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CO Summit County District Court [illegible]
Filing Date: May [illegible]
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DISTRICT COURT, SUMMIT COUNTY, COLORADO P.O. Box 269, 501 N. Park Ave Breckenridge, CO 80424 ALPENSEE WATER DISTRICT, a Colorado Municipal Corporation and FARMER'S KORNER, INC. a Colorado Corporation, Plaintiff, v. STATE OF COLORADO, DEPARTMENT OF TRANSPORTATION and Designated Non-Parties VAC DIRT, INC. a Colorado Corporation and SUMMIT SCHOOL DISTRICT RE-1 Defendants.	▲ COURT USE ONLY ▲
JOHN W. SUTHERS, Attorney General HARRY MORROW, First Assistant Attorney General* SKIPPERE SPEAR, Assistant Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-5129 Registration Numbers: 12435, 32061 *Counsel of Record	Case No.: 08CV138

DEFENDANT'S PREHEARING BRIEF

The State of Colorado, Department of Transportation (CDOT), by and through the Colorado Attorney General, hereby submits this pre-hearing brief in advance of the May 15, 2008 hearing on Plaintiff's motion for preliminary injunction.

BACKGROUND

1. Pursuant to Title 43 of the Colorado Revised Statutes, CDOT is an executive agency of the State of Colorado tasked with the construction, improvement, and maintenance of transportation systems, such as streets and highways, in Colorado. At the time of filing,

CDOT has 141 active highway construction projects with a total awarded contract dollar amount of $757,223,990.25.

2. Under its authority, CDOT has planned for various improvements to State Highway 9 near Summit County High School in Breckenridge at an approximate cost of $5.4 million dollars. The planned improvements include widening the highway to four lanes and adding various safety features such as new signing. The improvements also include the construction of a pond to collect sediment.

3. On February 7, 2007, CDOT contacted Plaintiff's General Manager, Lori Cutunilli, to discuss the pond and provided preliminary design information. CDOT expressly informed Ms. Cutunilli that: "We want to meet with you before we complete the pond configuration so that we can take your needs into account and make the necessary adjustments. As you can see this puts the pond and its back slope over you [sic] existing water line."

4. On February 8, 2007, Ms. Cutunilli agreed to the construction of the pond over Plaintiff's waterline on the condition that CDOT install additional manmade insulation above the line to prevent freezing. Ms. Cutunilli reaffirmed this agreement on March 20, 2007.

5. One-year later, on or about April 27, 2008, CDOT and its independent contractor informed Ms. Cutunilli that construction of the pond would commence the week of May 5.

6. On May 7, 2008, Plaintiff filed eight documents with the Court including, a complaint verified by Ms. Cutunilli, a motion for preliminary injunction supported by an affidavit from Ms. Cutunilli, and a motion for immediate *ex parte* temporary restraining order.

7. Plaintiff appears to have made no effort to contact CDOT to discuss the various documents it was filing or the actions complained of in those documents. Plaintiff's motion for temporary restraining order does not contain the attorney certification regarding notice that is required by C.R.C.P. 65(b).

8. Plaintiff's motion for a temporary restraining order, on its face, is limited in scope to the alleged danger that excavation of the sediment detention pond may leave Plaintiff's waterlines susceptible to freezing. Curiously, Plaintiff's motion and Ms. Cutunilli's affidavit make no mention of the insulation that CDOT agreed to install over Plaintiff's waterlines to prevent freezing. Notably, the letter from Pearson Engineering that Plaintiff submitted with its verified complaint does address the insulation but does not make any claim that the waterlines are in danger of freezing.

9. Despite the limited danger complained of, Plaintiff's motion seeks an order requiring CDOT "to Cease and Desist from all construction activity". Such broad relief has no rational relation to the alleged danger and is in direct violation of Title 43 of the Colorado Revised Statutes. However, the Court granted Plaintiff's motion on May 8, 2008. On May 9, Plaintiff submitted a cost bond of $250.00 that is patently inadequate for support of an order that not only suspends a $5.4 million dollar construction project but also all of CDOT's other construction in the State totaling in excess of $757 million dollars.

