9-9-1985

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

SUPREME COURT, STATE OF COLORADO
Case No. 85SA214

BRIEF OF APPELLEES

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.

Appeal from District Court
in and for Water Division No. 3
Honorable Robert W. Ogburn, Water Judge
Trial Court No. 82CW35

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Pursuant to C.A.R. 28(i), the Appellees have joined in a single brief. To further simplify matters, this brief will respond to the briefs of both Appellant Closed Basin Landowners Association ("Landowners") and Co-Appellant A.Z.L. Resources, Inc. ("AZL").1/

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

The issues presented for review are set forth in the briefs of Landowners and AZL.

II. STATEMENT OF THE CASE.

A. Nature Of The Case.

This appeal involves an attempted collateral attack on a judgment and decree entered by the Water Court for Water Division No. 3 awarding the Rio Grande Water Conservation District ("District") a conditional water right for the Closed Basin Water Salvage Project. The Water Judge concluded that the resume-notice of the District's application was adequate and granted summary judgment dismissing the action. Record on Appeal, Volume 1, pages 210-229.1A/

B. Course Of Proceedings Below.

Neither Landowners' brief nor AZL's brief contains an adequate statement of the course of the proceedings below, which is necessary to resolve certain arguments made by AZL.

1/ The views of the United States are set forth at pages 24-25.

1A/ The Record on Appeal consists of three volumes. References to the record hereinafter will be indicated as follows (1, 210:5), means Volume 1 of the Record on Appeal, page 210, line 5.

On March 24, 1982, the Closed Basin Landowners Association, Ray G. Slane, Allen Beard, Gaines W. Shults, and KC Land and Cattle Co. (collectively referred to as "Plaintiffs") filed a complaint praying that the conditional decree entered by the Water Court for Water Division No. 3 in Case No. W-3038 be declared void for lack of personal and subject matter jurisdiction due to inadequate notice. (1, 9-12).[2]/ Landowners is "an unincorporated association whose membership is comprised of landowners in the closed basin of the San Luis Valley, in Alamosa and Saguache Counties, Colorado." (1, 9 ¶1). The other Plaintiffs were owners of land in the closed basin. (1, 9 ¶2). The Plaintiffs alleged that they were injured by the conditional decree because the Colorado State Engineer, based on the decree, had denied well permits to members of Landowners and to the other named Plaintiffs. (1, 12 ¶22). The complaint was assigned Case No. 82-CW-35 by the Water Clerk. On May 3, 1982, the District filed a motion to dismiss the complaint or for summary judgment. (1, 2).

On May 13, 1982, the Colorado Water Conservation Board ("CWCB") moved to intervene as a defendant and filed a motion to dismiss the complaint. (1, 2). On May 20, 1982, the Court granted the CWCB's motion to intervene. (1, 3).

2/ AZL incorrectly states that the complaint was filed on May 21, 1980. See AZL Brief at 2.

On May 28, 1982, AZL filed a motion to intervene (1, 110-111) and a petition to correct substantive errors in the decree in Case No. W-3038 under C.R.S. Sec. 37-92-304(10) or to set aside the decree as void. (1, 112-113). AZL alleged that it owned water rights which were adversely affected by the decree in Case No. W-3038 and that it had failed to file a protest with the Water Clerk within the time specified by C.R.S. §37-92-304(2) because the resume-notice of the District's application in Case No. W-3038 was not adequate. (1, 112).

On June 1, 1982, the Plaintiffs filed a brief and affidavits in opposition to the motions to dismiss or for summary judgment. (1, 115-134). On June 23, 1982, the Plaintiffs filed a motion to amend the complaint, together with a proposed amended complaint. (1, 135-144).

On June 28, 1982, the United States of America (hereinafter "United States") moved to intervene and filed a motion to dismiss the complaint. (1, 3).

At a hearing before the Water Judge on September 16, 1982, AZL withdrew its petition under C.R.S. Sec. 37-92-304(10) and asked for leave to intervene as a plaintiff in the action and to join the complaint or amended complaint filed by the Plaintiffs. (1, 146). At the hearing, the Court permitted AZL to intervene as a plaintiff (1, 146-147) and the United States to intervene as a defendant. (1, 146). The Court also granted the Plaintiffs' motion to amend the complaint and took under advisement the various motions

to dismiss or for summary judgment. (1, 146).

On October 26, 1982, the Water Judge entered a written order, without opinion, denying the motions to dismiss or for summary judgment and granted the Plaintiffs and AZL leave to file a second amended complaint, if they so desired, setting forth all claims they wished to assert within thirty days from the Court's order. (1, 147). On November 9, 1982, the Plaintiffs and AZL filed a notice stating that they chose not to file a second amended complaint. (1, 149). The District, the CWCB, and the United States then filed answers to the amended complaint. (1, 4).

On April 9, 1984, the District, the CWCB, and the United States filed a joint motion for summary judgment. (1, 151). On May 4, 1984, the Plaintiffs and AZL filed briefs and affidavits in response to the motion for summary judgment. (1, 153-186).

On June 18, 1984, AZL filed a motion to amend its petition to amend or set aside the decree to allege that the water which was subject to the decree in Case No. W-3038 was nontributary. (1, 187-188).

At a hearing on July 10, 1984, the Water Judge entered an oral ruling denying AZL's motion to amend and granting the motion for summary judgment. (1, 202:3-6, 16-23). On November 29, 1984, the Water Judge entered a written Memorandum and Order. (1, 210-229). The Water Judge held

that because KC Land and Cattle Co. had voluntarily appeared in Case No. W-3038, it could not be heard to complain of lack of jurisdiction over the person or insufficiency of process. (1, 218). As to the other Plaintiffs and AZL, the Water Judge held that the published resume-notice of the District's application was adequate to apprise interested persons of the nature of the claim and, therefore, that the decree for the Closed Basin Water Salvage Project was not void. (1, 219-224).

On December 14, 1984, AZL filed a motion to alter or amend the judgment. (1, 231-232). On April 30, 1985, the Water Judge entered an order denying AZL's motion to alter or amend. (1, 315).

On June 14, 1985, Landowners filed a notice of appeal with the Colorado Supreme Court. (1, 317-321).[3]/ On June 24, 1985, AZL filed its notice of appeal. (1, 336-340).

C. Statement of Facts.

The following facts from Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914 (Colo. 1983), will provide a helpful backdrop to this appeal.

The San Luis Valley is located in south-central Colorado. 674 P.2d at 917. The mainstem of the Rio Grande rises in the San Juan Mountains, flows southeasterly through

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3/ The notice of appeal was filed only on behalf of the Closed Basin Landowners Association. (I, 318). The individual Plaintiffs, Ray G. Slane, Allen Beard, Gaines W. Shults, and KC Land and Cattle Co., were not listed as parties initiating the appeal in the notice of appeal and were not named as appellees in the caption. The Division Engineer was named as an appellee pursuant to C.A.R. 1(e).

the valley to Alamosa, Colorado, and then runs south into the State of New Mexico. Id. North of the Rio Grande mainstem, a hydraulic divide creates the southern boundary of an area known as the closed basin. Id. at 918 n. 3. Several large irrigation canals divert water from the Rio Grande to irrigate lands in the closed basin. Id. Return flow from irrigation and the streams within the closed basin flow toward a sump area, which is the basin's lowest surface area, rather than to the Rio Grande; consequently, substantial amounts of water are presently lost to evapotranspiration. Id.

