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### 7 Utes Corp. v. District Court of Eighth Judicial Dist.

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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

AUG 21 1984

SUPREME COURT, STATE OF COLORADO

Case No. 84SA333

David W. Brezina

ORIGINAL PROCEEDING, DISTRICT COURT NO. 84CV4

-----  
ANSWER TO SHOW CAUSE  
-----

7 UTES CORP., a Colorado corporation,

Petitioner,

v.

THE DISTRICT COURT IN AND FOR THE EIGHTH JUDICIAL DISTRICT

(Jackson County, Colorado);

HON. JOHN A. PRICE, one of the judges thereof; and

STATE BOARD OF LAND COMMISSIONERS, ROWENA ROGERS, WM. H. CLAIRE,

and TOMMY NEAL, as members of and constituting the State Board  
of Land Commissioners;

ANTHONY SABATINI;

LARNED A. WATERMAN;

7 UTES RESORT LTD., a Colorado corporation;

MELVIN A. WOLF;

HARRY WOLF;

STATE BOARD OF AGRICULTURE;

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY;

OF JACKSON,

Respondents.  
-----

Respondents, State Board of Land Commissioners, Rowena  
Rogers, Wm. H. Claire, Tommy Neal, Anthony Sabatini, Larned A.  
Waterman, the District Court in and for the Eighth Judicial Dis-  
trict (Jackson County, Colorado) and Honorable John A. Price,  
through the undersigned assistant attorney general, answer the

order to show cause as follows:

NATURE OF THE ACTION BY THE DISTRICT COURT BELOW

On or about May 8, 1984, petitioner filed three actions in the Jackson County District Court: A complaint (attached to petitioner's petition as exhibit 1), a motion for preliminary injunction (attached hereto as exhibit A), and a temporary restraining order. The temporary restraining order was denied by Judge John A. Price by written order on May 11, 1984 (attached as exhibit B).

On June 5, 1984, respondents State Board of Land Commissioners, Rowena Rogers, Wm. H. Claire, Tommy Neal, Anthony Sabatini and Larned A. Waterman ("land board"), filed a motion for change of venue and brief in support of the motion. (Motion and brief are attached as exhibit C.)

On June 29, 1984, oral arguments were held before Judge Price. At the conclusion of the arguments, in a well-reasoned opinion Judge Price granted the motion to change venue and directed that case 84CV4 be transferred to the district court in and for the City and County of Denver.

## ARGUMENT

### I.

THE SUBSTANCE OF THE PLEADINGS, AND NOT THE FORM, SHOULD CONTROL THE DETERMINATION OF VENUE.

Petitioner characterizes the pleadings as "an action in rem." A careful reading of the motion for preliminary injunction and complaint reveals that the substance of these actions is injunctive relief. It is the substance of the action and not the form which controls the venue of the case. The Board of County Commissioners of the County of Eagle v. District Court, 632 P.2d 1017 (Colo. 1981).

#### A. Preliminary Injunction

The preliminary injunction, which was served with the complaint, requests the court to enjoin the land board from proceeding with a request for proposal or other bidding procedure on certain land in the State Forest. That motion specifically states that no claim for relief is made against the other defendants.

#### B. Complaint

The complaint contains four claims for relief. The first claim is entitled "Declaratory Judgment," but contains such re-

quests as:

31.E. Construction of the right of the land board to prevent reasonable use, or improvement, of the permit area by failing to approve and consent to any such use and improvement.

33. The Court should determine that the land board shall negotiate a reasonable lease with plaintiff, which lease shall permit development, operation and management of a destination, year-round recreational facility.

These are not in rem requests. Instead, petitioner is challenging the authority of the land board to determine the use of state property, and is asking the court for mandatory injunctive relief to force the land board to issue a lease.

The second claim is entitled "Breach of Contract" and asks for monetary relief in an amount exceeding \$23,550,641.42 for loss of future revenue. Petitioner specifically excludes all other defendants from this claim.

The third claim is entitled "Estoppel" and asks for an amount exceeding \$23,550,641.42 in damages and a determination that the land board is estopped from denying plaintiff a reasonable lease.

The fourth claim is entitled "Breach of Duty." Plaintiff alleges that it had been damaged by the land board's "breach of duty" in an amount exceeding \$23,550,641.42. Plaintiff asks for those damages and in addition asks for injunctive relief against

defendant Larned Waterman, a land board staff member, to prevent him from performing his duties as planner for the land board.

