

Colorado Supreme Court
2 East Fourteenth Avenue, Fourth Floor
Denver, Colorado 80203

Appeal from District Court
Water Division Seven
Case No. 2004CW85

Judgment Reversed and Remanded
Decision En Banc
Opinion by Justice Hobbs

Concerning the Application for Water
Rights of the Pagosa Area Water and
Sanitation District and the San Juan Water
Conservancy District in the San Juan River
and its Tributaries in Archuleta County

Applicants-Appellees: Pagosa Area Water
and Sanitation District and San Juan Water
Conservancy District,

v.

Opposer-Appellant: Trout Unlimited,
Appellee Pursuant to C.A.R. 1(e): Dick
Wolfe, State Engineer, and Rege Leach,
Division 7 Water Engineer

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▲ COURT USE ONLY ▲

Case Number: 08SA354

PETITION FOR REHEARING OF TROUT UNLIMITED

Opposer-Appellant Trout Unlimited, pursuant to C.A.R. 40, hereby respectfully petitions the Colorado Supreme Court to reconsider and remove one sentence and the accompanying footnote from its November 2, 2009 opinion in this case. The sentence and footnote in question are inconsistent with the Court's articulation of an applicant's obligations under the anti-speculation requirement and are unsupported in the record.

The second sentence on page 30 of the Court's opinion reads, "The existing record also supports the proposition that a one year storage reserve equal to the water system annual demand is appropriate." *Pagosa Area Water and Sanitation District v. Trout Unlimited ("Pagosa II")*, slip op. at 30 (Colo. 2009). The Court supports this sentence with a footnote in which it quotes from the water court's remand decree (the "Remand Decree") as follows:

Mr. Schmidt, Ms. Wessells, Ms. Campbell, and Mr. Harris provided testimony on the PAWSD policy of providing for reserve storage equal to the water system annual demand, herein described as the One-year Safety Supply Margin. The Court finds by a preponderance of the evidence that the One-year Safety Supply Margin is reasonably necessary to ensure a reliable water supply for the Co-Applicants' water system, and to provide for the mix of beneficial uses for which the appropriation was made

Remand Decree ¶ 26.

Pursuant to the storage reserve policy, the Districts would add a volume of water equivalent to one-year's demand to the amount of storage they would

otherwise require, essentially doubling the size of the reservoir. *Exhibit 69, p. 4*. As this Court's jurisprudence demonstrates, the Districts' adoption of a policy of holding reserve storage is not sufficient to satisfy the requirements of the anti-speculation doctrine. Further, contrary to the quoted language from the Remand Decree, there is no evidence in the record demonstrating a reasonable need for a one-year storage reserve. This Court should, therefore, remove the sentence and footnote in question from its opinion.

I. The Districts' adoption of a policy of holding a one-year storage reserve does not satisfy the requirements of the anti-speculation doctrine.

In its first opinion in this case, this Court ruled that a governmental water supply entity has the burden of demonstrating the amount of water that is reasonably necessary to serve its reasonably anticipated needs in a reasonable period of time. *Pagosa Area Water and Sanitation District v. Trout Unlimited* ("*Pagosa I*"), 170 P.3d 307, 313 (Colo. 2007). The Court identified the essential function of the water court in a conditional water right proceeding as determining the amount of water for which the applicant has established a need. *Id.* at 317.

In *Pagosa II*, the Court rejected the argument that water suppliers act in a legislative capacity when making conditional appropriations and that, as such, courts owe deference to the amounts of water public utilities deem necessary for

future use. *Pagosa II*, slip op. at 38. The Court ruled that, to the contrary, public appropriators must carry their burden of proving their conditional water rights claims under a *de novo* standard of review. *Id.*

Given that public entities' conditional water rights appropriations are not legislative in nature and that water suppliers must prove their claims under *de novo* review, the Districts' policy decision to hold a one-year storage reserve carries no weight with respect to whether the Districts satisfied their burden under the anti-speculation doctrine. Regardless of the policy, the Districts must demonstrate that the one-year safety supply is reasonably necessary to meet their reasonably anticipated needs through the 2055 planning period. Were it otherwise, rather than demonstrating legitimate need for certain amounts of water, water providers would simply adopt storage reserve policies in order to justify excessive and unnecessary water rights claims, and Colorado's supply of unappropriated water would be quickly exhausted, in contravention of the maximum utilization policy. *Pagosa I*, 170 P.3d at 313. TU respectfully requests that the Court remove the suggestion that the Districts' policy decision justifies the one-year storage reserve.