In 1938, negotiators from the States of Colorado, New Mexico, and Texas signed an interstate compact to apportion the waters of the Rio Grande above Fort Quitman, Texas.[4] At the time the Rio Grande Compact was negotiated, the possibility of constructing works to salvage water in the closed basin[5] for the purpose of delivering water into the Rio Grande was contemplated and the compact expressly provides that Colorado shall not be credited with the amount of

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4/ The compact was subsequently ratified by the legislature of each state and approved by the United States Congress in 1939, 53 Stat. 785 (1939), and is codified at C.R.S. Sec. 37-66-101.

5/ The compact defines the term "Rio Grande basin" to mean "all of the territory drained by the Rio Grande and its tributaries ... above Fort Quitman, including the closed basin in Colorado." Art. I(c). The term "closed basin" is defined to mean "that part of the Rio Grande basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande." Art. I(d).

water delivered from the closed basin from any works constructed after 1937 unless the water exceeds certain minimum quality requirements. Rio Grande Compact, Art. III(4).

The Rio Grande Compact obligates Colorado to deliver water in the Rio Grande at the Colorado-New Mexico stateline based upon two schedules tying Colorado's delivery obligation to inflow at upper index stations. Art. III. In recognition of various factors, the compact allows Colorado to accumulate debits up to 100,000 acre-feet. Art. VI. Beginning in 1952, Colorado accumulated debits in excess of 100,000 acre-feet. 674 P.2d at 919. By the end of 1965, Colorado's accrued debit was alleged to be 939,900 acre-feet. Id. In 1966, Texas and New Mexico brought an original proceeding before the United States Supreme Court seeking repayment of the accrued debit. Id. Colorado then entered into a stipulation with New Mexico and Texas agreeing to seek a stay of the litigation if Colorado met its delivery obligation on an annual basis, without allowance for accumulated debits, and used all administrative and legal powers, including curtailment of diversions, to assure compliance. A joint motion for continuance was granted by the United States Supreme Court in 1968. Texas v. Colorado, 391 U.S. 901 (1968). Thereafter, Colorado water officials began enforcing the stipulation through substantial curtailments of diversions. 674 P.2d at 919.

It was against this background that Congress in 1972 authorized a federal reclamation project to salvage water from closed basin for delivery into the Rio Grande. Pub.L.No. 92-514, 86 Stat. 964, as amended by Pub.L.No. 96-375, Sec. 6, 94 Stat. 1507. The primary purpose of the project is to assist Colorado in making the annual delivery of water required by Article III of the Rio Grande Compact. Pub.L.No. 92-514, Sec. 104(b)(1). Another purpose is to reduce any accumulated deficit in deliveries by Colorado. Id., Sec. 104(b)(3).

On December 22, 1972, the District, which is a political subdivision of the State of Colorado, C.R.S. Sec. 37-48-101.3(1) (1984 Cum. Supp.), filed an application to adjudicate a conditional water right for the Closed Basin Water Salvage Project ("Closed Basin Project"). (2, 352-355). The application stated that the legal description of each point of diversion or proposed diversion was "the entire area of Tract A, hereinafter described, which makes up stages one and two of the project, and the entire area of Tract B, hereinafter described, which makes up stages three, four and five of the project." (2, 352, ¶3). The application contained a legal description of both tracts by section, township, and range. The application further stated:

> "The salvage of waters is to be accomplished by the construction and operation of approximately 80 shallow wells in Tract A and approximately 70 shallow wells in Tract B which will withdraw waters from the shallow or unconfined aquifer and will be so spaced within their respective

> tracts as to lower the entire water table within the tracts so as to preclude substantial loss of water through surface evaporation or evapotranspiration."

(2, 353-354). The amount of water claimed by diversion in the application was "277 cubic feet per second of time." (2, 355, ¶7).

The application was published in the resume of water applications for December, 1972, and the water clerk caused publication of the resume pursuant to the provisions of C.R.S. Sec. 37-92-302(3)(b).[6]/ (2, 356-363). Ten statements of opposition to the application were filed. (2, 347). In addition, three entries of appearance were filed, including one by N.B.H. Land Company, a predecessor in interest to KC Land and Cattle Co., one of the Plaintiffs in this action. (2, 347-348).

On November 9, 1977, a hearing was held before the Referee on the application. After the hearing, the Referee re-referred the application to the Water Judge in an order which stated:

> "At the hearing ... it had developed that some unspecified number of the proposed wells would be located on private lands. The Referee determined that owners of lands on which wells were proposed to be located should have notice of this fact, and required applicant to provide the names and addresses of owners of lands affected."

6/ Subsection (3)(b) was amended in 1983 to add a new sentence dealing with the cost for republication. Otherwise, this subsection has not been changed since 1969.

(2, 389). The Referee proposed that one of two courses be followed: 1) special notice to landowners, or 2) amendment of the application to specify the location of the proposed wells, with republication of the resume as amended. (2, 389). The District objected to further notice and briefs were filed on the issue.7/ A hearing was held before the Water Judge on March 9, 1978. (2, 397).

On April 1, 1978, the Water Judge entered an order returning the matter to the Referee, which stated:

> "The Court having considered the matter ... and the Court finding that the original resume publication provided proper and sufficient notice, and that there appears to be no basis or authority for requiring special notice to be given or republication to be had,
>
> IT IS HEREBY ORDERED THAT:
>
> The suggestion of the Referee for special notice to landowners of private land within the boundary of the Closed Basin Project or, in the alternative, republication of the resume, is denied."

(2, 397). The Referee subsequently issued a ruling dated August 23, 1979, approving a conditional water right for the Closed Basin Project. (2, 400-411). A protest to the

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7/ The CWCB entered its appearance at the hearing before the Referee and filed a brief in support of the District on the issue of notice. (2, 391, 393-396). The CWCB was created, inter alia, to foster and encourage districts and other agencies formed under the laws of the State of Colorado in conserving, developing, and utilizing the waters of Colorado, see C.R.S. Sec. 37-60-106(1)(a), and has specific responsibilities to monitor operation of the Closed Basin Project under the authorizing legislation, Pub.L.No. 92-514, Sec. 103, 86 Stat. 965.

ruling was filed by N.B.H. Land Company. (2, 427-428). The District also filed a motion to amend the Referee's ruling. (2, 430-437).

After a hearing, the Water Judge entered a judgment and decree on April 21, 1980, granting the District a conditional water right for the Closed Basin Project. (2, 445-455). The decree contains express findings that unappropriated water was available to satisfy existing appropriations of underground water and appropriations to be made by the District and that the unconfined aquifer of the closed basin, together with its inflow tributaries, constitute a natural stream system subject to appropriation under the Colorado Constitution. (2, 451, ¶4(j); 452, ¶6).

No appeal was taken from the decree.

In reliance on the decree, Congress appropriated over $57,000,000 for construction of the Project. Pub.L.No. 96-375, Sec. 6, 94 Stat. 1507.

III. SUMMARY OF ARGUMENT.

The Court should have a strong feeling of deja vu about this appeal. Virtually the same arguments made by Landowners were rejected by this Court a year ago in Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594 (Colo. 1984). Like the protestants in Pueblo West, Landowners appeals from a summary judgment on a claim that a decree entered by a water court was void for lack of adequate notice. Landowners' argument is constructed on the premise that because notice by publication alone

is permitted in water right adjudications in Colorado, the Court should construe the resume-notice provisions of the Water Right Determination and Administration Act of 1969 in a hyper-technical manner without regard to common sense or the just and reasonable character of the requirements of the Act and without due regard for the practicalities and peculiarities of a particular case. Even without the benefit of the decision in Pueblo West, the Water Judge had no difficulty in concluding that the published resume of the District's application in Case No. W-3038 gave fair notice of the District's claim and was fully adequate to apprise interested persons of the nature of the District's claim. The Water Judge was plainly correct in so ruling, as the Pueblo West case confirms.