As stated in City and County of Denver v. Glendale Water and Sanitation District, 152 Colo. 39, 380 P.2d 553 (1963):

In ascertaining the venue of an injunctive proceeding, the court should probe for the primary purpose of the suit. If the suit for injunction is not ancillary - and in this case it is not -, and if the decree sought would operate as a restraint upon the person, it is clearly an action in personam. (Citations omitted).

Judge Price examined the above facts presented to him in the oral argument, and determined that:

Substance over form controls in this case and this is actually a case involving the plaintiffs and the Board of Land Commissioners; it involves a contract; it involves an attempt by the plaintiff in his complaint to say "Judge, they won't do what they are supposed to do and we want you to make them do it, and we want you to make them carry out the terms of the lease."

(Exhibit B, p. 8, lines 13-21).

Judge Price then held that C.R.C.P. 98b(2) applies. That rule requires that actions against a public officer for acts done by him or for a failure to perform any act or duty shall be tried in the county where the claim arose. For the land board, the claim arose in Denver, it's official residence. See, Denver Board of Water Commissioners v. Board of County Commissioners in the County of Arapahoe, 187 Colo. 113, 528 P.2d 1305 (1974) and

Colo. Const. art. VIII, secs. 2 and 3.

II. C.R.C.P. RULE 98(j) SHOULD NOT APPLY  
TO REQUESTS FOR CHANGE OF VENUE UNDER  
C.R.C.P. RULES 98(a) or (b)(2)

Petitioner argues that C.R.C.P. 98(j) prohibits a change of venue from Jackson County. That rule requires that the place of trial shall not be changed unless the motion is made by or with the consent of all plaintiffs or defendants. Judge Price determined that rule 98(j) did not apply in this action:

/t/he court is of the opinion that the provision that parties must agree on change, if it were interpreted any other way, would mean that somebody other than the rulemakers would have the right to determine venue just by inserting "defendants" prior to any determination as to the validity of those defendants being in the case or not, or whether they should be.

(Exhibit B, pp. 4-5, lines 20-25, 1-6). Judge Price expresses a rule of statutory interpretation in holding that 98(j) does not apply in the mandatory venue changes of rules 98(a) and 98(b). That rule of statutory interpretation states that two conflicting statutes should be reconciled so as to achieve a just and reasonable result. Section 2-4-201, C.R.S. (1973). It is not just nor is it reasonable to permit the defeat of mandatory venue change under rule 98(a) or rule 98(b) for the sole reason that a named defendant does not affirmatively consent. The reasonable, just

interpretation is that rule 98(j) applies only in discretionary change of venue such as rule 98(f)(2) (for convenience of witnesses).

In addition, at the time the motion to change venue was filed, defendants 7 Utes Resort, Ltd., Melvin Wolf, Harry Wolf and the State Board of Agriculture had not been served with the complaint. (Petitioner's petition, exhibit 2.) The land board filed its motion to change venue on the 20th day after service of process. It is unreasonable to require the land board to obtain the consent of other named defendants who had not been served with the complaint.

III. THE ONLY PARTY IN INTEREST IS THE  
STATE BOARD OF LAND COMMISSIONERS AND PETI-  
TIONER SHOULD NOT BE PERMITTED TO SELECT  
VENUE THROUGH THE MISJOINDER OF PARTIES.

Petitioner alleges 7 Utes Resort Ltd., Melvin and Harry Wolf, the State Board of Agriculture, and the Jackson County Commissioners are proper defendants to this action and therefore the granting of the motion to change venue was improper on two bases:

A. These defendants did not affirmatively consent to the change under rule 98(j) (the joinder of defendants for the purpose of defeating the change of venue under rule 98(j) is discussed above).

B. Because three public entities have been named, the



official residence of any one of the three entities is proper venue under rule 98(b)(2).

As discussed in argument I, above, the complaint and the motion for preliminary injunction specifically disavow any cause of action or request for damages against defendants other than the land board, with the exception of the claim for declaratory relief; yet petitioner states that "each of the public bodies named as defendant has or claims an interest which would be affected by the declaration and construction requested by the base action." (Petitioner's petition, p. 5). Petitioner identifies the "interests" in his complaint:

1. In paragraphs 17 and 18, petitioner states that the interest of the State Board of Agriculture is that of a holder of a public right-of-way granted by the land board on property which is not a part of this action. It appears that the Board of Agriculture's sole interest is based on the fact that petitioner wishes to buy some of the improvements on the right-of-way and move them to petitioner's property if petitioner gets the lease from the land board through this action.

