

Consent Agenda Item 1.f

March 20-21, 2019 Board Meeting

Case No. 18CW3220 (Water Division 1); The City of Aurora

Summary of Water Court Application

This is an Application for Determination of Underground Water Rights from NonTributary and Not-Nontributary Sources in Arapahoe County South of Quincy Avenue.

Staff Recommendation

Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in February 2019 to protect CWCB's instream flow water rights.

CWCB Instream Flow Water Rights

Instream flow water rights that may be injured cannot be specifically identified because the proposed change in place of use is to undefined extraterritorial locations. Place of use claimed includes "either inside or outside the current or future corporate limits of the City of Aurora to be used, reused, successively used, and, after use leased, sold or otherwise disposed of before and after initial use to extinction."

Potential for Injury

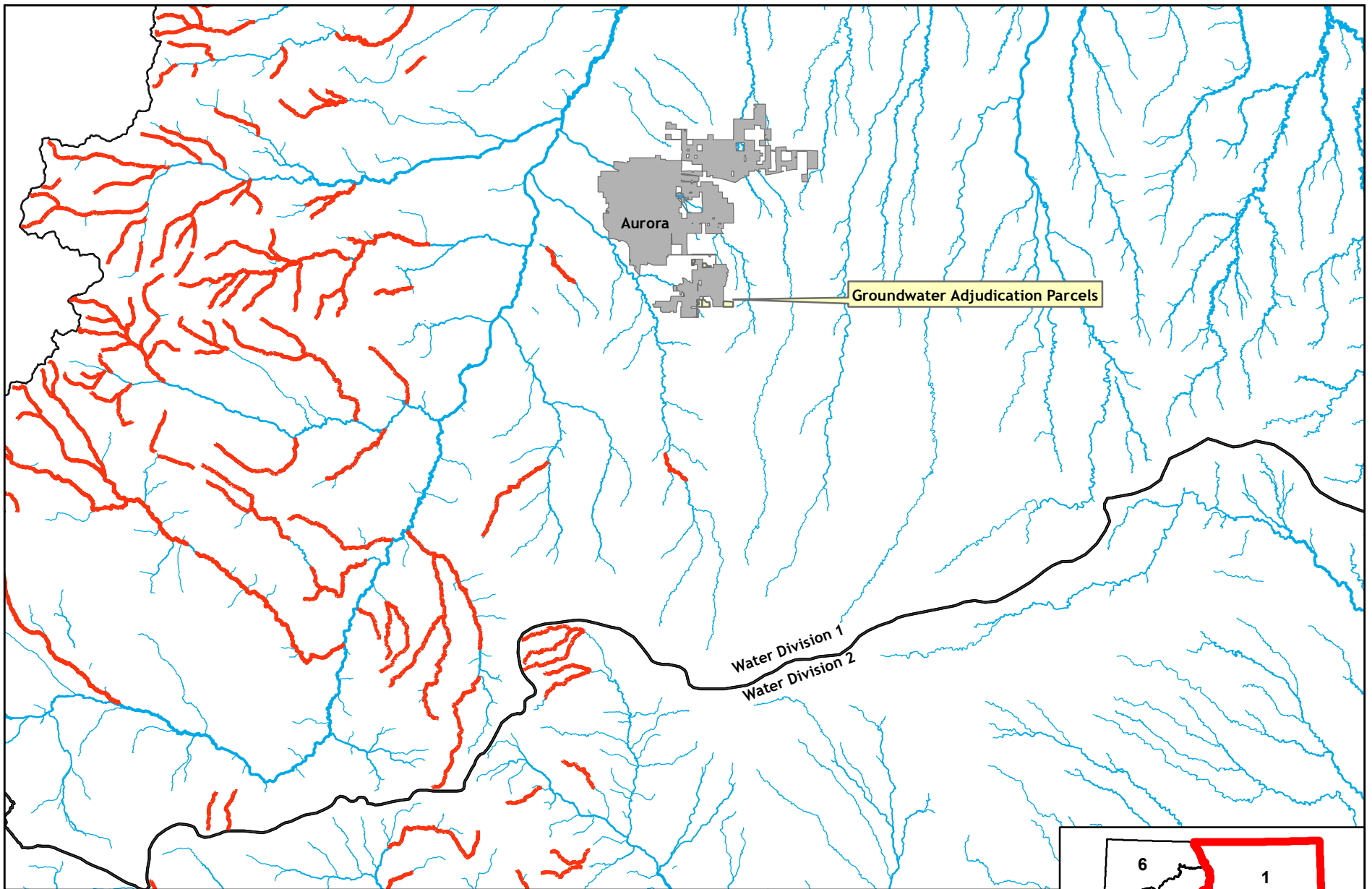
- The CWCB holds many water rights that could be injured by this application.
- Injury due to the extraterritorial uses of the changed water rights cannot be evaluated because the type of use and the place of use is undefined. Without protective terms and conditions, these uses could injure the CWCB's instream flow water rights.