Landowners also argues that summary judgment was improvidently entered because there exists a genuine issue of material fact concerning the adequacy of the notice. This argument should have a familiar ring to this Court for it is the same argument which this Court rejected in Pueblo West as "utterly devoid of merit."

AZL, Landowners' cohort in this appeal, has raised several additional arguments of its own. First, AZL argues that the publication method of providing notice was inadequate to acquire jurisdiction over it as a matter of due process in this case. However, AZL failed to raise this argument until after the Water Judge entered summary judgment. Having submitted to the jurisdiction of the Water

Court and having failed to raise this argument in a timely manner, AZL waived any challenge to insufficiency of process and, like the protestants in Pueblo West, cannot raise it here. AZL also raises a number of challenges to the decree for the Closed Basin Project which it failed to raise within three years of entry of the judgment and decree and which are therefore barred by the statutory period of limitations in C.R.S. Sec. 37-92-304(10). However, there is no merit to them in any case.

The major issue in this appeal concerns the adequacy of the published notice of the District's application in Case No. W-3038. We will first address the argument that the Water Court lacked subject-matter jurisdiction to enter the decree in Case No. W-3038. Second, we will address the argument that the resume-notice of the District's application in Case No. W-3038 was inadequate. Third, we will address the argument that summary judgment was improvidently granted because a genuine issue of material fact exists. Finally, we will dispose of the remaining arguments raised by AZL.

IV. THE WATER COURT HAD EXCLUSIVE SUBJECT MATTER JURSIDICTION OVER THE DISTRICT'S APPLICATION TO DETERMINE A CONDITIONAL WATER RIGHT FOR THE CLOSED BASIN PROJECT.

Landowners contends that a claim which fails to comply substantially with the statutory notice requirements of the Water Right Determination and Administration Act of 1969 ("1969 Act") does not confer subject matter on the Water

Court. Landowners' Brief at 23-27. Landowners' argument is based on a misunderstanding of the concept of subject matter jurisdiction; therefore, we will address it first.

Subject matter jurisdiction refers to "the Court's authority to deal with the class of cases in which it renders judgment." In re Marriage of Stroud, 631 P.2d 168, 170 (Colo. 1981). Thus, for example, county courts in Colorado do not have authority to try title to land in forcible entry and detainer actions. C.R.S. Sec. 13-6-104(2) (1984 Cum. Supp.); Aasgaard v. Spar Consol. Mining & Dev. Co., 185 Colo. 157, 522 P.2d 726 (1974).

In determining whether the Water Judge had subject matter jurisdiction to render a decree for the Closed Basin Project, "reference must be made to the nature of the claim and the relief sought." In re Marriage of Stroud, supra, 631 P.2d at 171; see Great Western Sugar Co. v. Jackson Lake Res. & Irrigation Co., 681 P.2d 484, 494 (Colo. 1984). The application in Case No. W-3038 involved a determination of a conditional water right, C.R.S. Sec. 37-92-302(1)(a) (1984 Cum. Supp.), and sought a decree approving the application. See C.R.S. Sec. 37-92-302 to 305. It is beyond peradventure that the Water Judge for Water Division No. 3 had subject matter jurisdiction to make a determination with respect to a conditional water right to appropriate tributary ground water within that division. State of Colorado v. Southwestern Colo. W. Cons. Dist., 671 P.2d 1294, 1303, 1320 (Colo. 1983), cert. denied, 104 S.Ct. 1929 (1984). Section 37-92-

203(1), C.R.S. 1973 (1984 Cum. Supp.), confers "exclusive jurisdiction of water matters" upon the water judge within each division. A determination of a conditional water right to appropriate tributary ground water within the division involves a "water matter" over which the water judge has exclusive subject matter jurisdiction. Bubb v. Christensen, 200 Colo. 21, 610 P.2d 1343, 1346 (1980). Whether the resume-notice was adequate is another question, but there can be no argument that the Water Judge had subject matter jurisdiction to render a decree for the Closed Basin Project in the sense of competence or authority to act in the general type of case.[8]/

Landowners concedes that the Water Judge had jurisdiction over the general subject of water matters, Landowners' Brief at 25, but argues that the failure to specify locations of points of diversion or quantities of water to be withdrawn from the proposed wells "destroys subject matter jurisdiction and also defeats the notice necessary for personal jurisdiction and due process." Id. at

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8/ The application stated that the source of water for the Closed Basin Project was the sump area of the Closed Basin, "not tributary to any stream." (2, 355, ¶5). However, the resume-notice merely stated: "Location of source is the sump area of the Closed Basin." (2, 359). Since the resume-notice failed to state that the source was nontributary, the Water Court could not enter a decree finding the source to be nontributary. Stonewall Estates v. C.F.& I. Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979). Subsequently, the Water Court found that the unconfined aquifer, together with its inflow tributaries, constitute a natural stream system subject to appropriation under the Colorado Constitution. (2, 452, ¶6). Since this finding was consistent with the resume-notice, no republication was required.

26. This argument confuses subject matter jurisdiction with adequate notice. Compare Restatement (Second) of Judgments Sec. 11 (1982) (subject matter jurisdiction) with id. Sec. 2 (adequate notice) and Sec. 10 (contesting notice). However, Landowners'argument is academic if the resume-notice in Case No. W-3038 was adequate to comply with the requisites of due process and the 1969 Act. For that reason, we turn to Landowners' argument that the notice was inadequate.

V. THE RESUME OF THE DISTRICT'S APPLICATION CONVEYED SUFFICIENT INFORMATION TO GIVE INTERESTED PERSONS FAIR NOTICE OF THE NATURE OF THE CLAIM. NOTHING MORE WAS REQUIRED AS A MATTER OF DUE PROCESS OR BY THE 1969 ACT.

The heart of Landowners' argument is the contention that the resume-notice in Case No. W-3038 was inadequate because it did not provide a legal description for each individual well location within the tracts of land described in the resume-notice and did not specify an individual pumping rate for each well. Landowners' Brief at 9-23. The Water Court concluded that this argument was without merit, as should this Court.

A. As A Matter Of Due Process, The Information Which Must Be Conveyed In The Published Notice Is Based Upon A Test Of Reasonableness, Taking Into Account The Circumstances Of Each Case.

Landowners begins its arguement with the premise that because service by publication is allowed in water right determinations in Colorado, the resume-notice requirements of the 1969 Act must be followed "exactly." Landowners'

Brief at 11. This premise cannot be accepted. Notice by publication is permitted in water right determinations in Colorado as a matter of practical necessity. The cost of water right determinations would be prohibitive if personal service were required on all persons whose water rights were potentially affected. To interpret the resume-notice requirements of the 1969 Act in a hyper-technical manner without regard to the reasonableness of the notice under the circumstances of a particular case would frustrate the compelling need for certainty in decrees adjudicating water rights. See, e.g., Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594, 600 (Colo. 1984); Ground Water Comm'n v. Shanks, 658 P.2d 847, 849 (Colo. 1983); United States v. City and County of Denver, 656 P.2d 1, 4 n.1 (1982).