2. Paragraphs 19 and 20 identify the interest of the Jackson County Commissioners as that of the issuer of a special use permit on the property. There is no indication that the declaratory relief requested will have any impact on that special use permit.

Judge Price examined the complaint and determined that "it would appear from my perusal of the complaint, at least, that for one reason or another plaintiff is not praying for relief against anybody, really, other than the Board of Land Commissioners." (Exhibit B, p. 5, lines 7-11.)

The Colorado Supreme Court has addressed the issue of the joinder of defendants in a declaratory judgment:

The general rule concerning those who must be joined as defendants is found in 67 C.J.S. Parties section 41 wherein it is said: "The interest which a party must have in the subject matter in order to make him a necessary party defendant must be a present substantial interest as distinguished from a mere expectancy or future contingent interest."

Game and Fish Commission v. Feast, 157 Colo. 303, 402 P.2d 169, 172 (1965).

In the complaint in this action, the Board of Agriculture and the Jackson County Commissioners have no "present substantial interest," and therefore, only the land board should be considered as a proper defendant.

#### SUMMARY

In summary, this case is substantially one of a request for injunctive relief against the State Board of Land Commissioners. As such, C.R.C.P. 98(b)(2) mandates that the proper venue is the

official residence of that public entity, the City and County of Denver.

FOR THE ATTORNEY GENERAL

*Patricia Blizzard*  
-----  
PATRICIA BLIZZARD, 10139  
Assistant Attorney General  
Natural Resources Section

Attorneys for Respondents  
State Board of Land Commissioners  
Rowena Rogers  
William H. Claire  
Tommy Neal  
Anthony Sabatini  
Larned A. Waterman  
The District Court in  
and for the Eighth Judicial  
District (Jackson County,  
Colorado) and Honorable  
John A. Price

1525 Sherman Street, 3d Floor  
Denver, Colorado 80203  
Telephone: 866-3611  
AG Alpha No. NR LC HWPK  
AG File No. CNR8403056/SC

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER TO SHOW CAUSE upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 21<sup>st</sup> day of August 1984, addressed as follows:

Donald M. Leshner  
3201 E. 2nd Avenue  
Denver, CO 80206

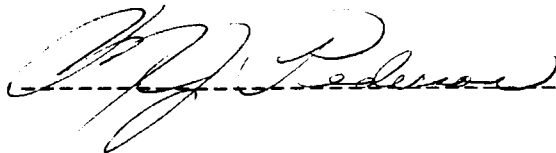
Daniel J. Kaup  
P. O. Box 1100  
Walden, CO 80480

Hon. Judge Price  
District Judge  
Jackson County District Court  
P. O. Box 308  
Walden, CO 80480

Milton Larson  
Assistant Attorney General  
1525 Sherman St., 3rd Floor  
Denver, CO 80203

Hasler and Fonfara  
Clifford P. Harbour  
1250 S. Howes, Suite 650  
Ft. Collins, CO 80522

Jeff Stalder  
Hall and Evans  
717 17th Street, Suite 2900  
Denver, CO 80202



-----

AG File No. BNR8403056/C

E X H I B I T "A"

DISTRICT COURT, JACKSON COUNTY, COLORADO

Case No. \_\_\_\_\_, Division \_\_\_\_\_

---

MOTION FOR PRELIMINARY INJUNCTION

---

7 UTES CORP., a Colorado corporation,

Plaintiff,

vs.

STATE BOARD OF LAND COMMISSIONERS; ROWENA ROGERS, WM. H. CLAIRE, and TOMMY NEAL, as members of and constituting the State Board of Land Commissioners; ANTHONY SABATINI; LARNED A. WATERMAN; 7 UTES RESORT LTD., a Colorado corporation; MELVIN L. WOLF; HARRY WOLF; STATE BOARD OF AGRICULTURE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants.

