . . had not substantially complied with filing requirements of this section by filing maps rather than copies of recording documents." Rogers v. U.S., 575 F. Supp. 4, 8 (D.C. Mont. 1982).

2. Under the Colorado laws governing how lode claims are located and recorded, a claimant must fix the claim specifically either by tying it to a natural object or to a U.S. government survey. This procedure has been followed in order to give the

proper notice of location to others. Nylund v. Ward, 67 Colo. 108, 187 P. 514, 516 (1919). Drummond v. Long, 9 Colo. 538, 13 P. 543, 545 (1886). CRS 34-43-103, 34-43-106 (1984).

3. Under the General Mining Act of 1872, "All records of mining claim must contain such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." 30 USC Sec. 28. The rationale behind this requirement is to secure a definite description, one so plain that the claim can be readily ascertained, and a reference to some natural object or permanent monument is named for that purpose. Clark v. Pueblo Quarries, 103 Colo. 402, 86 P.2d 602 (1939). In the same manner, since our water law stems from the same antecedents as western mining law, a legal description of all the defendants' wells is required under CRS 37-92-302(2) in order to secure a definite description necessary to fulfill the notice function of the application and resume.

IV. RIO GRANDE'S FAILURE TO SUBSTANTIALLY COMPLY WITH THE STATUTORY AND CONSTITUTIONAL PROVISIONS GOVERNING THE RESUME-NOTICE PROCESS DESTROYS THE WATER COURT'S JURISDICTION AND RENDERS ITS DECREE VOID AND SUBJECT TO COLLATERAL ATTACK. The term jurisdiction includes the Court's power to enter judgment. Entry of a decree which the Court has no authority to enter is without jurisdiction and void, and may be attacked directly or collaterally even though the Court had jurisdiction of the parties and subject matter. Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963).

West End Irrigation Co. v. Garvey, 117 Colo. 109, 184 P.2d 476, 478 (1947). Persons proceeding in reliance on a void judgment do so at their own risk, since the defense of laches is not available against a proceeding to vacate a void judgment.

A. Jurisdiction fails even though Colo. Rev. Stat. 37-92-301(1) confers jurisdiction of water matters upon the water judge. A claim which fails to substantially comply with the statutory notice requirements of the 1969 Water Right Act does not confer subject matter or personal jurisdiction on the Water Court. Stonewall Estates v. C.F. & I. Steel Corp., 197 Colo. 255, 592 P.2d 1318, 1320 (1979). Danielson v. Jones, 698 P.2d 240, 246 (Colo. 1985). Instead, the Water Court is without any jurisdiction and its decree on an application is void. Stonewall Estates v. C.F. & I. Steel Corp., 592 P.2d at 1320. Thus, an applicant's failure to state fish culture and storage uses render void the decree for those uses due to lack of notice. Danielson v. Jones, 698 P.2d at 1320. Failure of an application and published resume to mention the non-tributary character of the water rights claimed rendered the decree void and not subject to any statute of limitations due to a lack of notice. Stonewall Estates v. C.F. & I. Steel Corp., 592 P.2d at 1320. In general, failure to strictly follow rules for publication by notice in Colorado opens a judgment to attack in a collateral proceeding. Israel v. Arthur, 7 Colo. 5, 1 P. 438, 439 (1883). Empire Ranch & Cattle v. Coldren, 51 Colo. 115, 117 P. 1005, 1008 (1911).

B. Rio Grande has known since at least November 9, 1977, that it had notice problems in Case W-3038. This was the date of the Referee's first direction to Landowners to provide further notice to some well owners. [Rec. Vol.II, p. 380, 389]. Instead of complying, Rio Grande obtained an Order from the Water Judge [Rec. Vol.II, p.397] denying the Referee's suggestion that further notice be given. By proceeding in this manner, Rio Grande chose with its eyes open, to avoid the time and effort involved in giving adequate notice and to accept the possibility that any decree it might obtain could be void for lack of notice.

C. The Decree in W-3038 is also void because the Court never acquired proper subject matter jurisdiction.

1. Subject matter jurisdiction is of two kinds - the general subject of the type or category of the case, (water matters) and the particular property or rights which are affected by its ultimate decree. There is no argument of course that by statute the Water Judge has jurisdiction over the general subject of water matters. But, Defendants have argued that the Water Court had complete subject matter jurisdiction in W-3038 merely because that case concerned water, referring to the case of In re Marriage of Stroud, 631 P.2d 168 (Colo. 1981). The Supreme Court said in that case, in regard to evaluating subject matter jurisdiction, "reference must be made to the nature of the claim and the relief sought" (emphasis supplied). Although CRS 37-92-301(1) confers jurisdiction of water matters upon the water judge, a claim which fails to comply with the

remaining requirements of the Water Right Determination and Administration Act of 1969 ("the Act") does not confer subject matter jurisdiction under the doctrine of the Stroud case. As previously stated by Appellants, and supported by the Spronk and Nix affidavits, the application in W-3038 failed to specify locations of points of diversion or quantities of water to be withdrawn from the proposed wells. This failure destroys subject matter jurisdiction and also defeats the notice necessary for personal jurisdiction and due process. No one, not even the Court, could know anything about the wells which it was supposedly adjudicating, which were the specific subject matter of the case.