As the Water Court recognized, the starting point in considering Landowners' argument on the adequacy of notice is the leading case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which held:

> "The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.' The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." (Citations omitted, emphasis added.)

339 U.S. at 314-315.[9]/ Thus, as a matter of due process, the issue in this appeal boils down to whether the resume-notice reasonably conveyed the required information with due regard for the practicalities and peculiarities of the case. See Restatement (Second) of Judgments Sec. 2, comment b at 36 (1982).

As Mullane teaches, there is no litmus test for judging the "required information" which must be conveyed in the resume to satisfy the constitional requisites of due process, since the notice must be tailored to meet the circumstances of the particular case. However, reference to Colorado Rules of Civil Procedure is helpful to define the required information for a particular case. Under Rule 8(a), a pleader need not set forth the facts with particularity, but need only apprise adverse parties of the nature of the claim:

> "As said of the federal rule from which ours was adopted, 'The Courts have recognized that the function of pleadings under the Federal Rules is to give fair notice of the claim asserted so

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9/ Landowners quotes a portion of this passage in its brief at page 9, but omits the second and third sentences quoted above relating the content of the notice. Instead, Landowners quotes portions of the opinion relating to the manner of giving notice which are not relevant to its appeal. AZL's argument that the resume-notice procedures of the 1969 Act were inadequate to acquire jurisdiction over it, based on Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), is addressed in Section VII of this brief.

> as to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought, so that it may be assigned to the proper form of trial.' As Judge St. Sure said in one of the first decisions under the Rules, 'The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required.'" (Emphasis added.)

Smith v. Mills, 123 Colo. 11, 225 P.2d 483, 484 (1950); accord Conley v. Gibson, 355 U.S. 41, 47 (1957); 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil Sec. 1202 at 60 (1969); 2A Moore's Federal Practice, ¶8.13 (2d ed. 1984). Under the Rules, the burden of filling in the details is left to the discovery process. Conley v. Gibson, supra, 355 U.S. at 47; Reed v. Board of Educ., 460 F.2d 824, 826 (8th Cir. 1972); 5 C. Wright & A. Miller, supra, Sec. 1215 at 110.

The "required information" under the Mullane standard for notice can be no more stringent than information required under the "fair notice" standard of Rule 8(a), for it would make no sense to hold that a complaint gives fair notice of a claim for the purposes of setting forth a claim for relief under Rule 8(a), but is inadequate to give notice as a matter of due process. Thus, cases interpreting Rule 8(a) provide guidance on notice legally adequate for the purpose of due process. Under the "fair notice" standard of

Rule 8(a), the application and the published resume in Case No. W-3038 were fully adequate to apprise interested persons of the nature of the District's claim.10/

The published notice of the District's application stated that the nature of the appropriation was the "salvage of waters" to be accomplished by so spacing wells within two large tracts of land "as to lower the entire water table within the tracts." (2, 353-354). The published resume gave fair notice that the points of proposed diversion would consist of the entire area of Tract A and the entire area of Tract B, that the water would be withdrawn by means of wells within the shallow or unconfined aquifer, that the wells would be so spaced as to lower the entire water table within the two tracts to preclude loss of water through surface evaporation and evapotranspiration in the sump area of the Closed Basin, and that the total amount of water claimed was 277 cfs. Furthermore, one of the peculiarities of the District's claim was that it did not seek individual appropriations through wells, but claimed the entire area of Tract A and the entire area of Tract B as the points of

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10/ The same standard has been used to determine the adequacy of notice under other rules. See Garcia v. Board of Educ., 573 F.2d 676, 678 (10th Cir. 1978) (notice which set out the various parties and the claims they asserted was clearly sufficient to meet due process notice requirements in class action); Philadelphia Housing Auth. v. Am. Radiator & Standard Sanitary Corp., 323 F.Supp. 364, 378 (E.D. Pa. 1970) (notice of settlement of class action under Rule 23(e) must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings").

proposed diversion. Thus, the application and the published resume gave fair notice of the District's claim. Nothing more was required as a matter of due process.11/

B. The 1969 Act Does Not Impose A Higher Standard Of Notice In This Case.

Landowners' argument that the 1969 Act requires a specific legal description for each proposed well location is based on a misreading of the Act. The resume-notice procedures of the 1969 Act have been described in several cases. E.g., Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594, 601 (Colo. 1984); Gardner v. State, 614 P.2d 357, 359 (Colo. 1980). C.R.S. Sec. 37-92-302(3)(a) provides that the water clerk shall prepare a resume of all applications in the water division filed during the preceding month, "which shall give the name and address of the applicant, a description of the water right or conditional water right involved, and a description of the ruling sought." This section does not require a specific legal description for each proposed well location.

11/ Cases which have held that a published notice was inadequate have been cases in which there was a serious omission of material information from the notice, e.g., Danielson v. Jones 698 P.2d 240 (Colo. 1985) (resume failed to include use for fish culture and storage purposes); Stonewall Estates v. C.F.& I. Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979) (resume failed to mention that nontributary water was involved); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (notice failed to apprise utility customer of right to present objections), or cases in which a property description was so vague or complex as to be meaningless, e.g., Aalwyns Law Inst. v. Martin, 173 Cal. 21, 159 P. 158 (1916). Here the resume-notice contained an adequate property description of Tract A and Tract B, by section, range, and township.

Rather, it specifies that the resume shall give a "description of the ... conditional water right involved," which is exactly what the resume of the application of Case No. W-3038 did.

Landowners, however, argues that the requirement of a legal description of each well location has to be read into Sec. 37-92-302(3)(a) because Sec. 37-92-302(2) (1984 Cum.Supp.) states that the standard forms prepared by the water judges shall require "a legal description of the diversion or proposed diversion." Landowners' Brief at 11. Landowners states that the application form adopted by the Water Judge for Water Division No. 3 requires that the location of a well be specified in terms of the number of feet from north-south and east-west section lines. Id. Therefore, Landowners argues that the District's application was not sufficient to satisfy the requirements of the 1969 Act. This argument is without merit.

Section 37-92-302(2) (1984 Cum. Supp.) provides that in the case of applications for a determination of a water right or a conditional water right, the standard forms shall require, among other things, "a legal description of the diversion or proposed diversion." The District's application and the resume of the application did contain a legal description of the proposed diversion. As plainly stated in the application and the published resume, the District claimed a conditional water right for which the entire area of Tract A and the entire area of Tract B were the points of

proposed diversion, and the published resume contained a legal description of Tract A and Tract B, by section, range, and township. Thus, the published resume fully complied with the requirements of the 1969 Act for describing the conditional water right involved.

As for the form referred to by Landowners, it is a form used in Water Division No. 3 for "domestic and other small wells." (1, 14). Even if it had been applicable in the District's application, which it was not, Landowners ignores Rule 90 of the Colorado Rules of Civil Procedure which gives the Water Judge discretion to accept an application which is not in conformity with the forms adopted by the water judges if "strict conformity may be unsuitable, prejudicial, or impose an unreasonable burden." Rule 90 thus recognizes what Landowners does not, namely that the required information which must be conveyed in the resume-notice is not a formalistic test, but a practical one, giving due regard to the "practicalities and peculiarities of the case." Mullane, supra, 339 U.S. at 314-315; cf. City and County of Denver v. Colo. River Water Conservation Dist., 696 P.2d 730, 747 n. 13 (Colo. 1985).12/

It should be noted that an argument similar to the one raised by Landowners in this case was rejected by this Court in Pueblo West. In that case, the Southeastern Colorado

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12/ For example, not every water right in Colorado involves a diversion in the conventional sense. Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd., 197 Colo. 469, 594 P.2d 570 (1979).