---

COMES NOW the above Plaintiff, by and through its attorneys, Knight and Leshner, P.C., and moves this Honorable Court to issue its preliminary injunction, pursuant to Rule 65, Colorado Rules of Civil Procedure, enjoining the Defendants, State Board of Land Commissioners, hereinafter referred to as "Land Board", Rowena Rogers, Wm. H. Claire, and Tommy Neal, as members of and constituting the State Board of Land Commissioners, Anthony Sabatini, and Larned A. Waterman, from proceeding with further Request for Proposal (R.F.P.) or other bidding procedure including, without limitation, requests, notices, advertisements, or other solicitations, however delineated, affecting all or any part of the real property described on Ex. 3, attached hereto and incorporated herein by reference, and further enjoining the said Defendants from granting any lease, or leases, permit, or permits, right of way, or rights of way, or other rights, however delineated, to use all or any part of the real property described on Ex. 3.

AS GROUNDS THEREFORE, Plaintiff alleges and states, as follows:

1. The Plaintiff is the permittee under Special Use Permit 45-F, issued by the State Board of Land Commissioners, effective December 1, 1980, a copy of which is attached hereto as Ex. 1, and, in addition, the Plaintiff is the permitted under Special Use Permit issued on July 25, 1983, by the Board of County Commissioners of Jackson County by Resolution No. 1983-vii-25(b), a copy of which is attached hereto as Ex. 2.

2. The Plaintiff is entitled to a lease from the State Board of Land Commissioners leasing the real property described on Ex. 3, which real property is the subject matter of this action, and the Plaintiff claims an interest in said real property described on Ex. 3; any such lease must be reasonable so as to permit the development, operation, and maintenance of general recreational mountaineering activities, as the same may be hereafter described.

3. The Defendant, State Board of Land Commissioners (hereinafter referred to as "Land Board"), is an agency of the State of Colorado created by Article IX of the State Constitution.

4. The Defendants, Rowena Rogers, Wm. H. Claire, and Tommy Neal, are, and at all times referred to in this proceeding, have been, members constituting the Land Board, and, as such, have acted in behalf of, and have been responsible for all acts of, said Land Board.

5. The Land Board, and those Defendants comprising its membership, have the direction and disposition of the public lands of the State of Colorado, under such regulations as are, and may be prescribed by law.

6. The Defendant, Anthony Sabatini, is Administrator of the Land Board, and, as such, has, or has assumed, the duty, among other things, of: (1) administering the functions of the Land Board, (2) making recommendations to the Land Board, and to its members, concerning matters being considered, and to be considered, by said Land Board, and (3) performing many, or all, of the functions of the Land Board, in its absence, or otherwise. Said Defendant, Sabatini, is responsible for all actions of the staff maintained by the Land Board.

7. The Defendant, Larned A. Waterman, is the Land Resource Specialist of the Land Board and, as such, has, or has assumed, the duty, among other things, of "negotiating" leases, of exercising discretion which is reserved to the Land Board by the State Constitution and State statutes, and of making recommendations to the Land Board, and to its members, and instructing said persons concerning matters being considered, and to be considered, by said Land Board, especially concerning leasing policies relating to public lands of the State.

8. Said Special Use Permit 45-F (Ex. 1) provides, among other things, that the Land Board reserves the right to grant leases, permits, and rights of way affecting the subject property only when any such leases, permits, or rights of way are compatible with Plaintiff's uses under said permit.

9. The Land Board, and its representatives, has stated its intention to award no lease without proceeding with a Request for Proposal (R.F.P.) and to award a lease to the entire premises described on Ex. 3 based upon such R.F.P. or other bidding procedure.

10. Upon information and belief, Plaintiff believes such R.F.P. will be commenced on or about May 10, 1984.

11. Said R.F.P. or other bidding procedure will eliminate and destroy Plaintiff's right to negotiate a lease and will violate the terms of said Special Use Permit 45-F (Ex. 1). Said R.F.P. will cause immediate and irreparable injury, loss, and damage to the Plaintiff, which will be prevented by the granting of this preliminary injunction.

12. The Plaintiff has no plain, speedy, or adequate remedy at law.

13. The granting by this Court of said preliminary injunction is necessary to preserve the status quo pending hearing on the merits of this matter.

