


<input checked="" type="checkbox"/> Before the Ground Water Commission State of Colorado Commission Address: 1313 Sherman Street Denver, CO 80203 (303) 866-3581	<div style="text-align: center;">  MAR 15 2001 STATE OF COLORADO GROUND WATER COMMISSION </div> <div style="text-align: center;"> ▲ COURT USE ONLY ▲ </div>
IN THE MATTER OF THE APPLICATIONS FOR DETERMINATION OF RIGHTS TO DESIGNATED GROUND WATER FROM THE LARAMIE-FOX HILLS, ARAPAHOE, AND DENVER AQUIFERS THOMAS H. BRADBURY, ET AL, APPLICANTS	
Attorney or Party Without Attorney (Name and Address): Donald F. McClary 317 Ensign St., PO Box 597 Fort Morgan, CO 80701 Phone Number: (970) 867-5621 FAX Number: (970) 867-3703 Atty. Reg.#: 1651	Case Number: 99 GW 15 A through N consolidated Division Courtroom
EXCEPTION TO INITIAL DECISIONS AND RULINGS OF HEARING OFFICER, STEVE LAUTENSCHLAGER	

COMES NOW the Objector, North Kiowa-Bijou Ground Water Management District, by and through its attorneys, Epperson and McClary, and files its Exception to the Initial Decisions and Orders of said Hearing Officer in regard to said matter including but not limited to the following:

- A. Finding of Fact, Conclusions of Law, Initial Decision and Order entered February 1, 2001.
 - B. The Order dated December 4, 2000, regarding Applicant's Motion for Summary Judgment.
 - C. Order of December 4, 2000, regarding Objector's Motion to Strike and Protective Orders regarding Staff participation.
- A. EXCEPTION IN RE FINDING OF FACT, CONCLUSIONS OF LAW, INITIAL DECISION AND ORDER DATED FEBRUARY 1, 2001.**

Pursuant to Hearing Officer's Order of December 4, 2000, a Hearing was held on January 16, 2001, upon the issue of whether or not Bradbury's requests for a water right for the use of the subject groundwater speculative. In the Hearing Officer's Order of December 4, 2000, and upon consideration of the Briefs filed by the parties on this issue, the Hearing Officer specifically ordered as follows:

"The Applicant's Motion for Summary Judgment that Bradburys' requests for determination of their rights to ground water are not speculative is denied. The Applicants

argues that under the determination of water rights they are seeking in this proceeding, not one drop of water can be withdrawn or used prior to obtaining well permits from the Commission. **These arguments ignore the fact that these proceedings will establish water rights and that no further notice or opportunity to object is available in the process of issuing well permits.** Therefore these proceedings are the District's only opportunity to address the issue of speculation. **The issue of speculation is a factual matter and the Applicants have not yet offered any proof of their intent to appropriate designated ground water for beneficial use.** The Applicants argue that the issuance of a determination of water right only requires consideration of the factors specified in Section 37-90-107(a), C.R.S., and the Commission Rule 5.3.2, 2 CCR 410-1. **The anti-speculation doctrine works to supplement the statutory permit system and to encourage the fullest use of designated ground water. *Jaeger v. Colorado Ground Water Com'n* 746 P.2d 515, 523 (Colo. 1987).**" (emphasis supplied)

Based upon this Ruling and Order of the Hearing Officer which became the Law of the case, the Hearing was held on January 16, 2001, upon this sole issue which required the Applicant to demonstrate that his request granting him the subject water right was not speculative. At said Hearing the Applicant attempted to offer witnesses, testimony, and exhibits in an attempt to show that his requests for said water right was not speculative.

As a part of these proceedings the Objector has secured a transcript of the Hearing of January 16, 2001, which said transcript is a part of these proceedings on the exceptions filed by this Objector. As shown in said transcript and as stated by the Applicant's counsel:

"The only remaining issues in this case are whether the Applicants intend to appropriate the groundwater for beneficial use, and as I – and whether it will be used for **non speculative purposes.**" (T-p 12-L4-8)

To this statement by Applicant's counsel the attorney for the Staff also agreed:

"I guess we'd agree that the key issue for determination **is the issue to speculation,** and what the proposed uses are and how

those fit into the speculation analysis as referenced in the Cornhusker case.”