Water Conservancy District ("Southeastern") filed an application in 1980 for a determination that conditional water storage rights decreed for Pueblo Reservoir in 1962 and Turquoise Lake in 1969, as modified by a change of water right decree, had become partially absolute. 689 P.2d at 598. The two conditional storage decrees stated that the source of water was the Arkansas River and its tributaries, but also contained exchange provisions which decreed the right to store waters from the Arkansas River in substitution for waters from the Colorado River tributaries decreed for storage in the two reservoirs and introduced into the Arkansas River. Id. at 597. With regard to Southeastern's 1980 application for partial absolute decrees, the Referee found that the point of origin of the water stored by Southeastern, excluding water stored for flood control, was the Colorado River rather than the Arkansas River and its tributaries. Id. at 598. The protestants claimed that the resume-notice of the 1980 application was inadequate because the water stored came from a source other than that stated in the resume-notice, id. at 602, which had described the source by reference to the 1962 and 1969 conditional storage decrees. Id. at 598. The protestants argued that the notice was defective because the two conditional decrees did not describe the "source" of the water as that term is used in Sec. 37-92-302(2) of the the 1969 Act. Id. at 602. This Court held that it was unnecessary to decide the meaning of the word "source" because the protestants' focus on the des-

criptions in the conditional decrees was "too narrow" and that the decrees had to be read in their "entirety." Id. When so read, the Court concluded that the conditional storage decrees "adequately and correctly" described their sources and, therefore, that

> "because the language of those conditional decrees was broad enough to encompass storage of western slope [Colorado River] water in exchange for eastern slope [Arkansas River] water, the resume, which made reference to those decrees, was sufficient to put interested persons on notice of the absolute storage rights sought by Southeastern as to Turquoise Lake and Pueblo Reservoir."

689 P.2d at 601.

In Pueblo West, this Court held that a description of the source of the water cannot be read too narrowly, but has to be read in its entirety. The description of the proposed diversion in the instant case easily meets the Pueblo West test. When read in its entirety, the resume put interested persons on notice that the District claimed a conditional water right for which the entire area of Tract A and the entire area of Tract B were points of proposed diversion, and the resume contained a legal description of Tract A and Tract B. Further, the resume stated that the salvage of water was to be accomplished by the construction of approximately 150 wells so spaced within the tracts as to lower the entire water table within both tracts. Thus, when read in its entirety, the resume was fully adequate to describe the proposed diversion.

In conclusion, whether judged by the Mullane standard or the requirements of the 1969 Act, the resume-notice in Case No. W-3038 was adequate.

C. The Adequacy Of Notice In Case No. W-3038 Was Actually Litigated In That Case And The Court's Ruling That The Resume Provided Proper And Sufficient Notice Is Entitled To Deference Because Of The Substantial Reliance On The Decree.

Underlying Landowners' notice argument is the contention that it was necessary for its members to know the legal description of each well to be constructed as part of the Closed Basin Project in order to ascertain whether their interests or water rights would be affected by the District's conditional water right. This contention was considered by the Water Judge during the proceedings in Case No. W-3038 and found to have no merit under the facts of this case.

The District's position throughout Case No. W-3038 was that it did not claim a conditional water right for each well as a separate point of diversion. When the Referee suggested that the District should amend the application to specify well locations and republish the application, the District responded:

> "The concept of the Closed Basin Project, therefore, is not that of a series of independent diversions through individual wells acting as separate points of diversion. It is a single appropriation, because it depends upon a lowering of the water table under substantially the entire project area, accomplished through the strategic location of wells for the withdrawal of water to achieve the desired pattern of lowered water table. For the same reason, the point of diversion is the entire project area, not the individual well sites." (Emphasis added.)

(2, 381). The Water Court's order denying further notice to landowners within the boundary of the Closed Basin Project or, in the alternative, republication of the resume, made an explicit finding that "the original resume publication provided proper and sufficient notice." (2, 397). Thus, the adequacy of notice was actually litigated in Case No. W-3038. The Water Judge's finding that the notice was adequate is res judicata and binding upon parties to Case No. W-3038. Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775, 779 (1962); Durfee v. Duke, 375 U.S. 106, 110 n. 6 (1963). While the Court's order may not be res judicata on all members of Landowners,[13]/ it is entitled to deference for two reasons.

First, it would be highly prejudicial to the District, the CWCB, and the United States, if this Court were to reverse the Water Judge's ruling on the adequacy of notice some eight years later. In reliance upon the decree entered by the Water Court, the United States Congress has appropriated more than $57,000,000 for construction of the project, and construction of stages 1 and 2 of the project have been completed. (1, 224-225). Thus, vacating the decree would have serious consequences for those who have detrimentally relied upon the decree.

13/ Some, but not all, members of Landowners were members of the Closed Basin Protective Association which filed a statement of opposition in Case No. W-3038. (2, 364).

Second, there is a compelling need for finality in decrees adjudicating water rights, which has recently been stressed by both this Court and the United States Supreme Court. Pueblo West, supra, 689 P.2d at 600; Ground Water Comm'n v. Shanks, 658 P.2d 847, 849 (Colo. 1983); Arizona v. California, 460 U.S. 605, 620 (1983).

Nor is there any reason to reverse the Water Judge's rulings on the adequacy of notice. As a matter of due process, the published resume need do no more than put interested persons on notice of the nature of the claim "with due regard for the practicalities and peculiarities of the case." One of the "peculiarities" of the District's application was that the District sought to salvage waters by lowering the entire water table under two large tracts of land. The resume was fully adequate to apprise the members of Landowners of the nature of that claim, the location of the tracts, the total amount of water claimed, and the effect on the water table. Nothing more was required as a matter of due process or under the 1969 Act.14/

Furthermore, as the Water Judge noted, if a legal description of the individual well locations were necessary to determine if a proposed well would cause injury to exist-

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14/ Moreover, considering Landowners' argument from the standpoint of what a prudent person would ordinarily do in the conduct of important affairs, Mullane, supra, 339 U.S. at 320, it is simply not plausible that members of Landowners could not ascertain whether their interests or water rights would be affected by the District's application. The large number of objectors and entrants belies Landowners' contention that the resume-notice failed to give adequate notice of the District's claim.

ing water rights, it would void numerous decrees of water courts approving plans for augmentation. (1, 225-226). The reason that plans for augmentation do not always specify the legal description of proposed wells is obvious to anyone familiar with such plans. Many involve water supplies for subdivisions in which the final platting for the subdivision is not complete at the time of the application; thus, the location of individual lots and the location of proposed wells may be changed. E.g., Kelly Ranch v. Southeastern Colo. Water Conservancy Dist., 191 Colo. 65, 550 P.2d 297, 299 n. 2 (1976). Nevertheless, the decrees demonstrate that the water courts can determine whether the vested rights of others will be injured by a plan for augmentation without a legal description of each proposed well. In other words, owners of water rights and conditional water rights know that the wells will be spaced throughout a described tract of land. Such applications, like the District's application, are adequate to give fair notice of the nature of the claim. As the Court stated in Mullane:

> "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirement, having reference to the substance with which the statute deals."

