



DISTRICT COURT, WATER DIVISION 2, COLORADO

CONSOLIDATED CASE NOS. 96CW134 (WATER DIVISION NO. 2) AND
96CW225 (WATER DIVISION NO. 1)

**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE OF THE
WATER COURT APPROVING AN APPLICATION FOR A PLAN FOR AUGMENTATION**

CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE NORTHGATE
COMPANY, A COLORADO GENERAL PARTNERSHIP, AND THE GREAT DIVIDE WATER
COMPANY, A COLORADO NONPROFIT CORPORATION,
FILED IN THE OFFICE OF THE CLERK
DISTRICT COURT WATER DIV NO. 2
STATE OF COLORADO

IN EL PASO COUNTY

APR 30 1998

MARDELL TRIVISONNO
CLERK

THIS MATTER, having come on for consideration upon the Application of The Northgate Company, a Colorado general partnership, and The Great Divide Water Company, a Colorado nonprofit corporation, for Approval of a Plan for Augmentation, and the Court having considered the pleadings, the files herein, the stipulations of the parties, the evidence presented and the comments of the Division Engineer, does find.

FINDINGS OF FACT

1. The Application herein was filed in Water Division No. 2 on September 30, 1996. A substantially similar application was also filed with the District Court for Water Division No. 1 on October 1, 1996. Applications were filed with both Courts because the depletions attributable to pumping from a portion of the wells described herein will impact both the South Platte River drainage basin and the Arkansas River drainage basin. The Application was published in the September, 1996 Water Resume for Water Division No. 2 and the October, 1996 Water Resume for Water Division No. 1. All notices required by law of the filing of this Application have been fulfilled.

2. Statements of Opposition were filed to the Application filed in Water Division No. 1 by the City of Thornton and the State Engineer and the Division Engineer for Water Division No. 1. Statements of Opposition were filed to the Application filed in Water Division No. 2 by the City of Colorado Springs and the State Engineer and the Division Engineer for Water Division No. 2. No other statements of opposition have been filed and the time for filing such statements has now expired.

3. On July 25, 1997, Applicants filed a motion with the Panel on Consolidated Multidistrict Litigation requesting an order

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transferring the case filed in Water Division No. 1 (96CW225) to Water Division No. 2, and for assignment of the Water Judge for Water Division No. 2 to hear the consolidated cases. On August 27, 1997, an Order was entered in Case No. 97MDL19 by the Chief Justice of the Colorado Supreme Court pursuant to C.R.C.P. 42.1(i), appointing John E. Anderson, III, Water Judge of Water Division No. 2, to hear the consolidated cases. Therefore, this court has exclusive jurisdiction over the subject matter of these proceedings and over all who have standing to appear as parties whether they have appeared or not.

4. The land and water rights involved herein are not included within the boundaries of any designated groundwater basin.

5. The Northgate Company ("Northgate"), is the primary applicant in this matter. The mailing address for Northgate is as follows:

The Northgate Company
3720 Sinton Road, #106-D
Colorado Springs, Colorado 80907

6. Northgate and the Arrowwood Development Corporation are developing a residential subdivision located on approximately 794 acres in portions of Sections 17, 19 and 20, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado. The subdivision is known as Bent Tree. The water supply for the residences is from individual wells constructed into the Dawson Aquifer of the Denver Basin. Pursuant to the Decree entered in Case Nos. 82CW370 (Water Division No. 1) and 82CW180 (Water Division No. 2), 221 individual wells are authorized to be constructed within the Bent Tree Subdivision. However, as a result of changes to the original layout, a total of 257 individual wells will be needed. This decree will allow for the construction of the additional thirty-six wells that are needed to accommodate full build out of the Fourth Filing of the Bent Tree Subdivision. The lots which are covered by this augmentation plan are 197 through 232 of the Fourth Filing.

7. In addition to using water for domestic requirements, the owners of each of the additional thirty-six lots will be allowed to irrigate up to 2,000 square feet of turf grass, or other types of vegetation having an equivalent level of water consumption. No other outside water uses will be allowed.