By even the most cursory examination of the transcript of the Hearing, it is abundantly clear that the Applicant has totally failed to meet his burden of proof wherein all of the testimony and statements of the Applicant’s counsel, applicant, and his witnesses relate exclusively and entirely to **“Development Options”**¹. These purported “options” are no proof of any real intent to place the subject water to beneficial use but merely, by definition, the liberty of choosing, discretion, or possibility of some future speculative use of the subject water without any definite purpose or commitment. An option of use is no more than an unsupported statement that I may or may not use some or all of the water for any of the uses allowed under the statute. Certainly any applicant could respond in this same manner as to any application, but it would still remain so speculative in nature as to be in fact undefined and literally non-responsive.

The Hearing Officer’s findings of fact and initial decision on this issue is very limited and of little benefit to either the Commission or the parties. His finding of fact and initial decision is apparently based solely upon the testimony of the Applicants as to their “Development Options” and the only attempt of any finding of fact on this issue as contained in said Hearing Officer’s Order of February 1, 2001, is as follows:

“16. The evidence and testimony supports that the Applicants intend to use the water underlying each parcel of land they own to develop that land. *** 17. The evidence and testimony supports that its economically feasible for the lands owned by the Applicant to be fully developed within the next 20 years. In addition, the quantities of ground water determined to be available would be necessary for the development of the properties **under the potential development options.*****”

Based upon these meager and unsupported findings the Hearing Officer in paragraph 26 of the Order states:

¹ All of Applicant’s testimony and statements relating to the issue of speculation refers **only** to “Development Options” which term was used over 25 times. (see transcript)

“The District’s Motion to deny the application based upon speculation is denied.”

If the Initial Decision and Order of Hearing Officer was to be adopted by the Commission as the rule and guidelines for measuring when an application is speculative it would appear under the Hearing Officer’s decision that the minimum requirement would be that an applicant need only show that he has some possible “development options” whereby he may or may not place this water to some beneficial use, whether it be for industrial, commercial, irrigation, stock and domestic purposes, golf courses etc., within a period of 20 years. Such development options are no more than mere speculations for profit.

It should also be noted, that once this application is granted as presented a water right for groundwater is vested in the Applicant and there is no requirement that he use this water for any of the specific purposes nor for any specific time whether it be 20 years or 100 years. Certainly neither the Commission nor this Objector has any information that it could rely upon as to any specific use within any specific time period, whether it be used by the Applicant or future unknown developers for profit.

As stated in the Order of the Hearing Officer issued on December 4, 2000, relating to this issue of speculation which he has adopted as the rule in this case.

“The Anti-Speculation Doctrine works to supplement the statutory permit system and encourage the fullest use of designated groundwater.” *Jaeger v. Colorado Ground Water Com’n* 746 P.2d 515, 523 (Colo. 1987)

At the close of the Applicant’s case the Objector moved for a ruling of the Hearing Officer in the nature of a Direct Verdict on the basis that the testimony offered by the Applicant totally failed to show anything but a request for use of groundwater that is speculative contrary to the laws, decisions, and guidelines of our Courts. To support this Motion the Objector reviewed the development and latest rulings of our Court regarding this matter which are included in a Trial

Brief, a copy of which is attached to this Exception as Appendix A. It is to be noted that the Trial Brief commences with the *Jaeger* decision which was adopted by the Hearing Officer as the applicable law on this issue in his Order of December 4, 2000.

In addition to those cases cited and brought to the attention of the Hearing Officer, we would call to the attention of the Commission a more recent decision of our Supreme Court dated November 20, 2000. *The Board of County Commissioners of Arapahoe et al., v. Crystal Creek Homeowners et al.*, #98SA327. Wherein our Supreme Court continues to support and enforce the Anti-Speculation Doctrine applicable to **all** waters of the State of Colorado wherein the Court states:

“Colorado policy seeks to optimize the beneficial use of all available waters of the state. *See Matter of Rules & Reg. Gov. Use, Control & Protection of Water Rights*, 674 P.2d 914, 935 (Colo. 1983). We have interpreted the ‘can and will’ doctrine accordingly. See § 37-92-305(9)(b), 10 C.R.S. (2000) (establishing the ‘can and will’ doctrine); *see also Arapahoe I*, 891 P.2d 952 *passim*. The ‘can and will’ doctrine requires a conditional water right applicant to show a ‘**substantial probability** that within a **reasonable time** the facilities necessary to effect the appropriation can and will be completed with diligence, and that as a result waters will be applied to a beneficial use.’” (emphasis applied)

The Hearing Officer in his Initial Decision and Order of February 1, 2001, is in error in that he has totally failed to apply the appropriate standards and pronouncements of our Courts regarding the issue of speculation to the facts of this case as presented by the limited testimony of the Applicant.