Other Objectors

A Statement of Opposition was also filed by Public Service Company of Colorado.

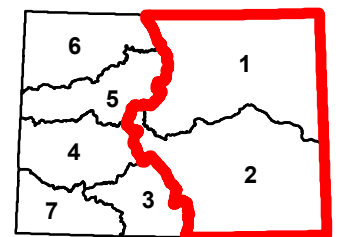
Attorney Representing CWCB

Christopher R. Stork, Assistant Attorney General, is assigned to this case and can be contacted at christopher.stork@coag.gov, or 720-508-6311.



March 20-21, 2019 CWCB Board Meeting
Consent Agenda Item 1.f: Statement of Opposition
Case No. 18CW3220 (Water Division 1)
The City of Aurora, Colorado, Acting by and Through its Utility Enterprise

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**DISTRICT COURT, WATER DIVISION 1, COLORADO
DECEMBER 2018 WATER RESUME PUBLICATION**

TO: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN WATER DIV. 1

Pursuant to C.R.S. 37-92-302, you are notified that the following is a resume of all water right applications and certain amendments filed in the Office of the Water Clerk during the month of **DECEMBER 2018** for each County affected.

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18CW3220 THE CITY OF AURORA, COLORADO, a municipal corporation of the Counties of Adams, Arapahoe, Denver, Douglas and Jefferson, acting by and through its Utility Enterprise (“Aurora”), 15151 East Alameda Avenue, Suite 3600, Aurora, Colorado 80012-1555, (303) 739-7370, E-mail: AuroraWater@auroragov.org. Attorneys: John M. Dingess, Anthony J. Basile and Teri L. Pettit, Hamre, Rodriguez, Ostrander & Dingess, P.C., 3600 S. Yosemite Street, Suite 500, Denver, Colorado 80237-1829, phone (303) 779-0200, fax (303) 779-3662, mail@hrodllaw.com, jdingess@hrodllaw.com, abasile@hrodllaw.com, poolteri@hrodllaw.com. **APPLICATION FOR DETERMINATION OF UNDERGROUND WATER RIGHTS FROM NONTRIBUTARY AND NOT-NONTRIBUTARY SOURCES IN ARAPAHOE COUNTY SOUTH OF QUINCY**. 2. Introduction: Through this Application, Applicant seeks to appropriate, perfect, and obtain vested rights for any and all nontributary and not nontributary ground water legally available to Applicant underlying specified parcels within portions the City of Aurora located in Arapahoe County South of Quincy Avenue that are described in Paragraph 3.4. and have not been previously permitted or decreed. This Court has jurisdiction to determine the water rights requested herein pursuant to C.R.S. § 37-90-137(6). 3. Legal Descriptions of Wells and Parcels: 3.1. Existing Wells Excluded: The Applicant seeks herein determination of its right to perfect its ownership, appropriate, obtain and withdraw only all heretofore unappropriated nontributary and not nontributary ground water which is legally available to it from the Dawson, Denver, Arapahoe, and Laramie-Fox Hills Aquifers, and any upper and lower designations thereof, underlying specified parcels within portions of the City of Aurora located in Arapahoe County South of Quincy Avenue that are described in Paragraph 3.4. Therefore, any and all existing wells owned and/or operated by the Applicant that withdraw nontributary or not nontributary groundwater from said aquifers, whether or not permitted or decreed, are specifically excluded from determination under this Application. 3.2. Permits for Future Wells: The wells that will withdraw nontributary and/or not nontributary ground water pursuant to this adjudication do not currently exist, and the Applicant has not applied for permits to drill any of the wells. Consequently, none of the wells have well permits, registrations, or denial numbers. Prior to constructing any well described herein, Applicant will apply to the Division of Water Resources (the “State Engineer”) for a permit to construct any such well. The Applicant requests that the Court require the State Engineer to issue well permits for any such wells in accordance with the decree to be entered herein. Applicant requests a determination that a failure to construct any of its wells within the period of time specified in the well permit not be deemed to extinguish the underlying water rights. The Applicant also requests a determination that at such time as it is prepared to drill its wells, the State Engineer shall issue new well permits to replace any well permits that have expired and that said well permits be issued in accordance with the terms of the decree herein. 3.3. Location of Future Wells: Applicant seeks the right to locate the future wells at any suitable location within those parts of Arapahoe County South of Quincy Avenue annexed to the City of Aurora during and since 2000 (the “Subject Portion of the City of Aurora”) as more fully described in the following Paragraph 3.4., so long as the wells are at least 600 feet away from any other existing well in the same aquifer owned by another person or entity; however, the future wells may be located closer than 600 feet from any other existing wells in the same aquifer owned by another person or entity if, pursuant to C.R.S. § 37-90-137(2)(b)(II), the State