10. After May 7, 2008, CDOT redesigned the pond to address Plaintiff's concerns. On May 12, the parties met to discuss the redesign. During the meeting, Ms. Cutunilli and Plaintiff's engineer agreed that the redesign addresses Plaintiff's concerns. Attached as **Exhibit A** is a letter from Plaintiff's engineer confirming that the redesign addresses Plaintiff's concerns.

PLAINTIFF CANNOT MEET THE EXACTING STANDARDS FOR A PRELIMINARY INJUNCTION AGAINST THE STATE

11. "Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits." *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982). "[I]njunctive relief should not be indiscriminately granted. ... Rather, it should be exercised sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity. *Id.* at 653 (citation omitted).

> Because equitable relief in the nature of an injunction constitutes a form of judicial interference with continuing activities, the courts have generally been reluctant to grant such relief where the actions complained of are those of departments of the executive and legislative branches of government in the exercise of their authority. ... The constitutional basis for judicial deference in this regard is the doctrine of separation of powers, which serves to restrain one branch of government from usurping or restraining the proper exercise of the powers of another branch.

Id. at 651 (internal citations and quotations omitted). Plaintiff cannot meet its exacting burden, particularly with regard to three of the elements required for a preliminary injunction as discussed below.

12. First, Plaintiff cannot show a danger of real, immediate, and irreparable injury. In particular, Plaintiff has offered no credible evidence that the previously planned construction, with insulation, may lead to the freezing of the waterlines. The only support

for this opinion is the affidavit of Ms. Cutunilli. However, it does not appear that Ms. Cutunilli is a licensed engineer and her affidavit may constitute a violation of C.R.S. § 12-25-105.

13. Further, it is axiomatic that damages that are "measurable and compensable in money" do not constitute "irreparable loss." *American Investors Life Ins. Co. v. Green Shield Plan, Inc.*, 145 Colo. 188, 193 358 P.2d 473, 476 (Colo. 1961). In its motion, Plaintiff expressly states that "it would be inequitable to allow Defendants to take property without paying for it" – a claim for money damages based on condemnation. "It is well settled that where objections may be heard in defense to a condemnation proceeding resort to equity may not be had because one having such an adequate and complete remedy at law cannot invoke injunctive relief." *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 192 322 P.2d 1053, 1056 (1958) (quoting *Colorado Central Power Co. v. City of Englewood*, 89 F.2d 233, 235 (10th Cir. 1937)).

14. Second, Plaintiff cannot show a reasonable probability of success on the merits:

a. Plaintiff's First and Second Claims for Relief are essentially for inverse condemnation. However, Plaintiff agreed to the planned construction in exchange for CDOT providing additional insulation for Plaintiff's waterlines. CDOT has not "taken" any property without compensation.

b. Plaintiff does not state a claim under its Third, Fourth, and Sixth Claims for Relief because the verified complaint does not contain factual averments supporting those claims. Plaintiff does not identify any duty, fiduciary or otherwise, of CDOT to maintain Plaintiff's waterlines. Plaintiff does not identify how CDOT has violated any statute. Notably, two of the statutes cited by Plaintiff, C.R.S. §§ "25-8-10" and "25-8202", are fictional.

c. Plaintiff's Fifth Claim For Relief is a tort, barred by the Colorado Governmental Immunity Act. C.R.S. § 24-10-101 *et seq.*

15. Third, the equities do not favor an injunction. Plaintiff obtained an overbroad restraining order in violation of Title 43 and C.R.C.P. 65(b). Plaintiff made absolutely no effort to confer with CDOT before obtaining the restraining order. Moreover, Plaintiff premised its requests for a restraining order and preliminary injunction on claims devoid of legal and factual merit. Plaintiff's actions throughout this process have been completely inequitable. Plaintiff hands are unclean, and Plaintiff is not entitled to the equitable injunction it now seeks.