If the Commission were to adopt the Hearing Officer’s Initial Decision and Order, as its own it would in effect perpetuate this error, ignoring the pronouncements, decisions, and guidelines of our Court on this issue to the end that in these types of proceedings any and all land owners may request and receive from the Commission a water right to groundwater without any real intent to place said water to any beneficial use within any specified time. Such a ruling would only

have the effect of increasing speculation in sale or transfer of these water rights in the future and foster further speculation for profit.

B. EXCEPTION IN RE ORDER DATED DECEMBER 4, 2000, REGARDING APPLICANT'S MOTION FOR SUMMARY JUDGMENT.

1. Section 37-90-107(7), C.R.S. is unconstitutional both in its own terms and in its application and administration.

It is the contention of the District in this regard that the provisions engrafted in the 1998 Amendment to C.R.S. 37-90-107(7)(8) establishes a claim of ownership of a water right to groundwaters based solely upon the ownership of lands overlying said waters. Such an attempt to grant **ownership** of waters of this state is in violation of Article 16, Section 5 of the Colorado Constitution declaring that the waters of this state are the property of the public and subject to appropriation in the manner as provided in Section 6 of said Article. This matter was briefed and fully argued before the Hearing Officer. In order not to unduly burden the Commission, the District would refer to Subsection C of the **District's Response to Bradbury's Motion for Summary Judgment** as included in the records of these proceedings.

2. Applicant has failed to comply with the rules and regulations of the District and to afford the District an opportunity to investigate and make recommendations.

It is the District's position in this regard that the Management District has adopted controls, regulations, and conservation measures in the manner as described under the Ground Water Management Act. The District's position in regard to this question is more fully set forth in Subsection D of the **District's Response to Bradbury's Motion for Summary Judgment**, and again to not unduly burden the Commission, the District will refer the Commission to the arguments of the District as stated in its response which is again made a part of the record of these proceedings.

3. The Hearing Officer was in error in denying the District's Motion to Strike Staff's Response to Motion for Summary Judgment and Protective Orders.

The District's position on this matter is that the "Staff of the Ground Water Commission" is not a legal entity and is not a proper party to this action. The District in this Motion also desires to call to the attention of the Commission the apparent conflict of interest of the "Staff" and its attorney and their attempts to prejudge the issues before the Hearing Officer and this Commission are not only unwarranted but present a real question of undue influence and conflict of interest. Again these matters are more fully set forth and argued in the **District's Motion to Strike Staff's Response to Motion for Summary Judgment and Protective Orders** which is also included in the record of these proceedings.

CONCLUSION

The Management District represents the tax paying electors and owners of existing wells producing groundwaters within the boundaries of their District. The District was formed at the request and positive vote of said electors and well owners pursuant to the provisions of the Ground Water Management Act. It is the duty and responsibility of the District's Board members, as well as the Ground Water Commission, to protect and preserve the subject groundwaters for the benefit of the existing permitted uses upon which the farmers and users of the District rely for their very livelihood. It has been already declared and repeatedly recognized that the groundwaters of this District are **over appropriated and the present users are in a mining condition whereby their future is seriously imperiled and limited.**


The District, its tax paying electors, and existing groundwater users are understandably zealous and take the issues raised in these proceedings seriously as a important matter directly effecting the future of the Districts' groundwater users. As is apparent in these proceedings the subject 1998 Amendment to C.R.S. Section 32-90-107(7) and as it is being applied and administered by the "Staff" can only be viewed as special legislation for the benefit of prospective "Developers"

who have not already made an investment of their time, monies, and effort in developing a beneficial use of these groundwaters to the detriment of those existing users who are only trying to conserve these groundwaters in every way possible for their livelihood and for their future generations.

Dated this 2nd day of March 2001.

Respectfully submitted,

Epperson and McClary


Donald F. McClary
Attorney for North Kiowa-Bijou Ground
Water Management District

CERTIFICATE OF MAILING

I hereby certify that a copy of the within **EXCEPTION TO INITIAL DECISIONS AND RULINGS OF HEARING OFFICER, STEVE LAUTENSCHLAGER** was placed in the United States Mail, first class, postage pre-paid addressed to the following on the 2nd day of March 2001:

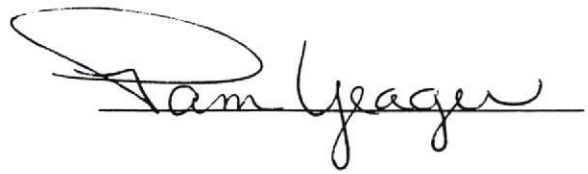
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A handwritten signature in cursive script, reading "Sam Geager", written over a horizontal line. The signature is positioned to the right of the typed address.