14. The Plaintiff has a reasonable probability of success on the merits.

15. The granting of this preliminary injunction will do no disservice to the public interest.

16. The balance of equities favors the granting of this preliminary injunction.

17. Plaintiff's verified Complaint is attached hereto as Exhibit A and incorporated herein by reference.

18. The Plaintiff makes no claim for relief against the Defendants, 7 Utes Resort Ltd., Melvin L. Wolf, Harry Wolf, State Board of Agriculture, and The Board of County Commissioners of the County of Jackson, under this motion.

WHEREFORE, the Plaintiff prays that this motion be granted.

DATED this \_\_\_\_\_ day of May, 1984.

KNIGHT AND LESHER, P.C.

By \_\_\_\_\_  
Donald M. Leshar, No. 2510  
3201 East 2nd Avenue, Suite 300  
Denver, Colorado 80206  
(303) 321-2929  
ATTORNEY FOR PLAINTIFF



E X H I B I T "B"

IN THE DISTRICT COURT IN AND FOR THE  
COUNTY OF JACKSON AND STATE OF COLORADO  
CIVIL

MAY 22 REC'D

COPY

84-CV-4 CASE NO

May 11, 1984 DATE

JOHN A. PRICE JUDGE

JO ANN BRIER CLERK

7 UTES CORP., a Colorado  
Corporation

Plaintiff

vs.

STATE BOARD OF LAND COMMISSIONERS;  
ROWENA ROGERS, WM. H. CLAIRE, and  
TOMMY NEAL, as members of and  
constituting the State Board of  
Land Commissioners; ANTHONY SABATINI;  
LARNED WATERMAN; 7 UTES RESORT LTD.,  
a Colorado Corporation; MELVIN L.  
WOLF; HARRY WOLF; STATE BOARD OF  
AGRICULTURE; THE BOARD OF COUNTY  
COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants,

ORDER OF

COURT


This matter was before the Court in Larimer County, Colorado for consideration of Motion For Temporary Restraining Order. The movant moves for the issuance of a temporary restraining order without written or oral notice based upon the contents of the motion and the filed verified complaint. After full consideration of the contents of the motion and the said verified complaint, the Court now refuses to issue any temporary restraining order.

The plaintiff is a permittee under Special Use Permit 45-F issued by the State Board of Land Commissioners covering certain land located in Jackson County, Colorado. The plaintiff moves the Court to temporarily restrain the said board and its members "from proceeding with further Request For Proposal (R.F. P.) or other bidding procedure including, without limitation, notices, advertisements, or other solicitations, however delineated, affecting all or any part of the real property described on Ex. 3, attached hereto and incorporated herein by reference, and further temporarily restraining the said Defendants from granting any lease, or leases, permit, or permits, right of way, or rights of way, or other rights, however delineated, to use all or any part of the real property described on Ex. 3.

It is the Court's opinion that the position of the plaintiff as a permittee is controlled by the provisions of Land Board Special Use Permit 45-F which became effective on December 1, 1980.

84-CV-4  
May 11, 1984  
Page 2

This Court is of the opinion that it would be inappropriate for this Court to temporarily restrain the Board in any way under the situation as described and set forth in the herein concerned motion and the verified complaint.

  
DISTRICT JUDGE

5-11-54

E X H I B I T "C"

DISTRICT COURT, COUNTY OF JACKSON, STATE OF COLORADO

Civil Action No. 84CV4

---

MOTION FOR CHANGE OF VENUE

---

7 UTES CORP., a Colorado corporation,

Plaintiff,

vs.

STATE BOARD OF LAND COMMISSIONERS; ROWENA ROGERS, WM. H. CLAIRE, and TOMMY NEAL, as members of and constituting the State Board of Land Commissioners; ANTHONY SABATINI; LARNED A. WATERMAN; 7 UTES RESORT LTD., a Colorado corporation; MELVIN L. WOLF; HARRY WOLF; STATE BOARD OF AGRICULTURE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants.

---

COME NOW the defendants, State Board of Land Commissioners ("Land Board"); Rowena Rogers, Wm. H. Claire, and Tommy Neal, as members of and constituting the Land Board; Anthony Sabatini and Larned Waterman, by and through its counsel, Duane Woodard, Attorney General of the State of Colorado and Patricia A. Blizard, Assistant Attorney General, and pursuant to rule 98(b), (c), and (f) of the Colorado Rules of Civil Procedure hereby move this Court for an order changing the venue of this action from the District Court of Jackson County to the District Court of the City and County of Denver. As grounds therefor the defendants state:

1. The above-named plaintiff has filed a Motion for Preliminary Injunction and Complaint in this matter in the County of Jackson, State of Colorado.