16. As especially pertinent to judging Plaintiff's actions, is the noticeable absence of any averment from Plaintiff in support of venue or jurisdiction. It is well known that actions against executive agencies are governed by C.R.C.P. 98(b)(2) and must be brought in the City and County of Denver. *See, e.g., 7 Utes Corp. v. District Court*, 702 P.2d 262, 264 n.3 and 266 (Colo. 1985); *Denver Board of Water Comm'rs v. Board of County Comm'rs*, 187 Colo. 113, 116, 528 P.2d 1305, 1307 (Colo. 1974); *Farmers Cave, Inc. v. Department of Revenue*, 752 P.2d 1064, 1065-66 (Colo. App. 1988). The Honorable W. Terry Ruckriegle recently ruled that requests for injunctions concerning CDOT construction on State Highway 9 must be brought in Denver and not Summit County. *Duckels Constr. Inc. v. State of Colo., Dep't of Transp.*, 06CV61 (Dist. Ct., Summit County, Mar. 12, 2006), attached as **Exhibit B**.

17. Because venue was improper, the Court lacked jurisdiction to issue Plaintiff's restraining order. *Millet v. District Court*, 951 P.2d 476, 477 (Colo. 1998) ("If a change of venue is required by law because the suit was originally brought in an improper county, the trial court has no jurisdiction over the case except to grant the change of venue."). However, Plaintiff proceeded with its motion despite this fact.

CONCLUSION

18. Plaintiff's requested relief is moot given the redesign of the pond and the express recognition by Plaintiff that the redesign satisfies its concerns. Further, Plaintiff's verified complaint is substantially frivolous and groundless and Plaintiff's continuation of this lawsuit is substantially vexatious. This matter should be immediately dismissed.

JOHN W. SUTHERS
Attorney General

/s/ Skip Spear

SKIPPERE SPEAR, 32061
Assistant Attorney General
Transportation Unit
Litigation & Employment Section
Attorneys for State of Colorado, Department of Transportation

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANT'S PREHEARING BRIEF** upon all parties VIA LexisNexis File & Serve, or by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 14th day of May, 2008 addressed as follows:

Ronald W. Carlson, Esq.
Judith James Carlson, Esq.
Paul R. Dunkelman, Esq.
Christopher D. Tomchuck, Esq.
CARLSON, CARLSON & DUNKELMAN, LLC.
P.O. Box 1829
Frisco, Colorado 800443

/s/ Denise Munger

Pursuant to C.R.C.P. 121, § 1-26(9), the original of this document with original signature will be maintained in the offices of the Colorado Attorney General, 1525 Sherman Street, Seventh Floor, Denver, CO 80203, and will be made available for inspection by other parties or the Court upon request.

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EXHIBIT A

PEARSON ENGINEERING, INC.
P.O. Box 1308
Frisco, CO 80443
970-668-5067
970-668-3073 (fax)
gray@pecivil.com

Consulting
Civil Engineering
Development
Planning

Alpensee Water District
c/o Lori Cutunilli
P.O. Box 127
Frisco, CO 80443

May 12, 2008

Re: Proposed CDOT water quality pond - revised

Dear Mrs. Cutunilli;
A meeting was held on the project site this afternoon at 3:30 pm. In attendance were:
Mr. Wes Goff of PBS&J engineering
Mr. Bob Smith of CODT
Mr. David Wieder of CDOT
Mr. Scott Hummer of Summit County
The undersigned
And yourself.

The purpose of the meeting was to resolve the issues I addressed in my letter of April 29, 2008 regarding the impact of the proposed CDOT construction on the existing water supply facilities of the District as shown in the then applicable construction plans for the CDOT Highway 9 project.
Mr. Goff presented revised plans showing that the proposed water quality enhancement pond which would have had a potential negative impact the District facilities had been moved to the south away from the district facilities. I believe that this revision resolves the impact concerns of the CDOT project on District facilities.

Sincerely,

Gray Pearson

cc Goff, Smith, Wieder, Carlson

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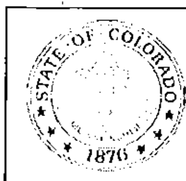
EXHIBIT B



GRANTED

The moving party is hereby ORDERED to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.

