

APR 20 2001

BEFORE THE GROUND WATER COMMISSION
STATE OF COLORADO
Case No. 99 GW 15 (A through N Consolidated)

WATER RESOURCES
STATE ENGINEER
COLO.

APPLICANTS' BRIEF ON EXCEPTED ISSUES

IN THE MATTER OF APPLICATIONS FOR DETERMINATION OF WATER RIGHTS TO
DESIGNATED GROUND WATER FROM THE LARAMIE-FOX HILLS, ARAPAHOE, AND
DENVER AQUIFERS OF THOMAS H. BRADBURY, ET AL

The Applicants ("Bradburys"), by their attorneys, Hill & Robbins, P.C., hereby submits this Brief on the issues raised by North-Kiowa Bijou Ground Water Management District's ("District") Exceptions to the Initial Decision and Orders of the Hearing Officer in this case.

Introduction

The District has raised four separate exceptions to the Hearing Officer's Orders in this case. The District's positions can be succinctly stated as follows:

1. The applications in this case are speculative.
2. C.R.S. § 37-90-107(7) and (8) are unconstitutional.
3. Applicant has failed to comply with the Rules of the District and afford the District an opportunity to investigate and to make recommendations prior to finding the applications in this case.
4. The Ground Water Commission's Staff is not a legal entity, has a conflict of interest, and should not be allowed to participate in this case.

The first issue pertains to District's disagreement with the Hearing Officer's Findings of Fact, Conclusions of Law and Initial Decision and Order dated February 1, 2001. The last three issues relate to the District's disagreement with the Hearing Officer's Order of December 4, 2000, on Applicants' Motion for Summary Judgment and the District's Motion to Strike.

replace any depletions to alluvial aquifers caused due to withdrawal of ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers.

(II) The publication and hearing requirements of this section shall also apply to an application for determination of water rights pursuant to this subsection (7).

(III) Any such commission approved determination shall be considered a final determination of the amount of ground water so determined; except that the commission shall retain jurisdiction for subsequent adjustment of such amount to conform to the actual local aquifer characteristics from adequate information obtained from well drilling or test holes.

(emphasis added)

Bradburys Are Not Speculators And Bradburys' Applications Are Not Speculative

The first issue raised by the District is whether, based on the record, the Hearing Officer erred by denying the District's motion to dismiss the applications based on the anti-speculation doctrine. District's Exceptions, p.1.

What Is The Anti-Speculation Doctrine?

The anti-speculation doctrine holds that a person seeking to appropriate water who does not intend to use the water himself, but instead intends to sell the water in the future but does not have a present contractual commitment for purchase of the water for beneficial use, is a mere speculator and is not entitled to an appropriation under Colorado law. *See Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P.2d 566 (1979). The anti-speculation doctrine is incorporated in C.R.S. § 37-92-103(3)(a), which provides, in pertinent part, as follows:

"Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but *no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation.* . . . (emphasis added).

overlying land does not have any present use for the Denver Basin Aquifers ground water, no other person can lawfully appropriate it, or is being unlawfully deprived of the use of such water. The legislature has determined that only the overlying landowner can appropriate such water.¹

Although not cited in any of its prior briefs or arguments before the Hearing Officer, the District now also cites *Arapahoe County Commissioners v. Crystal Creek Homeowners*, 14 P.3d 325 (Colo.2000) dealing with the Union Park Project in Gunnison County to support its position that “the Anti-Speculation Doctrine is applicable to all waters of the State of Colorado”. District’s Exceptions, p. 5. The District’s reliance is misplaced. The phrase “Waters of the state” is defined by statute as “all surface and underground water in or tributary to all natural streams within the State of Colorado . . .” C.R.S. § 39-92-103 (13). Ground water in the Denver Basin Aquifers is not “waters of the State” because it is not in or tributary to a natural stream. See *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass’n*, 956 P.2d 1260, 1264, n.2 (Colo. 1998).