PRELIMINARY INJUNCTION

2. Said Motion requests an injunction against the Land Board, its members and its staff.

3. Rule 98(b) of the Colorado Rules of Civil Procedure provides that proper venue for actions against public officers arise in the county in which those officers have official residence.

4. The Land Board, Rowena Rogers, Wm. H. Claire, Tommy Neal, Anthony Sabatini, and Larned Waterman have their official residences in the City and County of Denver pursuant to Article VIII, sections 2 and 3 of the Colorado Constitution.

5. Plaintiff makes no claim for relief against the other defendants under the Motion for Preliminary Injunction.

#### COMPLAINT

6. The Complaint filed in this action asks for declaratory relief and estoppel, and charges breach of contract and breach of duty against the Land Board.

7. The Complaint makes no claim for relief against the other named defendants. (See paragraphs 43, 54, and 70.)

8. Plaintiff's address as listed on the Complaint is located in the City and County of Denver. Counsel for plaintiff is located in the City and County of Denver.

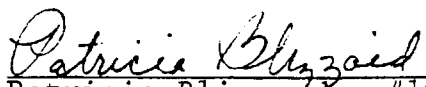
9. Rule 98(b) of the Colorado Rules of Civil Procedure provides that proper venue for actions against public officers arise in the county in which those officers have official residence. As noted under "Preliminary Injunction", the official residence of the Land Board, its members and its staff is the City and County of Denver.

10. Most of the actions complained of against the Land Board, its members and its staff, have taken place in the City and County of Denver. The requested relief is against future actions which will be conducted primarily in the City and County of Denver.

11. Paragraph 70 (B) of the Complaint requests a restraining order against defendant Waterman, a member of the Land Board staff, located in the City and County of Denver.

WHEREFORE, the defendant Land Board, its members and staff request that the place of trial in this matter be changed from Jackson County to the City and County of Denver.

FOR THE ATTORNEY GENERAL

  
Patricia Blizzard #10139  
Assistant Attorney General  
Natural Resources Section  
Attorney for State of Colorado  
1525 Sherman, 3d Floor  
Denver, Colorado 80203  
Telephone: 866-3611

DISTRICT COURT, JACKSON COUNTY, COLORADO

Case No. 84CV4

-----  
MEMORANDUM BRIEF IN SUPPORT OF DEFENDANT'S  
MOTION FOR CHANGE OF VENUE  
-----

7 UTES CORP., a Colorado Corporation,

Plaintiff,

v.

STATE BOARD OF LAND COMMISSIONERS;

ROWENA ROGERS,

WM. H. CLAIRE, and

TOMMY NEAL, As Members of and Constituting the

State Board of Land Commissioners;

ANTHONY SABATINI;

LARNED A. WATERMAN;

7 UTES RESORT LTD., a Colorado Corporation;

MELVIN L. WOLF;

HARRY WOLF;

STATE BOARD OF AGRICULTURE;

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON,

Defendants.  
-----

COME NOW the defendants State Board of Land Commissioners, Rowena Rogers, Wm. H. Claire, Tommy Neal ("Land Board"), Anthony Sabatini and Larned A. Waterman, by and through their counsel Duane Woodard, attorney general of the State of Colorado and Patricia A. Blizzard, assistant attorney general, and hereby submit this memorandum brief in support of their motion for change of venue.

### STATEMENT OF FACTS

Plaintiff was granted special use permit No. 45-F by the Land Board for certain land in the state forest in April 1981, retroactive to December 1, 1980. That permit provided that, after the second year of compliance with the terms of the permit, the plaintiff would have "the right to negotiate a lease for the permit area under terms and conditions deemed necessary by the board." (Special use permit 45-F, paragraph 2, attached hereto as exhibit A.) Plaintiff has filed a motion for preliminary injunction and a complaint against the Land Board asking for declaratory relief and estoppel with additional charges of breach of contract and breach of duty in regard to the negotiation of the lease.