8. Each of the additional wells to be constructed will obtain water from the Dawson Aquifer of the Denver Basin, and will divert water at a maximum flow rate of 15 gallons per minute. The

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gross annual water requirements for the thirty-six lots will be approximately 13.77 acre feet per year. This figure is based on an average year around occupancy of the single family residences of 3.5 persons per residence and a per capita water usage of 80 gallons per day. The irrigation of turf grass will require an application of approximately 1.50 acre feet of water per irrigated acre.

9. The total consumption attributable to water used by the owners of the additional thirty-six lots is projected to be 3.11 acre feet per year. Wastewater from all in-building uses of water will be treated by non-evaporative septic tank soil absorption systems. All return flows from the septic tank leach fields and outside irrigation will be to the Dawson Aquifer of the Denver Basin. Ten percent (10%) of the water used for in-building purposes is assumed to be consumed. The possibility exists that a community mechanical wastewater treatment system that consumes less than ten percent (10%) of the water used for in-building purposes may be constructed in the future. Before such a system is implemented, Applicants, or their successors and assigns, shall amend this decree and thereby provide notice of the proposed change to other water users by publication procedures required by then existing law. To the extent that evapotranspiration type wastewater treatment systems are required on any of the lots, an amendment of this decree shall be obtained so that the return flow figures stated herein can be adjusted to reflect the reduced return flows to the Dawson Aquifer of the Denver Basin. Eighty percent of the water used for irrigation purposes is assumed to be consumed. The irrigation figures described herein are the result of negotiations and settlement discussions between the Applicants, the State Engineer and the Division Engineers for Water Division No. 1 and Water Division No. 2, ("State water administration officials"). The figures are based on the specific facts and circumstances of this case. By stipulating to the entry of this Decree, the parties do not intend that the figures become a precedent in any future case, and the State water administration officials specifically reserve the right to challenge similar irrigation figures in any other matter.

10. The Application contained a request that fifteen of the additional thirty-six wells be operated as alternate points of diversion for Well U.D. 1-17798F, due to the fact that the lots upon which the fifteen wells are to be constructed appear to be within the "cylinder of appropriation" of Well U.D. 1-17798F. As a result of negotiations between Northgate and the State and Division Engineers, the request for alternate points of diversion has been withdrawn. All thirty-six wells shall be considered to deplete the flow of a natural stream at an annual rate greater than

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one-tenth (1/10) of one percent (1%) of the annual rate of withdrawal from the Dawson Aquifer within 100 years. Therefore, such ground water is "not nontributary ground water" as that term is defined in §37-90-103(10.5), C.R.S. (1990). Northgate has obtained a judicial quantification of the volume of ground water in the Dawson Aquifer which underlies the Fourth Filing of the Bent Tree Subdivision, (i.e. Case No. 97CW262, filed in Water Division No. 1). Northgate has agreed not to pursue its claim to use, reuse and successively use to extinction, all of the return flows which are attributable to pumping of the thirty-six wells; provided, however, that Northgate and its successors and assigns shall be allowed to take credit for such return flows to replace the pumping of water from the Dawson Aquifer.

11. Northgate's engineering consultants have analyzed the extent of depletions to surface streams associated with the diversion of water from the thirty-six wells. A computer model, which is based upon the best information currently available from the State Engineer's data files, was used for this purpose. At the end of three hundred years of pumping, depletions to the South Platte River Basin are projected to be 0.39 of an acre foot per year and depletions to the Arkansas River Basin are projected to be 0.33 of an acre foot per year. Out-of-priority depletions will be augmented in accordance with the criteria outlined below.

12. In order to replace projected depletions, The Great Divide Water Company (Great Divide) will deliver the required volume of nontributary ground water to the South River and Arkansas River basins each year. Northgate will assign to the Bent Tree Property Owners Association for use in this augmentation plan, 0.72 of an acre foot of nontributary ground water administered by Great Divide. The nontributary water rights administered by Great Divide were decreed by the District Court for Water Division No. 1 in Case Nos. W-8269-76, 80CW369, 84CW621, 82CW295 and 87CW193. The water is presently being delivered using Well AD-3, Permit No. 43217-F, and Well U. D. No. 1-17798F. A description of the wells is as follows:

a. Well U. D. No. 1-17798F:

i. Legal Description: Located in the NE 1/4 NE 1/4, Section 17, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado, at a point approximately 100 feet South and 75 feet West of the Northeast corner of said Section 17.

ii. Source: Nontributary Dawson-Arkose Aquifer of the Denver Basin.