339 U.S. at 315, quoting American Land Co. v. Zeiss, 219 U.S. 47, 67 (1911) (emphasis added).

VI. THE AFFIDAVITS SUBMITTED BY LANDOWNERS AND AZL DO NOT RAISE A GENUINE ISSUE OF MATERIAL FACT.

Both Landowners and AZL challenge the Water Court's summary judgment order of November 29, 1984, dismissing the amended complaint on the grounds that there were genuine issues of material fact which precluded the entry of summary judgment. Landowners asserts that matters set forth in the affidavits of Brent E. Spronk and Larry C. Nix submitted in opposition to the motion for summary judgment demonstrate that issues of fact exist regarding the adequacy of notice in Case No. W-3038. Landowners' Brief at 7. AZL makes a similar argument based on a deposition by Lindell C. Elfrink. AZL Brief at 8. These arguments are without merit. Further, Elfrink's desposition was not taken in this case and was not submitted to the Water Court prior to the entry of summary judgment.[15]/

According to his affidavit, Mr. Nix reviewed the resumes of all applications filed in Water Division No. 3 during the year 1972. (1, 129, ¶2). Mr. Nix stated that he had classified the legal description of wells in some 2,621 applications for underground water rights in which adjudication was sought for 9,779 wells. (1, 129, ¶3). The

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15/ AZL's brief is utterly disingenuous on this point. At page 8 of its brief, AZL asserts that it submitted affidavits in response to the motion for summary judgment. In the next sentence, AZL states: "In his deposition, Elfrink openly admitted ...," implying that Elfrink's deposition was taken in this case and submitted in response to the motion for summary judgment, which is not the case.

summary attached to his affidavit shows that a high percentage of the wells were described by distance and bearing or feet from a section line or by a quarter-quarter description. (1, 133).

While the District, the CWCB, and the United States do not challenge the accuracy of Mr. Nix's summary, it is not material to the issue in this case. As the Water Court found, an unusually large number of applications was filed in 1972 to adjudicate water rights diverted by means of wells to take advantage of the "grandfather" provision in C.R.S. Sec. 37-92-306, which allowed underground water rights to obtain a priority as of the date of the actual appropriation if the application was filed no later than July 1, 1972. (1, 227). For the most part, applications for underground water rights filed in 1972 were to adjudicate wells which had already been constructed. In such cases, the applicants claimed a water right diverted by means of an individual well; therefore, there was no reason the applicants could not specify the legal description of the well by distance and bearing or feet from a section line or by a quarter-quarter description.

The District's application in Case No. W-3038 was unique, however, in that it did not seek individual appropriations through wells. The application and the published resume plainly stated that the proposed points of diversion consisted of the entire area of Tract A and the entire area of Tract B of the project. (2, 352, 359). Thus, to compare

the District's application to other applications filed in 1972 to adjudicate water rights diverted by means of wells is to compare apples and oranges. The more relevant comparison is to applications for approval of plans for augmentation involving the construction of a large number of wells in subdivisions. As noted above, water courts have approved numerous plans for augmentation in which the applications did not specify a legal description for proposed wells with the degree of specificity which Landowners maintains is necessary in this case.16/ Thus, even if the Nix affidavit establishes that there was a "customary" well location description used to give notice of other applications filed in 1972 in Water Division No. 3, it is not material to the adequacy of notice in Case No. W-3038 because the other applications filed in 1972 were not similar to the District's application. Regardless of the "customary" method of description which may have been used for other applications, the adequacy of the resume-notice in Case No. W-3038 must be decided with due regard for the practicalities and peculiarities of the District's application. Mullane, supra, 339 U.S. at 314-315; C.R.C.P. 90.

16/ Decrees and pleadings in the court files are subject to judicial notice. E.g., Doll v. McEllen, 21 Colo. App. 7, 121 P. 149 (1912); see also State of Colorado v. Southwestern Colo. Water Cons. Dist., 671 P.2d 1294, 1312 n.27 (Colo. 1983), in which the Supreme Court took judicial notice of the fact that decrees had been entered by the Water Judges for nontributary groundwater even though the decrees were not before the court.

The Spronk affidavits likewise fail to raise a genuine issue of material fact.[17] Mr. Spronk stated that in his opinion as a registered professional engineer "a high standard of accuracy in describing the location of proposed wells in an application for underground water rights is necessary in order for other water right owners to properly protect their water rights...." (1, 174, ¶3; 178, ¶3). Mr. Spronk then goes on to state that, in his opinion, in an aquifer such as the unconfined aquifer of the closed basin, 1) any description less precise than by quarter section does not meet his minimum standard and is inadequate notice to other owners of water rights (1, 179, ¶6), and 2) description of the total amount of water claimed from all wells, collectively, does not meet his minimum standard and is inadequate notice to other owners of water rights. (1, 176, ¶6).

The Spronk affidavits do not raise a genuine issue of material fact because the adequacy of the notice in Case No. W-3038 is a question of law for the Court to determine based upon the constitutional requisites of due process and the requirements of the 1969 Act. See, e.g., Mullane, supra;

17/ There are two Spronk affidavits. One was signed May 28, 1982, and was submitted in oposition to the District's original motion to dismiss or for summary judgment. The Water Court denied the District's motion in order to give the Plaintiffs and AZL an opportunity to present all the claims they wished to assert. (1, 213). Thereafter, the District, the CWCB, and the United States moved for summary judgment. The May 28, 1982 affidavit and a new affidavit signed May 3, 1984, were submitted in opposition to the motion. (1, 174-176).

Pueblo West Metropolitan Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594, 601 (Colo. 1984); Stonewall Estates v. C.F.&I. Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979). Merely because Mr. Spronk states that, in his opinion, the notice is inadequate does not create a genuine issue of material fact. In Pueblo West, this Court rejected a similar argument as "utterly devoid of merit" and pointed out that "[t]he real core of protestants' argument is that the Water Court erred as a matter of law in entering a summary judgment in favor of Southeastern." 689 P.2d at 599 n. 7 (emphasis in original).[18]/ In Pueblo West, the protestants argued that the Water Court had improvidently granted summary judgment on the grounds that there was a genuine issue of material fact concerning the adequacy of notice of the water rights which the Southeastern Colorado Water Conservancy District sought to make absolute in an application for partial absolute storage decrees. 689 P.2d at 600. After reviewing the principles relating to summary judgments and the notice requirements of the 1969 Act, this

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18/ Cf. Roberts v. May, 41 Colo.App. 82, 583 P.2d 305, 307 (1978), holding that the doctrine of strict liability applies to an automobile design defect. Unlike Roberts v. May, the Spronk affidavit does not raise a factual question about the reasonableness of notice in Case No. W-3038 because Mr. Spronk merely offers his opinion on what the standard of notice should be and then states that the notice failed to meet that standard. His opinion on what the standard of notice should be is no more relevant than is an expert's opinion that the doctrine of strict liability should apply in a given case. See Alamosa-La Jara Water Users Protective Ass'n. v. Gould, 674 P.2d 914, 929 (Colo. 1984) (court deference to policy determinations in rule-making proceedings does not extend to questions of law).

Court held that "the resume ... was sufficient to put interested persons on notice of the absolute storage rights sought by Southeastern ...." Id. at 601. The Court made it patently clear that the adequacy of the notice was a matter of law to be determined by the Court, not a question of fact. Id. at 599 n. 7. Any other conclusion would place applicants in an intolerable position. Any person who had not participated in a water court proceeding could later file an action to set aside the decree as void and allege there was a genuine issue of material fact concerning the adequacy of the notice, thereby throwing a cloud over the decree. This would undermine the finality of water right adjudication decrees.