Engineer, after hearing, finds circumstances warrant issuance of a permit and issues a permit for the wells. Applicant waives the 600-foot spacing requirement of C.R.S. § 37-90-137(2) within the Subject Portion of the City of Aurora and elsewhere within the City of Aurora. The Subject Portion of the City of Aurora consists of approximately 955 acres located in the parcels described in Paragraph 3.4. within Arapahoe County South of Quincy Avenue, Colorado, and more specifically set forth in Exhibit A. Not all of the parcels are contiguous with one another; however, all are contiguous with portions of the City of Aurora wherein Aurora has previously adjudicated nontributary and not nontributary ground water from the identified aquifers. A map showing those parts of Arapahoe County South of Quincy Avenue annexed to the City of Aurora that are the subject of this Application and their relation and contiguity to the current City boundaries is attached hereto as Exhibit B.

3.4. Subject Portion of the City of Aurora Descriptions: 3.4.1. Parcel 1 – Approximately 50 acres, generally in §7-T5S-R65W, 6th PM. 3.4.2. Parcel 2 – Approximately 373 acres, generally in §34-T5S-R65W, 6th PM. 3.4.3. Parcel 3 – Approximately 34 acres, generally in §31-T5S-R65W, 6th PM. 3.4.4. Parcel 4 – Approximately 269 acres, generally in §31 & §32-T5S-R65W, 6th PM. 3.4.5. Parcel 5 – Approximately 40 acres, generally in §31-T5S-R65W, 6th PM. 3.4.6. Parcel 6 – Approximately 33 acres, generally in §31-T5S-R65W, 6th PM. 3.4.7. Parcel 7 – Approximately 136 acres, generally in §8 & §17-T5S-R65W, 6th PM. 3.4.8. Parcel 8 – Approximately 15 acres, generally in §31-T5S-R65W, 6th PM. 3.4.9. Parcel 9 – Approximately 5 acres, generally in §31-T5S-R65W, 6th PM.

3.5. Parcel Ownership: The owners of lands within the Subject Portion of the City of Aurora specifically consented to withdrawal of ground water underlying their land by the Applicant pursuant to various Annexation Agreements and other documents or in other cases have conveyed the ground water to Aurora. Evidence of the Annexation Agreements and other consent documents required pursuant to Rule 3 of the Uniform Local Rules for All State Water Court Divisions and applicable deeds showing Aurora's ownership of certain ground waters are part of the attached Exhibit C. As stated Aurora has obtained the consent of each overlying landowner to withdraw the groundwater by deed, or other written evidence and at the time of this Application the overlying land is within Aurora's water service area.

4. Claims for Water Rights: The Applicant seeks herein determination of its right to perfect its ownership, appropriate, obtain and withdraw only all heretofore unappropriated nontributary and not nontributary ground water which is legally available to it from the Dawson, Denver, Arapahoe, and Laramie-Fox Hills Aquifers, and any upper and lower designations thereof, underlying the Subject Portion of the City of Aurora. Such aquifers may include where physically present the Upper Dawson, Lower Dawson, Denver, Upper Arapahoe, Lower Arapahoe and Laramie-Fox Hills Aquifers underlying the Subject Portion of the City of Aurora. The actual aquifers will be those determined to be available pursuant to the Denver Basin Rules (2 CCR 402-6) underlying the Subject Portion of the City of Aurora.