Even If The Anti-Speculation Doctrine Applies, The Hearing Record Establishes That The Bradburys Are Not Speculators And Have The Requisite Appropriative Intent

Even if the anti-speculation doctrine applies to applications for determinations of rights to Denver Basin Aquifers ground water under C.R.S. § 37-90-107(7), the Hearing Officer determined that the applications in this case were not speculative and the Applicants’ had the requisite appropriative intent, based on the testimony and evidence presented at the January 16, 2001 Hearing. Specifically, the Hearing Officer found that

15. The evidence and testimony supports that the withdrawal of ground water from the Denver, Arapahoe and Laramie-Fox Hills Aquifers in the quantities approved herein will not unreasonably impair existing water rights and will not cause unreasonable waste.

and the uses of water on the developed property would be those uses applied for in the subject applications.⁷ Mr. Healy also testified that in his opinion as a water resources expert, such development options prepared by Mr. Conway for the overlying land would not result in waste, but that such uses would constitute beneficial use of the Denver Basin Aquifers ground water.⁸

Mr. Conway testified as an expert in market analysis and economic feasibility of land development options and opportunities for the overlying land.⁹ Mr. Conway testified that feasible development for the property would require the use of all available ground water in the Denver Basin Aquifers underlying the land described in the applications using the estimated water requirements developed by Mr. Healy.¹⁰ Mr. Conway also testified that in his expert opinion the development options that he had prepared for the Applicants were very feasible given current and projected growth in the area using a 20-year planning horizon used by DRCOG, the regional planning agency.¹¹ Finally, Mr. Conway testified as to his knowledge of the Applicants' previous successful development of other land using Denver Basin ground water.¹²

The District presented no testimony or evidence at the Hearing to attempt to counter, rebut, or contradict the testimony and evidence presented by the Applicants. Instead, the District moved for dismissal of the applications based on the allegation that the Bradbury's were speculators and therefore the Colorado Supreme Court's holding in *Jaeger* required the Hearing Officer to dismiss the applications. Since the District presented no testimony or evidence that would support such an allegation in the face of substantial evidence to the contrary, the Hearing Officer appropriately denied the District's motion.

Aquifers ground water determined to be available underlying their land would be necessary for the feasible development of their overlying land.

The District cites no case, statute, authority, or precedent of any kind that supports the District's argument that an application by an overlying landowner seeking an appropriation of Denver Basin Aquifers ground water for use on his own overlying land is speculative unless the landowner also has a firm and final development plan for the property.

Based on the uncontroverted evidence and testimony in this case, the Bradburys applications are not speculative, even if the anti-speculation doctrine is applicable to their applications. Thus, the Hearing Officer's Findings of Fact, Conclusions of Law, Initial Decision and Order dated February 1, 2001 is well founded and should be upheld by the Commission to the extent that it denies the District's motion to dismiss based on the anti-speculation doctrine.

Enactment of C.R.S. § 32-90-107 (7) and (8) is a Constitutional Exercise of the General Assembly's Plenary Authority

The District also takes exception to the Hearing Officer's December 4, 2000 Order rejecting the District's legal argument that C.R.S. § 32-90-107 (7) and (8) are unconstitutional because they attempt to allocate rights to ground water in the Denver Basin Aquifers based on overlying land ownership, contrary to the appropriation doctrine. District's Exceptions, p.6. The District's argument has no merit.

It is well settled that a statute is presumed to be constitutional, and the party challenging the statute bears the heavy burden of proving it to be unconstitutional beyond a reasonable doubt. *Allstate Products Co., Inc. v. Colorado Dept. of Labor and Employment*, 782 P.2d 880, 881 (Colo.App.1989); *Weitzel Redi-Mix, Inc. v. Industrial Commission*, 728 P.2d 364

application". District's Response to Motion for Summary Judgment, p.13. Because the General Assembly has plenary authority to allocate and administer designated ground water in the Denver Basin Aquifers, this argument must also fail. With respect to designated ground water in the Denver Basin Aquifers, the General Assembly has exercised its plenary authority by delegating exclusive authority to the Commission to determine and allocate rights thereto based on overlying land ownership. The fact that the District does not agree with the manner in which the General Assembly has exercised its plenary authority does not make C.R.S. § 37-90-107(7) or (8) unconstitutional.

The Hearing Officer's December 4, 2000 Order is well founded and should be upheld by the Commission to the extent that it rejects the District's legal argument that C.R.S. § 32-90-107 (7) and (8) are unconstitutional.

The Applications in this Case are Properly Before the Ground Water Commission

The District also takes exception to the Hearing Officer's December 4, 2000 Order rejecting the District's legal argument that the Bradburys were required by law and the Rules of the District to submit the applications in this case to the District for review and recommendations prior to any proceedings before the Commission. District's Exceptions, p. 6. This argument is unsupported by the plain language of the applicable statutes, or the even the rules of the District.

C.R.S. § 37-90-107(7)(c)(I) unambiguously provides, in pertinent part, as follows:

. . .Any person desiring to obtain such a determination [of rights to Denver Basin Aquifers ground water] shall make application to the **commission** in a form to be prescribed by the commission . . .

Id. (emphasis added). There is no requirement in C.R.S. § 37-90-107(7)(c)(I), or elsewhere in the Ground Water Management Act, that an application for a determination of rights to designated ground water in the Denver Basin Aquifers must first be submitted to the District.

The Ground Water Commission's Staff Lawfully and Appropriately Participated in this Case

Finally, the District takes exception to the Hearing Officer's December 4, 2000 Order rejecting the District's legal argument that there is no such entity as "Staff of the Groundwater Commission," and that even if there were such an entity, it would have a conflict of interest preventing it from taking a position in this matter. District's Exceptions, p.7. Both of these positions are in direct conflict with the rules and regulations of the Groundwater Commission. Rule 4.2.9 of the Rules and Regulations for the Management and Control of Designated Groundwater. 2 CCR 410-1 defines the "Commission's staff or staff" as "an employee or agent of the Colorado Division of Water Resources authorized by the State Engineer to act or assist in discharging the duties of the Commission." Therefore, contrary to the position taken by the District, the Commission's staff is recognized by a lawful regulation of the Commission.

Moreover, the Commission's rules of procedure for adjudicatory hearings specifically provide at paragraph VI for the participation of the Groundwater Commission's staff as follows:

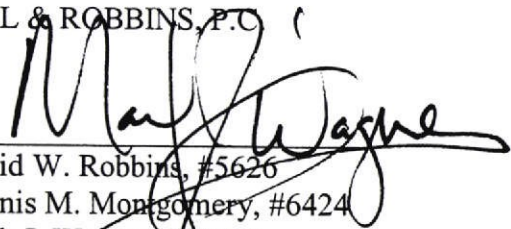
The staff of the Groundwater Commission may appear to present any testimony or evidence relevant to any matter being heard by the Commission or its hearing officer. The staff shall be represented by the Attorney General.

2 CCR 402-3. Therefore, under the lawful regulations of the Groundwater Commission, the Commission's staff is a proper party to this proceeding and may fully participate as a party therein.

The District's other argument is that the Commission Staff has a conflict of interest preventing it from taking a position in this matter. The District has cited no authority for its argument and its argument is without merit. It is well settled and is common practice in this and

Respectfully submitted this 20th day of April 2001.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 20, 2001, service of the within pleading was made by placing a true and correct copy of same in the United State mail, postage prepaid, addressed as follows:

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STATE OF COLORADO GROUND WATER COMMISSION

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RULES AND REGULATIONS FOR THE MANAGEMENT AND CONTROL OF DESIGNATED GROUND WATER

2 CCR 410-1

Effective Date: May 1, 1992
Amended: March 30, 1995
Re-amended: April 1, 1997
Re-amended: February 1, 2001

5.3.2.4 In computing the land area to be used under Rule 5.3.2.3, the area of the cylinder of appropriation for a well(s) which has or can be issued a small-capacity well permit pursuant to Section 37-90-105, C.R.S., shall be considered to be zero. The average annual withdrawal computed under Rule 5.3.2.3 may be reduced by any applicable appropriation amount for such a small-capacity well(s) located on this land area and withdrawing water from the aquifer under consideration.

5.3.2.5 The allowed maximum annual amount of withdrawal may exceed the allowed average annual amount of withdrawal as long as the total volume of water withdrawn from the well or wells does not exceed the product of the number of years since the date or dates of issuance of the well permit or permits times the allowed average annual amount of withdrawal. This provision is applicable only for Denver Basin aquifer wells but is not applicable to a well whose water right was created prior to November 19, 1973 in accordance with the provisions of Rule 5.3.3. Existing permitted well owners may avail themselves to this provision upon written approval of the Commission.

5.3.3 Determination of the extent of appropriations created prior to November 19, 1973

5.3.3.1 If the cylinder of appropriation of a well for which a right was created prior to November 19, 1973 as evidenced by a well registration or by a well permit and its beneficial use statement, overlap(s) the overlying land claimed in the application, the number of acres of overlying land to be used in determining the available water in storage shall be reduced by the number of acres of the cylinder of appropriation which overlaps the land. An applicant whose water rights are reduced by such cylinder(s) may, upon notice to all affected parties, challenge the Commission's determination of the size of such overlap by requesting an evidentiary hearing before the Commission.

5.3.3.2 In the event that a well completed prior to November 19, 1973 does not fully penetrate the aquifer, the radius of the cylinder of appropriation for that well shall be calculated assuming that it does fully penetrate that aquifer.

5.3.3.3 In the event that a well initiated prior to November 19, 1973 is constructed so as to produce water from more than one aquifer, cylinders of appropriation shall be calculated for each aquifer. The production of the well from each aquifer shall be allocated in proportion to the historical production of the well from each aquifer. The interval of each aquifer through which the well is completed shall be considered in the determination of the historical production from each aquifer. Where this perforation interval cannot be determined, the well shall be assumed to be producing from the entire interval of the aquifers involved.

5.3.4 Determination of thickness of Saturated Aquifer Materials in the Denver Basin Aquifers

5.3.4.1 The thicknesses of sandstones and siltstones in the Denver Basin Aquifers are shown on the following figures prepared by the Colorado Division of Water Resources:

- | | |
|-----------------|--|
| a. Upper Dawson | Denver Basin Atlas No. 1, Plate 3, Figure 1E |
| b. Lower Dawson | Denver Basin Atlas No. 1, Plate 2, Figure 1C |

- F. The location of nontributary ground water in the Laramie-Fox Hills Aquifer is shown in Denver Basin Atlas No. 4, Plate 4, Figure 4D as revised March 21, 1991.

5.3.6.2 Replacement Water Required:

- A. For wells proposing to withdraw water from the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers within the nontributary zone, the terms and conditions shall provide that no more than 98% of the water withdrawn annually is consumed.
- B. For wells proposing to withdraw not-nontributary ground water from the Denver, Arapahoe, or Laramie-Fox Hills aquifers at a point farther than 1 mile from the contact with the alluvium, the terms and conditions shall provide for the replacement of 4 percent of the water diverted from such well. The return of replacement water to the uppermost aquifer in the vicinity of the point of withdrawal shall be presumed to be in compliance with Rule 5.6.1.(C) but replacement at other locations may be approved by the Commission.
- C. For wells proposing to withdraw not-nontributary ground water from a Dawson Aquifer or not-nontributary ground water from the Denver, Arapahoe, or Laramie-Fox Hills aquifers at a point closer than one mile from the contact with the alluvium, the amount of such replacement water shall provide for the depletion of alluvial water for the first 100 years due to all previous pumping and if pumping continues beyond 100 years, shall replace actual impact until pumping ceases, assuming water table conditions in the bedrock aquifer. The applicant shall be required to develop terms and conditions necessary to prevent injury to prior designated ground water rights. Such terms and conditions shall meet the standards for a Replacement Plan as defined in Rule 5.6.

5.3.6.3 For wells which will appropriate water from more than one zone of an aquifer as identified in Items A, B, and C of Rule 5.3.6.2, the replacement requirements to meet the intent of replacement needs of Rule 5.3.6.2 shall be determined based upon the overlying land acreage located in each zone and the location of the well.

5.3.6.4 The measurement of annual withdrawals and the keeping of records is the responsibility of the well owner. The annual diversion from the period January 1 to December 31 of each year shall be the basis for computation of the replacement requirement.

5.3.6.5 The replacement water may occur as a return flow from the owner's use of the well pursuant to a plan which provides an accounting for the use of the well and the source of each point of return flow. The well owner shall be responsible for any required measurements of the return flow. Credit for diffuse return flow shall be given only to the extent that the well owner has maintained control over such waters and can quantify such returns by reasonable engineering methods acceptable to the Commission. A plan proposing return flow as a source of replacement water must be incorporated as a term and condition of the permit.

5.3.6.6 The well owner shall be required to provide such self-administration as necessary to assure compliance with permit terms and conditions. Self-administration may include metering, reporting or the retention of a neutral third party as reporting agent.

- B. Such ordinance or resolution was adopted prior to the effective date of these Rules, and, prior to January 1, 1985, such ground water was conveyed or reserved or consent to use such ground water was given or reserved in writing to anyone other than such water supplier and such conveyance, reservation, or consent has been properly recorded prior to the effective date of these rules;
- C. Such ordinance or resolution is adopted on or after the effective date of these Rules, and said ground water has been conveyed or reserved or consent to use such ground water has been given or reserved in writing to anyone other than such water supplier and such conveyance, reservation, or consent is properly recorded before the effective date of that ordinance or resolution;
- D. Consent to use such ground water has been given to anyone other than such water supplier by the lawful effect of an ordinance or resolution adopted prior to January 1, 1985;
- E. Such ground water has been decreed or permitted to anyone other than such water supplier prior to the effective date of such ordinance or resolution; or
- F. Such portion of the land is not being served by said water supplier as of the effective date of such ordinance or resolution and such ground water is the subject of an application for determination of a right to use ground water filed with the Commission prior to the effective date of these Rules.

5.4 Appropriation from all Bedrock Aquifers Except the Denver Basin Bedrock Aquifers

5.4.1 This Rule shall apply to all aquifers in all the designated basins except those aquifers listed below:

- A. Lost Creek, Kiowa-Bijou, Upper Big Sandy and Upper Black Squirrel Creek Basins: Alluvium and Denver Basin Bedrock aquifers.
- B. Northern High Plains and Camp Creek Basins: Alluvium, Ogallala, and White River.
- C. Southern High Plains Basin: Alluvium, Ogallala, Dakota, Cheyenne and Dokum.
- D. Upper Crow Creek: Alluvium, Fan, and White River.

5.4.2 An application to appropriate ground water from these aquifers shall be analyzed on the basis of the ownership of the overlying land and on the basis of an aquifer life of one hundred years.

5.4.3 The amount of water available in storage in a specified bedrock aquifer under a specified parcel of land shall be computed based upon the site specific hydrogeologic information available to the Commission.

5.4.4 The provisions of Rule 5.3.7 dealing with the well location for the Denver Basin bedrock aquifer wells shall also apply to all other bedrock aquifer wells.

LIST OF TESTIMONY IN RE: POSSIBLE DEVELOPMENT OPTIONS

A. Bradbury

1. Page 20 Lines 23-25
2. Page 21 Lines 1-6
3. Page 21 Line 11
4. Page 21 Lines 22-25 and Page 22 Line 1
5. Page 36 Lines 9-13

B. Healy

6. Page 50 Lines 21-25
7. Page 51 Lines 7-10
8. Page 51 Lines 11-22
9. Page 52 Lines 12-14
10. Page 52 Lines 19-25
11. Page 53 Lines 1-19

C. Conway

12. Page 63 Line 21-25 (Wagner)
13. Page 66 Line 2-25
14. Page 69 Lines 2-7
15. Page 69 Lines 8-19
16. Page 70 Lines 1-9
17. Page 80 Lines 4-9
18. Page 82 Lines 5-11
19. Page 82 Lines 24 and 25, Page 83 Lines 1 and 2
20. Page 83 Lines 12-14
21. Page 85 Lines 1-8
22. Page 86 Lines 8-10