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iii. Depth: 1,000 feet.

iv. Amount: 0.167 of a cubic foot per second (75 gallons per minute), with an annual limitation of 121 acre feet.

v. Decree: Decreed by the District Court for Water Division No. 1 in Case No. W-8269-76, on December 30, 1976, for domestic, municipal, commercial, industrial and irrigation purposes. The water has been used for augmentation and replacement purposes in numerous other plans for augmentation decreed by the Water Courts.

b. Well AD-3, Permit No. 043217-F:

i. Legal Description: Located in the SW 1/4 NW 1/4, Section 20, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado, at a point 1,640 feet from the North Section line and 460 feet from the West Section line of said Section 20.

ii. Source: Nontributary Denver Aquifer of the Denver Basin.

iii. Depth: 1,520 feet.

iv. Amount: 0.223 of a cubic foot per second (100 gallons per minute), with an annual limitation of 100 acre feet.

v. Decree: Decreed by the District Court for Water Division No. 1 in Case No. 82CW295, on November 23, 1983, for municipal, domestic, commercial, industrial, irrigation, recreational, fishery, wildlife propagation, stock watering, fire protection, maintenance of adequate storage systems and reserves, exchange and augmentation purposes, including the right to use, successively use and reuse the water to extinction.

The water will be discharged by Great Divide to the South Platte River and Arkansas River Basins as needed. The point of release to the South Platte River Basin is to an unnamed tributary of West Cherry Creek at a point from which the Northeast corner of Section 17, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado, bears North 62° East, a distance of 3,400 feet, more or less. The point of release to the Arkansas River Basin is to an unnamed tributary of Jackson Creek, a tributary of Monument Creek,

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at a point from which the Northwest corner of Section 20, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado, bears North 12° West, a distance of 1,600 feet, more or less.

13. Due to the small volume of annual stream depletions projected to occur to each basin, the depletions may be aggregated and replaced by one or more releases of short duration. The rate and timing of an aggregated release shall be determined by the Division Engineer or his designated representative after coordinating with Great Divide.

14. Northgate and the State and Division Engineers disagree about the legal requirements associated with replacing depletions to the Arkansas River and South Platte River basins once pumping from the thirty-six wells ceases. In order to resolve those differences, Northgate has agreed to reserve a total of 933 acre feet of the nontributary Laramie-Fox Hills Aquifer ground water which underlies the lots to be served by the thirty-six wells. Of this amount, 504 acre feet shall be reserved for delivery to the South Platte River Basin and 429 acre feet shall be reserved for delivery to the Arkansas River Basin. The water is owned by Northgate and was decreed in Case No. 82CW295. Northgate and its successors and assigns agree to replace post pumping depletions for the shortest of the following periods: (1) The period provided by the Colorado Legislature, should the Legislature eventually specify such a time limit; (2) The period determined by the State Engineer, should the State Engineer lawfully establish such a period; (3) The period established through rulings of the Colorado Supreme Court in relevant cases; or (4) Until such time as Northgate or its successor-in-interest files a petition with the Court, with notice to all parties in the Case, and obtains a ruling that all of the statutory requirements regarding post pumping depletions have been fulfilled. If replacement of post pumping depletions is ever required, it shall be the responsibility of the Bent Tree Property Owners Association to construct the physical facilities needed to deliver water to the Arkansas River and South Platte River basins. The points of release of the water will be consistent with the points described in Paragraph No. 12, supra. The Court finds that this provision is adequate to ensure that Northgate is in compliance with existing laws and to prevent injury to other water rights.