5. Production Rate Claimed: The Applicant seeks herein determination of its right to perfect its ownership, appropriate, obtain and withdraw only all heretofore unappropriated nontributary and not nontributary ground water which is legally available to it all of the Denver Basin aquifers underlying the Subject Portion of the City of Aurora over the 100-year life of the aquifers as set forth in C.R.S. § 37-90-137(4) and to withdraw said amounts at whatever rate is required in order to do so and when the water is needed during the course of any year. Applicant requests the right to pump its wells at rates in excess of any nominal production rate to the extent necessary to withdraw the total number of acre feet which Applicant is entitled to withdraw from the aquifers each year including any banked water as described below in Paragraph 8.6.

6. Date of Appropriation, How Appropriation Was Initiated, and Date Water Was Applied to Beneficial Use: Applicant contends that the prior-appropriation doctrine does not apply to the ground water rights to be determined herein. Applicant requests the Court to determine notwithstanding the ground water involved herein has not been diverted and applied to beneficial use, the Applicant's rights thereto are vested property rights and not conditional water rights subject to the requirements of findings of reasonable diligence. If it is determined that some or all of the ground water subject hereto is subject to the appropriation doctrine and/or must be decreed as conditional water rights, for the ground water underlying the Subject Portion of the City of Aurora, Applicant claims an appropriation date of December 18, 2018.

7. Proposed Use of Water: Applicant intends to use all available ground water

withdrawn from any and all of the Denver Basin aquifers underlying the Subject Portion of the City of Aurora in a unified water supply system either inside or outside the current or future corporate limits of the City of Aurora to be used, reused, successively used, and, after use leased, sold or otherwise disposed of before and after initial use to extinction for the following beneficial purposes: Municipal, domestic, agricultural, energy production, manufacturing, mechanical and industrial purposes including, but not limited to, fire protection, irrigation, commercial, recreation, fish and wildlife propagation, reservoir evaporation replacement, creation and maintenance of wetlands, maintenance of storage reserves, stock watering, reclamation, revegetation, dust suppression, water treatment and supply, wastewater treatment, storage for such uses, and use as a supply or substitute supply for augmentation, replacement, exchanges decreed or to be decreed, and substitute supply plans. All uses include reuse and successive reuse to extinction for the above purposes, or disposition of effluent for the above purposes. 8. Remarks: 8.1. Prior to entry of the decree herein, Applicant will supplement this Application with evidence that the State Engineer has issued or failed to issue, within four months of the filing of this Application, a determination as to the facts of this Application. 8.2. The annual withdrawal of the amount of ground water applied for herein, subject to the terms and conditions proposed herein, will not result in material injury to any vested or decreed conditional water right. 8.3. Each of the future nontributary wells is sought as a point of diversion for all of the nontributary ground water decreed herein from the aquifer into which such well is completed and Applicant claims the right to pump such wells at any rate as may be necessary to withdraw the maximum amount of ground water decreed to be available to the Applicant from each such aquifer. Each of the future not nontributary wells is sought as a point of diversion for all of the not nontributary ground water decreed herein from the aquifer into which such well is completed and Applicant claims the right to pump such wells at any rate as may be necessary to withdraw the maximum amount of ground water decreed to be available to the Applicant from each such aquifer. 8.4. Applicant may need to construct additional wells, including supplemental, replacement or alternate point of diversion wells, to recover the entire amount of water available to it from each aquifer. Applicant requests the right to construct such additional wells as necessary in order to maintain production of the amounts of water to which it is entitled. 8.5. Applicant requests that all of the wells constructed in one aquifer, plus any additional wells constructed in that same aquifer, shall constitute a "well field" as that term is described in the Statewide Nontributary Ground Water Rules, 2 CCR 402-7, Rule 4.A.13 and Rule 14. The pumping rates for each well shall be allowed to exceed the nominal pumping rates set forth herein to the extent necessary to withdraw the maximum acre-foot entitlement from each aquifer. 8.6. Applicant requests the right to withdraw from any combination of wells completed in the same aquifer, including additional wells, an amount of ground water in excess of the amount decreed for average annual withdrawal from that aquifer, so long as the sum of the total volume of water withdrawn from said wells does not exceed the product of the number of years since the date of issuance of the original well permits or the date of entry of a decree herein, whichever occurs first, times the average annual amount of withdrawal which Applicant is entitled to withdraw from that aquifer. 8.7. Applicant requests this Court to order that the standards of C.R.S. § 37-90-137(4) be applied to any permits for additional wells as if the applications for those well permits were filed on the dates that the original applications were filed, in accordance with the standards of C.R.S. § 37-90-137(10). 8.8. Applicant requests this Court to order that a failure to construct any well described herein within the period of time specified in any well permit therefor not be deemed to extinguish the underlying right to ground water. Applicant further requests the Court to order that, at such times as Applicant is prepared to drill its wells, the State Engineer shall issue permits for the wells in accordance with the terms of the decree herein and to issue new well permits for any wells which have expired. 8.9. Applicant requests that the Court retain jurisdiction only for adjustment of the amounts of ground water which are available for withdrawal by Applicant from the Denver Basin aquifers underlying the Subject Portion of the City of Aurora based on actual local aquifer characteristics, and to authorize Applicant to invoke the Court's retained jurisdiction at any time after such data becomes available, without the necessity of amending this Application or republishing the same. 9. WHEREFORE, Applicant prays that this Court enter a decree: 9.1. Granting the Application herein and awarding the

water rights claimed herein as final, absolute and perfected water rights, except as to those issues for which jurisdiction of the Court has been specifically retained. 9.2. Specifically determining: 9.2.1. That this Court has jurisdiction to determine the water rights requested herein pursuant to C.R.S. § 37-90-137(6); 9.2.2. That Applicant has complied with C.R.S. § 37-90-137(4) and the water is legally available for withdrawal by the wells proposed herein, but that jurisdiction will be retained with respect to the annual amounts of withdrawal and to provide for adjustment of such amounts to conform to actual local aquifer characteristics from adequate information obtained from wells or test holes drilled within the Subject Portion of the City of Aurora, pursuant to C.R.S. § 37-92-305(11); 9.2.3. That the sources of supply for the water rights claimed herein are the nontributary and not nontributary ground waters in all of the Denver Basin aquifers underlying the Subject Portion of the City of Aurora and that such aquifers may include, where physically present, the Upper Dawson, Lower Dawson, Denver, Upper Arapahoe, Lower Arapahoe and Laramie-Fox Hills Aquifers underlying the Subject Portion of the City of Aurora; and 9.2.4. That vested or conditionally decreed water rights of others will not be materially injured by the withdrawals proposed herein. 9.3. Retaining jurisdiction only for the purpose of finally determining the quantity of ground water to which the Applicant is legally entitled from each aquifer and providing that Applicant may at any time invoke the Court's retained jurisdiction to obtain a final determination of the water rights granted by a factual showing of the quantity of the entitlement. 9.4. Finding that: 9.4.1. The nature and extent of the water rights applied for herein are governed by C.R.S. §§ 37-90-137, and that the decreed withdrawals are based on an aquifer life of 100 years and based upon the quantity of water, exclusive of artificial recharge, underlying the Subject Portion of the City of Aurora; 9.4.2. Applicant may construct additional wells as required to recover the entire allowed annual appropriation under the provisions of C.R.S. § 37-90-137(10); 9.4.3. Any wells constructed into the same aquifer, along with any additional wells into such aquifer within the Subject Portion of the City of Aurora as described in Paragraph 3.3. shall constitute a "well field" as that term is described in the Statewide Nontributary Ground Water Rules, 2 CCR 402-7, Rule 4.A.13 and Rule 14, and as such, Applicant may withdraw the maximum annual amount of water decreed and confirmed under this Application through any one or any combination of wells in the same aquifer, and that the pumping rate for each well constructed in the same aquifer may exceed its nominal pumping rate in order to allow the withdrawal of the full cumulative amount from each aquifer; and 9.4.4. For each aquifer, Applicant may withdraw water through wells in the same aquifer plus any additional wells in the same aquifer, an amount of ground water in excess of the total allowed average annual amount of withdrawal as long as the total volume of water withdrawn through the wells in each aquifer does not exceed the product of the number of years since the date of issuance of the well permit or permits or entry of a decree herein, whichever occurs first, times the total allowed average annual amount of withdrawal for each aquifer. 9.5. Declaring that no findings of reasonable diligence are required to maintain the quantification of water applied for herein and that Applicant may proceed to develop and use the quantification of water applied for herein at such times as the Applicant deems appropriate for the nontributary ground waters, and at such time as the Applicant obtains a court approved plan for augmentation for the not nontributary ground waters. 10. FURTHER, the Applicant prays that this Court grant such other relief as it deems appropriate. (Application and attachments are 198 pages)