VII. AZL'S ADDITIONAL ARGUMENTS ARE UNTIMELY AND WITHOUT MERIT IN ANY EVENT.

Having disposed of arguments by Landowners, we next turn to the arguments advanced by AZL.

A. AZL Waived Any Challenge To Insufficiency Of Process By Submitting To The Jurisdiction Of The Water Court And Failing To Raise The Issue In A Timely Manner.

AZL argues that resume-notice procedures of the 1969 Act were inadequate to acquire jurisdiction over it because the names and addresses of all landowners upon whose lands wells were to be located for the Closed Basin Project were known and reasonably ascertainable, including those of AZL. AZL Brief at 5-6. AZL therefore maintains that it was entitled to notice by mail or other means as certain to

ensure notice as a matter of due process under the U.S. Supreme Court's decision in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

There is no question that the Water Court must have had jurisdiction over AZL if the decree in Case No. W-3038 is to be binding on it. In re Marriage of Stroud, 631 P.2d 168, 170 (Colo. 1981).[19]/ AZL, however, failed to raise a timely challenge to the validity of the resume-notice procedures of the 1969 Act as the method of providing notice to it in Case No. W-3038. At no time prior to filing its reply brief in support of its motion to alter or amend the Water Court's summary judgment did AZL suggest that the statutory resume-notice procedures were not adequate as a means to apprise it of the pendency of the proceedings in Case No. W-3038 and of its opportunity to appear and present objections. Under the facts of this case, AZL waived any challenge to the validity of the resume-notice procedures. Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594, 602 n. 9 (Colo. 1984); Restatement (Second) of Judgments, supra, Sec. 10.

Unlike lack of jurisdiction over the subject matter, the defense of insufficiency of process may be waived. C.R.C.P. 12(h)(1). The judgment in this case was entered on November 29, 1984, after a hearing on a motion for summary

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19/ Although the adjudication of water rights in Colorado has been characterized as an in rem proceeding, a judgment in rem affects the rights of persons with respect to property and is not merely a proceeding against the property itself. Shaffer v. Heitner, 433 U.S. 186, 205-206 (1977).

judgment filed under Rule 56. Therefore, AZL could have appealed that judgment without the necessity of filing a motion to alter or amend the judgment. C.R.C.P. 59(h).[20] Had AZL simply appealed the Water Court's judgment rather than filing a motion to alter or amend, it could not have raised a challenge to the resume-notice procedures as a method of providing notice since it had failed to raise the issue in the Water Court. Pueblo West, supra, 689 P.2d at 602 n. 9.[21] When a party elected to file a motion to alter or amend, Rule 59(f) at that time provided that "only questions presented in such motion will be considered by the appellate court on review." Since AZL failed to challenge the validity of the resume-notice procedures as a method of providing notice in its motion to alter or amend, AZL could not raise the issue on appeal. C.R.C.P. 59(f); Wagner v. Allen, 688 P.2d 1102, 1109 (Colo. 1984). In other words, insufficiency of process is a waivable defense; AZL waived any challenge to the validity of the resume-notice procedures by appearing in this case, submitting to the juris-

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20/ C.R.C.P. 59 was repealed and reenacted effective January 1, 1985. However, AZL's motion to alter or amend was filed on December 14, 1984 (1, 231), and was therefore subject to the provisions of Rule 59 prior to amendment.

21/ Prior to AZL's reply brief in support of its motion to alter or amend, neither Landowners nor AZL ever contended that they had not received actual notice of the District's application, only that the resume was inadequate to apprise them of the nature of the claim.

diction of the Court, and failing to raise that issue in a timely manner. See Weaver Construction Co. v. District Court, 190 Colo. 227, 545 P.2d 1042, 1046 (1976).

B. Owners Of Land Upon Which Wells Are To Be Located Did Not Have Property Interests Which Would Have Been Significantly Affected By The Decree For The Closed Basin Project.

Even if AZL were not barred from challenging the validity of the resume-notice procedures as a means of providing notice to it in Case No. W-3038, the basic fallacy in AZL's argument is that it confuses landowners upon whose lands wells are to be located with owners of water rights and conditional water rights entitled to notice in water adjudication proceedings. Under Mullane and subsequent cases, including Mennonite Board, the U.S. Supreme Court has said that "prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Mennonite Board, supra, 462 U.S. at 795, quoting from Mullane, supra, 339 U.S. at 314.

Under the Mullane analysis, the party claiming a right to notice must possess an interest that will be significantly affected in the proceeding. Mennonite Board, supra, 462 U.S. at 798. The owners of lands upon which wells are to be located for the Closed Basin Project are not by that fact

alone the owners of water rights or conditional water rights. In Colorado, ownership of land does not carry with it the ownership of rights to tributary ground water. State of Colorado v. Southwestern Colo. Water Conservation Dist. ("Huston"), 671 P.2d 1294, 1304-1308, 1316-1317 (Colo. 1983), cert. denied, 104 S.Ct. 1929 (1984). Nor does a water right adjudication in Colorado determine a landowner's right to damages for trespass or compensation for the condemnation of a right-of-way to construct diversion and transportation facilities. Bubb v. Christensen, 610 P.2d 1343, 1346-1347 (Colo. 1980). Since a decree for a conditional water right in Colorado merely confirms an existing right, Cline v. Whitten, 144 Colo. 126, 355 P.2d 306, 307 (1960), a decree for a conditional water right does not create the right to condemn a right-of-way. Thus, the owners of lands upon which wells are to be located for the Closed Basin Project did not have property interests which would have been significantly affected by the water adjudication proceeding and, therefore, were not entitled to personal service or service by mail. In re State of South Dakota Water Mgmt. Bd., 351 N.W.2d 119, 123 (S.D. 1984).

C. AZL's Contention That The Water Which Was The Subject Of The Decree In Case No. W-3038 Is Nontributary Is Barred By The Statute Of Limitations And Is Based On A Misunderstanding Of The Law In Any Case.

Second, AZL argues that the Court lacked "jurisdiction" in Case No. W-3038 because the resume-notice failed to mention the nontributary character of the water which was

the subject of the Water Court's decree. AZL Brief at 7. This argument is cockeyed. There is no "jurisdictional" problem when the water court enters a decree consistent with the resume-notice. The real core of AZL's argument is that the decree is erroneous in finding that the water which was subject to the decree is tributary ground water, subject to appropriation. This was an argument which AZL failed to raise in a timely manner.

On June 18, 1984, more than three years after the decree for the Closed Basin Project had been entered, AZL filed a motion to amend its petition to correct substantive errors in the decree under C.R.S. Sec. 37-92-304(10), contending for the first time that the water of the closed basin which was the subject of the decree in Case No. W-3038 was "nontributary water, and not subject to administration under Article 92." (1, 187).