### ARGUMENT

The plaintiff first requests injunctive relief against the Land Board, its members and its staff. Rule 98(b)(2) of the Colorado Rules of Civil Procedure requires that actions against a public officer shall be in the county where the claim arose. The Colorado Supreme Court has interpreted that rule in injunctive actions as follows:

Claims for injunctive relief against public officers arise, within the meaning of C.R.C.P. 98(b), in the county in which the public body has its official residence and



from which any action by the board pursuant to the injunction must emanate.

(Citations omitted.) Denver Board of Water Commissioners v. Board of County Commissioners of the County of Arapahoe, 187 Colo. 113, 528 P.2d 1305, 1307 (1974).

The official residence of the Colorado State Board of Land Commissioners is the City and County of Denver pursuant to article VIII, sections 2 and 3 of the Colorado Constitution. All official functions of the Land Board take place in Denver. The Land Board was served with the complaint in Denver.

A careful analysis of the complaint identifies additional requested injunctive relief, even though defined in other terms:

1. Paragraph 36A(4) prays for an order of this court which would identify uses which are incompatible with uses permitted under special use permit No. 45-F. Such a determination could have the effect of enjoining the Land Board from issuing leases for such uses on the state forest.

2. Paragraph 36A(5) prays for an order of the court which would construct "the right of the Land Board to present reasonable use, or improvement, of the permit area by failing to approve and consent to any such use and improvement." It appears that the plaintiff is requesting mandatory injunctive relief to force the Land Board to include certain activities in a lease.

3. Paragraph 54B asks this court to order that the Land

Board is "estopped to deny that the Plaintiff is entitled to a reasonable lease, which lease shall permit the development, operation, and management of a destination, year-round, recreation facility." This request is in the form of a mandatory injunction requiring the Land Board to perform a certain act.

4. Paragraph 70A, together with paragraph 66, asks for a determination that the "request for proposal" process be determined as "capricious, arbitrary, unconstitutional, and a breach of duty," effectively asking for permanent injunctive relief against such a process.

5. Paragraph 70B asks for an order of this court restraining and disqualifying a Land Board staff member from participating in the negotiations, discussions or recommendations associated with any lease on the Land Board property identified in exhibit B of the complaint.

The plaintiffs make no claim for injunctive relief against any other named defendants.

WHEREFORE, the Land Board, its named members and staff request that this suit be removed to the City and County of Denver. Since Denver is the proper county for venue purposes, defendants request that such removal be made mandatory.

FOR THE ATTORNEY GENERAL

*Patricia Blizzard*

-----  
PATRICIA BLIZZARD, 10139  
Assistant Attorney General  
Natural Resources Section

Attorneys for State Board of  
Land Commissioners, its members  
and its staff

1525 Sherman Street, 3d Floor  
Denver, Colorado 80203  
Telephone: 866-3611  
AG Alpha No. NR LC HWPK  
AG File No. DNR8401998/MT

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing ENTRY OF APPEARANCE, MOTION, BRIEF, AND ORDER FOR CHANGE OF VENUE were placed in the U.S. Mail on this 4th day of June, 1984, addressed to:

Donald M. Leshner  
3201 East Second Avenue  
Denver, Colorado 80206

Daniel J. Kaup  
P.O. Box 1100  
Walden, Colorado 80480

  
Office of the Attorney General

SPECIAL USE PERMIT

No. 45-F

THE COLORADO STATE BOARD OF LAND COMMISSIONERS, hereinafter referred to as the "board", hereby grants permission to 7 UTES CORPORATION, 1031 South Gaylord Street, Denver, CO 80209, hereinafter referred to as the "permittee", to use, subject to the conditions set forth below, the following described state lands in the Colorado State Forest, Jackson County, State of Colorado, to wit:

Township 6 North - Range 76 West

In Sections 8, 9, 15, 16, 17, and  
N 1/2 of Section 21,

480.00 acres, more or less.

Excluding any lands that may be  
contained in Leases F 14 and  
F 22 or renewal thereof.

1. This permit shall entitle the permittee to use the above-described lands for general recreational mountaineering activities including horseback riding, hiking, cross country and nordic skiing.
2. This permit shall be effective commencing December 1, 1980 and terminating December 1, 1985. In consideration for the issuance of this permit, on or before the first day of December of each year of this permit, the permittee shall pay the board the sum of One thousand and No/100 Dollars (\$1,000.00). After the second year of this permit, if the permittee has complied with the terms and conditions herein to the satisfaction of the board, then the permittee shall have the right to negotiate a lease for the permit area under terms and conditions deemed necessary by the board.
3. The permit area shall not be disturbed more than absolutely necessary for the purpose for which this permit is issued and for safety purposes, such as avalanche control. Use of snow mobiles in the area by the public is prohibited. Clear cutting of vegetation is not authorized except on the portion of the permit area specifically designated by the board forester. Existing roads and trails on the permit area shall be used except when clearing deep powder glades. This permit does not allow vehicular use off of the permit area, except for essential ingress and egress for maintenance and trail grooming.