2. In City of Grand Junction v. Kannah Creek Assn., 192 Colo. 289, 557 P.2d 1173, 1177, 1178 (1976), the Court said that a void judgment is subject to attack directly or collaterally at any time and in any Court. In that case, the Supreme Court held that an unappealed 1970 Water Court decree was void for lack of jurisdiction over the subject matter, where the Water Court had attempted to review a valid previous decree. In Sanchez v. Straight Creek Constructors, 41 Colo. App. 19, 580 P.2d 827, 829 (1978), the Court, citing the old case of Thorne v. Ornauer, 6 Colo. 39 (1881), for the proposition that consent is ineffectual to confer jurisdiction, said, "Subject matter jurisdiction relates to the power or authority to deal with a particular case. Either it exists or it does not." In Triebelhorn v. Turzanski, 149 Colo. 558, 370 P.2d 757, 758 (1962) the Court held that where

the District Court did not reserve the matter of property settlement in a final divorce decree, it lacked jurisdiction over the subject matter and could not acquire jurisdiction by consent.

3. City of Grand Junction (supra) was a case concerning water rights brought in the Water Court, which has jurisdiction of water matters, yet it was held that the Court did not have subject matter jurisdiction of the particular case. Sanchez (supra) was a workmen's compensation case in the Colorado Court of Appeals, which has jurisdiction by statute of appeals in such cases, yet it held that it did not have subject matter jurisdiction in the particular case. Triebelhorn (supra) was a divorce case in the District Court, which certainly has jurisdiction over divorce cases in general but lacked subject matter jurisdiction in the particular case. The citation of similar cases could continue, but suffice it to say that Rio Grande's argument that the Court had subject matter jurisdiction in W-3038 merely because it was hearing a water matter is too simplistic and shows a failure to understand the concept.

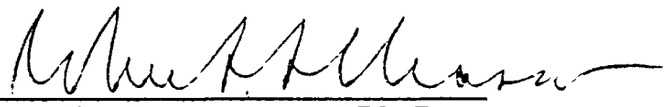
CONCLUSION

Summary Judgment for the Rio Grande was improper either because unresolved issues of fact exist or because the facts established by the Spronk and Nix affidavits render it improper as a matter of law. If, upon trial those factual issues are resolved in favor of the Landowners, then the Decree in Case W-3038 must be declared void because of Rio Grande's failure to give notice sufficient to confer jurisdiction upon the Water

Court. This Court should therefore reverse the order for Summary Judgment and remand this case for trial. In the alternative, this Court should rule that the Resume given in Case W-3038 was inadequate as a matter of law, and direct the entry of judgment voiding the decree in that case.

Respectfully submitted this 9th day of October, 1985.

LAW OFFICES OF
ROBERT F. T. KRASSA, P.C.

By 

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CERTIFICATE OF SERVICE

This is to certify that the undersigned on the 9th day of October, 1985, placed a true and correct copy of the within Brief in the United States mails, postage prepaid, addressed to:

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Deanne Roberts

AFFIDAVIT

Brent E. Spronk, P.E., of lawful age and duly sworn, deposes and states as follows:

1. That he is a registered professional engineer in the State of Colorado.
2. That he is a qualified experienced water resources engineer and he is familiar with the hydrology of the San Luis Valley in Colorado.
3. That a high standard of accuracy in describing the amount of water claimed from each of the proposed wells in an application for underground water rights is necessary in order for other water right owners to properly protect their water rights for the following reasons:
   a. to determine the hydrologic connection between a proposed well and existing wells or surface streams which have decreed surface rights.
   b. to evaluate whether depletions to an aquifer caused by the withdrawals by a proposed well will prevent existing wells from obtaining their full decreed rate of flow;
   c. to determine if there is sufficient unappropriated water available at the specific location of the proposed well;
   d. to ascertain whether the proposed well will unreasonably impair existing water rights such as

by an unreasonable lowering of the water level or the unreasonable deterioration of water quality, beyond reasonable economic limits of withdrawal or use.

4. That examples of standards of accuracy, which in his opinion are acceptable in describing the amount of water claimed from proposed wells in an application for underground water rights, are as follows:

   a. The standard well permit application form used by the Colorado Division of Water Resources requires the applicant to describe the amount of water to be withdrawn from a proposed well by the proposed maximum pumping rate (gpm) and by the average annual amount of groundwater to be appropriated (acre-feet).

   b. The standardized forms which are approved for use in all seven water divisions require the applicant to describe the amount of water claimed from a proposed well in gallons per minute.

5. That in his opinion, in an aquifer such as the unconfined aquifer of the Closed Basin of the San Luis Valley, description of the amount of water claimed by flow rate (gallons per minute or cubic feet per second) from each well meets the minimum acceptable standards of accuracy.

6. That in his opinion, in such an aquifer, description in terms of the total amount of water claimed from all of the wells, collectively, does not meet minimum standards and is inadequate notice to other owners of water rights.

'urther affiant sayeth not.

Brent E. Spronk

Brent E. Spronk, P.E.

tate of Colorado)
) ss.
ity & County of Denver)

Signed and sworn to before me by Brent E. Spronk this 3
ıy of May, 1984.

Notary Public

My Commission Expires Sept. 12, 1986

Address: 3[illegible] East 17th Avenue
[illegible], Colorado 80203

My Commission Expires: