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WATER RESOURCES
STATE ENGINEER
COLORADO

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Filed in the Combined Court
Alamosa County, Colorado

DEC - 3 1999

*Carol S. Redding
Clerk of the Combined Court*

WATER COURT, WATER DIVISION THREE, STATE OF COLORADO

Case No. 99 CW 7

CONCLUSIONS OF LAW AND ORDER

SILVER STATE, INC.

Plaintiff,

vs.

HAL SIMPSON, STATE ENGINEER FOR THE STATE OF COLORADO

Defendant.

THIS MATTER came before the Court on October 28, 1999, for oral argument on Plaintiff's Complaint for Judicial Review of Agency Action. The Plaintiff was present, with his attorney Erich Schwiesow of Lester, Sigmond, Rooney & Schwiesow. Defendant Hal Simpson was represented by Craig Cotton from the Division Engineer's Office, who was present, and by his attorney David Hayes of the Attorney General's Office, who attended by telephone. Intervenor Rio Grande Water Conservation District was represented by its attorneys David Robbins and Jennifer Hunt of Hill & Robbins, who attended by telephone. Having read the briefs and other matters contained in the Court file, having heard the arguments of counsel, and being otherwise fully advised, the Court concludes and orders as follows:

1. While appellate Courts always give deference to the facts as found by trier of fact, in this situation involving judicial review of agency action there is no reason why this Court should

give deference to the agency's interpretation of law. N. Colo. Med. Center v. Committee on Anticompetitive Conduct, 914 P.2d 902 (Colo. 1996); Three Bells Ranch v. Cache La Poudre, 758 P.2d 164, 172 (Colo. 1988). See also Chevron USA, Inc., v. Natural Resources Defense Council, 467 U.S. 837 (1984).

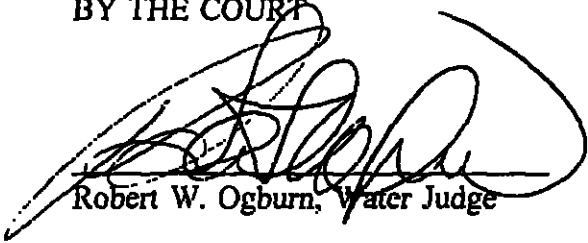
2. The facts as found by the Hearing Officer, which findings all parties agreed were correct in all material respects, clearly establish that the water produced by the subject wells was applied to beneficial use for the purposes for which the appropriation was made, which was irrigation of already existing and productive pasture, and that the water was so applied shortly before and also after the expiration date of the permits. The facts also show that no permanent pump has been installed in either well. Although the lack of permanent pump installation is noted in the case of Danielson v. Milne, 765 P.2d 572 (Colo. 1988), the Court concludes that the deliberate efforts undertaken by the Plaintiff to spread the water on irrigated pastures are significant enough to distinguish this case from the facts in Milne, where the claimed use under a permit for commercial use amounted to no more than spilling water produced in a pump test onto undeveloped ground not used for any purpose. The expiration order issued on September 15, 1997, was therefore in error, and the State Engineer will be directed to recognize that the well permits are not expired.

3. In the circumstances before the Court, including the situation in which the case is postured and the fact that the only evidence in the record as to the productive capacity of the two wells is the test report filed shortly after the wells were completed, it is appropriate for the Court to limit the flow rate allowed under the permits to that amount shown by the pump test, because

this reflects the actual amount of water put to beneficial use. Peterson v. Groundwater Commission, 579 P.2d 629 (Colo. 1978); see also Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064, 1067 (Colo. 1981). Accordingly, the State Engineer is directed to issue new or amended permits which shall reflect limitations on the rate of flow consistent with those amounts shown by the pump tests. For permit no. 21403-F, located in the center of the NW¼ of Section 6, T39N, R11E, that rate is 525 gallons per minute. For permit no. 21405-F, located in the center of the SW¼ of Section 6, T39N, R11E, that rate is 415 gallons per minute.

DONE AND SIGNED this 30th day of December, 1999.

BY THE COURT


Robert W. Ogburn, Water Judge

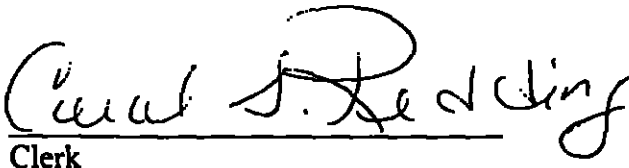
CERTIFICATE OF MAILING

I do hereby certify that on the 7th day of December, 1999, I hand delivered or placed in First Class U.S. Mail a true and correct copy of the above Ruling and Order properly addressed and postage prepaid to the following:

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