II. The record does not support the one-year storage reserve.

Because the Districts' adoption of the storage reserve policy does not provide the justification necessary to sustain their appropriation, the Districts must

establish *de novo* that the storage reserve in the amount of one-year's demand will be reasonably necessary to serve their reasonably anticipated requirements through the planning period. To meet this burden, the Districts are required to demonstrate a "substantial probability that [they] will use such amounts during the water supply planning period." *Pagosa II*, slip op. at 24. Contrary to the water court's finding, which it adopted verbatim from the Districts' proposed decree, *compare Remand Decree* ¶ 26 with *Districts' proposed decree at Pleadings p. 531-47*, the record does not demonstrate a "substantial probability" that the Districts will reasonably require the one-year storage reserve to serve their reasonably anticipated requirements through 2055.

The model that the Districts' engineer prepared demonstrates the baseline water rights necessary to meet future demand under water availability conditions equivalent to the driest four-year period on record. *Transcript, p. 383 lines 6-9, p. 410 lines 3-12, p. 412 lines 4-9*. The Districts claim the storage reserve to account for more severe hypothetical conditions, *Exhibit 69, p. 4*, and they presented evidence that they are concerned about drought, climate change or other emergencies that might arise in the future. As their counsel described it, the Districts need the storage reserve to prepare for conditions, "we haven't even dreamt of." *Transcript, p. 382 lines 6-17*.

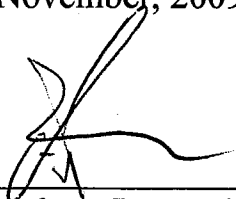
Though the Districts presented evidence of their generalized concerns regarding future water availability, they did not establish a “substantial probability” that they will reasonably require the one-year storage reserve to meet their reasonably anticipated requirements. The Districts presented no evidence that conditions more severe than the driest period on record are probable or, even if such conditions were probable, that they would necessitate a storage reserve in the amount of one-year’s demand before 2055. For example, while one of Applicants’ lay witnesses testified that he believes climatic conditions could be more severe in the future than they have been in the last 50 to 80 years, *id.*, p. 87 lines 3-5, the Districts did not demonstrate that worsened conditions are probable or that probable future conditions would necessitate a one-year storage reserve before the end of the planning period.

The Districts’ evidence regarding the storage reserve is identical in character to their evidence in support of water to satisfy recreational in-channel diversion (“RICD”) or in-stream flow (“ISF”) water rights or bypass flow conditions imposed by the federal government: Both categories of evidence are “purely hypothetical.” *Pagosa II*, slip op. at 18. In the same way that the Districts conjectured about future RICD, ISF or bypass flow requirements, *id.*, at 18-19, 23-26, they conjectured about future water availability conditions that might

necessitate more storage than required under the driest period on record, without providing one bit of evidence to suggest that such conditions are probable or that they would necessitate reserve storage in the amount of one-year's demand. And the effect of the claims for water for the storage reserve and the RICD, ISF and bypass flow requirements is the same as well: Both results in water rights for "substantial amounts of water . . . over and above the amounts that are otherwise justified to meet [the Districts'] reasonably anticipated water supply needs for the 2055 planning period." *Id.* at 25.

In the absence of evidence demonstrating reasonable need, the Districts should not be permitted to double the size of their water storage rights. And, for the very same reason that this Court found that the record lacks evidence to support the claims for water to meet hypothetical RICD, ISF or bypass flow requirements, TU respectfully requests that it remove the finding that the record supports a need for the one-year storage reserve.

Respectfully submitted this 16th day of November, 2009.



Andrew Peternell, Reg. No. 32455

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of November 2009, a true and correct copy of the foregoing PETITION FOR REHEARING OF TROUT UNLIMITED was served by placing the same in United States mail, first-class postage prepaid, addressed as follows:

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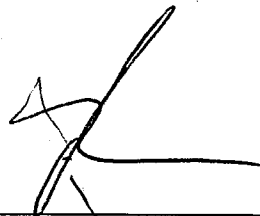
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