15. The Court finds that the sources of replacement water and the protective terms outlined above are sufficient to protect the vested rights of other water users in the Arkansas River Basin and the South Platte River Basin.

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CONCLUSIONS OF LAW

16. Applications in this matter were filed with the Water Clerks for Water Division No. 1 and Water Division No. 2 pursuant to §37-92-302(a), 10 C.R.S. (1997). Statements of Opposition to the Applications were filed by the City of Colorado Springs, the City of Thornton, the State Engineer and the Division Engineers for Water Division No. 1 and Water Division No. 2. As is specified in §37-92-302(1)(c), 10 C.R.S. (1997), the time for filing statements of opposition has expired.

17. The request of Northgate and The Great Divide Water Company for approval of a plan for augmentation, as described herein, is contemplated and authorized by law, and if administered in accordance with this decree, will permit the uninterrupted utilization of the structures described herein, without adversely affecting any other vested water rights in the Arkansas River, the South Platte River or their tributaries. Sections 37-92-305(3), (5) and (8), §37-80-120 and §37-83-104, 10 C.R.S. (1997).

18. The State Engineer may lawfully be required to administer this plan for augmentation in the manner set forth herein.

19. As a result of the operation of the Plan for Augmentation, there is water available for withdrawal from the thirty-six wells described herein, and the construction and use of same will not result in the material injury to the vested water rights of others. Accordingly, the State Engineer shall approve applications for well permits or replacement well permits submitted by Northgate or its successors and assigns, in accordance with the provisions of Section 37-90-137, 10 C.R.S. (1997).

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

20. The Application for Approval of a Plan for Augmentation proposed by The Northgate Company and The Great Divide Water Company is approved.

21. The State Engineer, the Division Engineer and/or the Water Commissioner for former Water District No. 8 shall not, at the request of appropriators, or on their own initiative, curtail the diversion and use of water from the structures described herein, except as specified in this Paragraph, as long as the plan for augmentation is operating as specified in this decree. To the extent that Northgate, or its successors and assigns, are ever unable to provide the replacement water required, then the thirty-six wells described herein, shall not be entitled to operate under

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the protection of this Plan, and shall be subject to administration and curtailment in accordance with the laws, rules and regulations of the State of Colorado. Pursuant to §37-92-305(8), 10 C.R.S., (1997), the State Engineer shall curtail all out-of-priority diversions from the subject wells which are not so replaced as to prevent injury to vested water rights.

22. All of the foregoing Findings of Fact and Conclusions of Law are incorporated by reference herein, and are to be considered a part of the decretal portion hereof as though set out in full.

23. Northgate and its successors and assigns, shall make available for release to the stream system, a sufficient quantity of water to replace depletions caused by diversions from the subject wells. The volume of augmentation water required to be released each year shall be limited to out-of-priority depletions to the stream system directly attributable to diversions from such structures.

24. The Court confirms that water from the sources described above can be utilized for replacement and augmentation purposes to replace the depletions described herein.

25. Northgate shall include the lots to be served by the wells described herein in the existing Bent Tree Property Owners Association. Northgate shall also file restrictive covenants running with the property which obligate the individual purchasers and the Property Owners Association to carry out the requirements of this Decree, including the possible replacement of post pumping depletions from the subject wells. Said covenants shall indicate clearly that the failure of the Property Owners Association or the individual lot owners to comply with the terms of this Decree, may result in an order of the State water administration officials to curtail or eliminate pumping from the subject wells.

26. The Bent Tree Property Owners Association shall complete an annual inventory of the number of homes constructed on the lots to be served by the wells described herein, and the total area of turf grass or equivalent vegetation being irrigated. Depletions from the wells shall be calculated as follows: (1) The number of homes which have been constructed shall be multiplied by 0.0314 of an acre foot. It shall be assumed that water use inside each residence is constant throughout the year; (2) The total area of lawn grass irrigated from the subject wells, shall be multiplied by 1.2 acre feet per acre; (3) The total area of gardens irrigated from the subject wells, shall be multiplied by 0.4 of an acre foot per acre; (4) The first three components shall be added together, and the resulting total shall be multiplied by the appropriate