On July 10, 1984, the Water Judge denied the motion to amend on the grounds that the petition which AZL sought to amend had been voluntarily withdrawn at the hearing on September 16, 1982, and because the motion was not timely. (1, 210, 212-213). AZL raised the issue again in its motion to alter or amend. (1, 231). Attached to AZL's brief in support of its motion to amend was a copy of a deposition of Lindell H. Elfrink, project engineer for the Closed Basin Project, taken in a condemnation action filed by the United States in federal district court. (1, 232, 241-274). This argument is barred by the three-year statutory period of

limitations. Pueblo West, supra, 689 P.2d at 600. The Water Court plainly had jurisdiction to determine whether the water which was the subject of the Court's decree was tributary or nontributary. Huston, supra, 671 P.2d at 1315. Therefore, having determined that the unconfined aquifer of the Closed Basin, together with its inflow tributaries, constitutes a natural stream system subject to appropriation under the Colorado Constitution, any substantive challenge to the judgment is now barred. Pueblo West, supra; Southeastern Colo. Water Conservancy Dist. v. Rich, 625 P.2d 977, 979 (Colo. 1981); Ray G. Slane et al. v. Rio Grande Water Conservation Dist., No. 84-M-1062, slip op. at 2, (D.Colo. Dec. 4, 1984), a copy of which is attached as Exhibit A.[22] Thus, the essential premise of AZL's argument -- that the water which was the subject of the decree in Case No. W-3038 is nontributary -- is defeated by the res judicata effect given to the decree in Case No. W-3038.[23] Furthermore, the argument is predicated on a deposition which is not admissible or material.

22/ Two of the individual Plaintiffs in this case, Ray G. Slane and Allen Beard, subsequently filed an action in U.S. District Court for Colorado seeking compensation for a taking of the "nontributary" ground water beneath their lands for the Closed Basin Project. Ray G. Slane, et al. v. Rio Grande Water Conservation Dist., No. 84-M-1062. The District Court entered an order on December 4, 1984, dismissing the claim on the grounds that the decree in Case No. W-3038 was res judicata as to the tributary nature of the water appropriated for the project.

23/ A judgment in an in rem action, which is intended to be binding against the whole world, is conclusive as to the matters determined, even as to nonappearing parties. Restatement (Second) of Judgments, supra, §30.

Rule 804(b)(1), C.R.E., provides that testimony given in a deposition taken in the course of another proceeding may be admissible under certain circumstances "if the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Neither the District nor the CWCB was a party to the federal court action in which Mr. Elfrink's deposition was taken and, thus, had no opportunity to develop or clarify his testimony. Further, the United States had no motive to develop Mr. Elfrink's testimony. The questions put to Mr. Elfrink concerning the tributary or nontributary character of water in the closed basin were in the context of eliciting a "helpful ... background description of the Project." (1, 243:5-6). There was no reason for the United States' attorney to suspect that the questions were asked for any purpose other than background information about the Closed Basin Project. Thus, since the United States had no motive to develop Mr. Elfrink's testimony, the deposition was not admissible. In any event, the deposition does not establish that the water which was subject to the decree in Case No. W-3038 was nontributary.

AZL incorrectly assumes that whether ground water is "tributary" or "nontributary" is simply a question of fact. AZL Brief at 7. To the contrary, the classification of ground water as "tributary" or "nontributary" is a legal classification, based on statutes and case law. Huston,

supra, 671 P.2d at 1300 n.2; see C.R.S. Sec. 37-90-103(10.5) (added by Senate Bill No. 5, Colo. Sess. Laws, 1985, Ch. 285, §1, p. 1161). AZL makes the same mistake made by the applicant in Giffin v. State of Colorado, 690 P.2d 1244 (Colo. 1984). In Giffin, the applicant contended that water transpired by plant life was "nontributary" because it did not find its way to the stream. This Court pointed out that this was not the proper test for determining whether the water was tributary or nontributary:

> "Contrary to Giffin's assertion, the water saved is clearly tributary ground water under the relevant statutes ....
>
> ... [W]hile it never reaches the aquifer, water lost through evapotranspiration is a factor in determining how much water, if any, will influence the aquifer from a particular area at a particular time. The water lost by evapotranspiration is an integral part of a single hydraulically connected system and must be regarded as tributary to the aquifer, and subsequently, to the stream ...."

Giffin, supra, 690 P.2d at 1247.

Mr. Elfrink's statement that the water was not "tributary" to the Rio Grande was made in response to a question about whether the water would "flow on the surface" to the Rio Grande. (1, 244:11-13). It was in that context that Mr. Elfrink testified that the water would not be "tributary" to the Rio Grande or any other stream. (1, 244:21-25). But, as is clear from Giffin, that is not the only basis on which water in Colorado is classified as tributary or nontributary. For example, C.R.S. Sec. 37-92-102(1)(b) (1984 Cum. Supp.) provides as follows:

> "A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation as provided in paragraph (a) of this subsection (1)."

Thus, the fact that water in the sump area of Closed Basin is lost to evaporation and does not "flow on the surface" to the Rio Grande or any other stream does not establish that the water is "nontributary" as a matter of law. Therefore, not only is Mr. Elfrink's deposition inadmissible, but it simply does not establish that the water which was the subject of the decree in Case No. W-3038 is "nontributary in every sense of the word." AZL Brief at 7.

Third, AZL argues that where the resume-notice of an application failed to give notice of the nontributary character of the water, the notice was inadequate as a matter of law. AZL Brief at 7. This argument is predicated on the assertion that "[i]t is simply a fact that the water which was subject to the application in Case No. W-3038 is nontributary in every sense of the word." Id. Since the finding of the Water Court in Case No. W-3038 that the water of the unconfined aquifer is tributary ground water subject to appropriation is res judicata, AZL's argument falls for lack of a premise.

D. The Shelton Farms Doctrine Does Not Preclude The Award Of A Decree For A Conditional Water Right Based On Salvage Of Water In The Priority System.

Finally, AZL argues that even if the waters of the Closed Basin were tributary and the resume-notice was adequate, the application in Case No. W-3038 should have been denied on the basis of the Shelton Farms doctrine. AZL Brief at 8-9. See Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc., 187 Colo. 181, 529 P.2d 1321 (1975). This argument too was first raised by AZL in its motion to alter or amend after the Water Court granted summary judgment on the adequacy of notice. (1, 231). By conceding that the resume-notice is adequate, AZL admits that the Water Court had jurisdiction to enter the decree. Therefore, any factual or legal infirmity in the decree is foreclosed by the three-year statute of limitations in C.R.S. Sec. 37-92-304(10). Pueblo West, supra. However, AZL's argument is spurious in any event. In RJA, Inc. v. Water Users Ass'n of District No. 6, 690 P.2d 823 (Colo. 1984), this Court held that the reduction of historical consumptive use of tributary water by alteration of natural conditions could not be the basis for a developed water right free from the priority system. The decree in Case No. W-3038 awarded a conditional water right to salvage tributary water in the priority system. Nothing in Shelton Farms or RJA suggests that an appropriation could not be based in part or in whole on the salvage of tributary water in the

priority system. "Salvage" of tributary water in the priority system is simply the "maximum utilization" which Colorado law encourages. See Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914, 934-935 (Colo. 1983); Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288, 294 (1976).

CONCLUSION

The resume-notice of the District's application in Case No. W-3038 was fully adequate to apprise interested persons of the nature of the District's claim for the Closed Basin Project. No other challenge to the decree was raised within the three-year period of limitations in C.R.S. Sec. 37-92-304(10). Therefore, the judgment of the water court granting summary judgment and dismissing the amended complaint should be affirmed.

Respectfully submitted this 12 day of December, 1985.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned on the 2nd day of December, 1985, placed a true and correct copy of the within pleading in the United States mails, postage prepaid, addressed to:

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