TRIAL BRIEF—BRADBURY

APPLICATION AND DEVELOPMENT OF ANTI-SPECULATION DOCTRINE TO BRADBURY

1987—Jaeger v. Colorado Ground Water Com'n 746 P.2d 515:

This case cited as authority in Hearing Officer's Order—Application was for 6,600 acre feet and Hearing Officer found that it would not unreasonably impair existing water rights, but also found that the Well Permits clearly shows an intent to take water and put to beneficial use.

The matter was then referred to the Commission which adopted the Hearing Officer's report that the 6,600 acre feet would not unreasonably impair existing water rights, however, it reversed the Hearing Officer and found that the applications were speculative. The Commission stating:

“To initiate and appropriation of designated groundwater, one must have the intent to appropriate. The right to appropriate is for beneficial use, not merely for profit. ***it is inconsistent with the policy of full economic development of the states designated groundwater resources to issue conditional permits for speculative future use.”

This Commission's ruling was then appealed to the water court under Judge Behrman who upheld the Commission's ruling and was appealed to the Supreme Court. The Supreme Court held in this regard:

“A fundamental principal included within the doctrine (water rights) is that a valid appropriation of water requires an intent to appropriate i.e. ‘a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source.’”

“Although it (applicant) planned to use the water to meet the future anticipated needs of municipalities and others, it had no firm contractual commitment from any such entity for the use of water.”

“Our Constitution guarantees the right to appropriate not to speculate. The right to appropriate is for use, not for profit. As we read our Constitution and statutes they give no one the right to preempt the development potential of water for anticipated future use of others not in privity of contract etc. ***to recognize conditional decrees granted on no interest beyond the desire to obtain water for sale would as a practical matter discourage those who have a need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial

use, whatever unappropriated water remain. The Supreme Court denied that by survey, plat, a token construction compelling subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by the Constitution is not appropriate.”

Designated ground water is made subject to the principals of the doctrine of prior appropriation. The ground water management act recognizes the doctrine of prior appropriation as may be modified.

The applicant argued that the cases relating to speculation did not apply under the ground water management act and in reply the Supreme Court states:

“In none of our cases, however, have we suggested that the modified doctrine of prior appropriation applicable to designated ground water does not require an intent to appropriate for beneficial use rather than for speculation.”

1998—Chatfield East Well Company v. Chatfield Owners Ass’n, 956 P.2d 1260.

Supreme Court states: “We hold that the Denver Basin Aquifer water is a public resource, the ownership of which cannot be reserved in a deed conveying the surface estate to another person.” “All surface and ground water in Colorado is a public resource.”

“Ground water located in a designated Basin is subject to a modified system of prior appropriation administered by the Ground Water Commission—regardless of whether water rights are obtained in accordance with prior appropriation law or pursuant to ground water management act no person owns Colorado public water resources as a result of land ownership.”

“The general assembly in the courts of this state have often reinforced the policy of keeping the public water resources available to those who can and will use it beneficially as opposed to those who wish to speculate in its value and price. ***even though Denver Basin ground water is managed differently from water of a natural stream the ground water management act mirrors the anti-speculation, beneficial use non waste precepts of Colorado water law.

1999—Santa Fe Trail Ranches v. Simpson, 990 P.2d 46.

“Property rights in water are usufructuary; ownership of the resource itself remains in the public. ***efficient water management disfavors speculation and waste—adherence to these principles serves to extend the benefit of the resource to as many water rights as there is water available for use in Colorado.”

“The general assembly and the courts of this state have often reinforced the policy of keeping the public water resources available to those who can and will use it beneficially, as opposed to those who wish to speculate in its value and price. ***The privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation.”

February 2000—Upper Black Squirrel Creek Ground Water Management District v. Goss v. Colorado Ground Water Commission 993 P.2d 1177.

Wherein the Supreme Court States in this recent case:

“Intent to appropriate for beneficial use is a necessary factor in the Commission’s decision whether to grant a well permit application Colorado anti-speculation doctrine applies. See Jaeger v. Colorado Ground Water Commission 746 P.2d 515.”