4. No permanent improvements shall be constructed in the permit area without the prior written approval of the board. The permittee may place moveable or temporary structures on the permit area for maintenance and sanitation purposes. Lift and tow lines are expressly prohibited.

5. Timber is not to be cut unless specifically authorized by the board in writing. Any merchantable timber cut by the permittee shall remain the property of the state. All other timber, slash, stumps, and boughs are to be disposed of by the permittee as required by, and under the direction of, the board forester.

6. All improvements and alterations to the permit area shall be constructed and completed in a workmanlike manner and shall be maintained in a safe, clean and healthy condition. Such maintenance shall include but not be limited to taking steps to control and remove refuse, waste or litter of any kind. The permittee shall also take all necessary steps to avoid damage to property or injury to persons, which shall include but not be limited to providing proper drainage and erosion control.

7. This permit does not grant exclusive use of the land described. The board reserves the right to grant leases, permits and rights-of-way for said property when compatible with current uses under this permit.

8. This permit is subject to all leases, permits and rights-of-way heretofore granted and now in effect for the permit area. The permittee shall not interfere with or cause damage to operations or activities conducted under the authority of said prior grants.

9. At all reasonable times, the permit area shall be open to the public for its use and enjoyment. Any terms and conditions established by the permittee affecting public use or access shall be subject to prior written board approval. The permittee, its agents and employees shall provide courteous and efficient service to the public.

10. The permittee hereby agrees to indemnify, save and hold harmless the board for any and all claims or liabilities whatsoever, for damage to property or injury to persons, which may arise from the permittee's use and occupation of the permit area. The permittee shall maintain a suitable liability insurance policy for said purpose in an amount determined by the board. On or before the

first day of December of each year of this permit, the permittee shall provide the board with a certificate of insurance evidencing said coverage.

11. The permittee shall comply with all applicable federal, state, and local laws, rules and regulations.

12. This permit does not entitle the permittee to use water from the permit area or to apply water to beneficial use thereon without the prior written approval of the board. Any and all water rights established on the permit area shall be the property of the board and any adjudications or necessary permits relating to said water rights shall be in the name of the board.

13. This permit is issued for the purposes and under the terms and conditions specified herein. If the permittee uses or attempts to use the permit area for any other purpose without prior written permission from the board, or if the permittee fails to comply with any of the terms and conditions herein, then the board may terminate this permit upon thirty (30) days prior written notice by certified mail.

14. Upon the termination of this permit, either by expiration of its term, or by failure of the permittee to comply with the terms and conditions hereof, the permittee shall remove any and all improvements, to the extent reasonable and shall restore the permit area, as near as practicable, to its original condition. Any improvements remaining on the permit area ninety (90) days after termination shall become the property of the board without cost. In the event that the permittee secures a lease as provided for herein, this paragraph shall not apply.

15. The permittee shall execute a good and sufficient bond, with sureties, or some other financial instrument, in an amount to be determined by the board for payments due hereunder and the faithful performance of the terms and conditions herein.

16. This permit may not be assigned without the prior written approval of the board.

17. This permit shall be binding on the parties hereto, and their successors and assigns if any there be.

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18. The permittee is a corporation which is authorized to do business in the State of Colorado. In the event that said corporation dissolves, this permit shall automatically terminate. If this permit is assigned to an individual, or corporation or partnership, this permit shall automatically terminate in the event of death or dissolution respectively.

STATE OF COLORADO

BOARD OF LAND COMMISSIONERS

*R. Owens Rogers*  
Rovena Rogers, President

*Tommy Neal*  
Tommy Neal, Register

Wm H Claire, Engineer

ACCEPTED:

7 UTES CORPORATION

By *Rice Curney - President*

*Robert L. Mahoney*  
*Robert L. Mahoney*

Application 80/260

Copy of lease \$1 pd. 6/26/81, F298