BY THE COURT

W Terry Ruckriegle

W. Terry Ruckriegle
District Court Judge

DISTRICT COURT, SUMMIT COUNTY, COLORADO Court Address: 501 N. Park Avenue Breckenridge, CO 80424 **Plaintiffs-Petitioners:** DUCKELS CONSTRUCTION, INC. and FRED DUCKELS v. **Defendants:** STATE OF COLORADO, DEPARTMENT OF TRANSPORTATION	**▲ COURT USE ONLY ▲**
	Case No. 06CV61 Courtroom:

ORDER RE: DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO CHANGE VENUE

This matter came before the Court on March 8, 2006 at 1:00 p.m. for hearing on Defendant's Motion to Dismiss or, in the Alternative, to Change Venue ("Motion"), and upon hearing arguments from counsel from Plaintiffs and Defendant, the Court grants the Motion to the following extent and enters this Order.

On February 21, 2006, Plaintiffs filed an Emergency And Verified Application For Injunctive Relief To Protect Rights In Ongoing Highway 9 Construction Project In Breckenridge, Prevent Shutdown Of Project, And Enforce Open Records Act. On March 7, 2006, Defendant filed a Motion To Dismiss Or, In The Alternative, To Change Venue.

The Court finds that the substance of Plaintiffs' First Claim for Relief is to prohibit the act of removing Plaintiff Fred Duckels from the Highway 9 Construction Project and/or the act of shutting the Project down. The Court further finds that, while the subject construction is occurring in Summit County, Plaintiffs' claims do not "affect" real property as that term is used in C.R.C.P. 98(a).

The Court notes the following statements from the case law:

"Claims for injunctive relief against public officers arise, within the meaning of C.R.C.P. 98(b), in the county in which the public body has its official residence and from which any action by the board pursuant to the injunction must emanate." *Denver Board of Water Commissioners v. Board of County Commissioners*, 187 Colo. 113, 116, 528 P.2d 1305, 1307 (Colo.1974).

"In *Denver Board of Water Commissioners v. Board of County Commissioners*, 187 Colo. 113, 528 P.2d 1305 (1974), the supreme court held that, in injunction actions, a claim arises, for purposes of C.R.C.P. 98(b)(2), 'in the county in which the public body has its official residence.' And, in our view, an action to set aside an order of a public official is sufficiently similar to an action for injunctive relief as to require application of the same venue rules." *Farmers Cafe, Inc. v. State of Colorado, Department of Revenue*, 752 P.2d 1064, 1065 (Colo. App. 1988).

"In determining the proper venue for an action, the substance rather than the form of the action controls. ...

The present case presents no question as to the right to title or possession of property. The property is acknowledged to be state land, and the board has not granted exclusive possession of it to anyone. The special use permit reserves to the board the right to grand additional leases, permits and rights-of-way for the same property. Three counts of the complaint request injunctive relief or damages against the board and its employees for breach of contract, estoppel and breach of duty. The fourth claim requests declaratory relief in construing the special use permit. The lawsuit affects the property only in that it request that the special use permit be construed as a contract requiring the board to negotiate a lease. A motion for a preliminary injunction filed with the complaint would prevent the board from seeking competitive bids for leasing the property. Such declaratory and injunctive relief would operate against the members of the board, not against the land itself. Therefore, 7 Utes' claims against public officers, which only incidentally affect the land, should be tried in the county of residence of the public officials.

* * *

C.R.C.P. 98(b)(2) controls venue for actions against public officers for acts done or the failure to perform acts in public office."

7 Utes Corporation v. The District Court in and For the Eighth Judicial District, 702 P.2d 262 (Colo.1985).

As a result, the Court orders that venue in this case is hereby transferred to the District Court of the City and County of Denver, where Defendant has its official residence.

After receiving the Court's verbal ruling on venue, Plaintiffs and Defendant stipulated that the District Court for the City and County of Denver has the authority to make rulings on any issues arising under the Open Records Act regardless of the county or counties where Defendant may retain its documents. This Court also hereby rules that the District Court in Denver has that authority.

Dated this _______ day of __________________, 2006.

BY THE COURT:

____
District Court Judge

Carlson Carlson and Dunkelman

From: LexisNexis File & Serve [efile@fileandserve.lexisnexis.com]
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To: Carlson Carlson and Dunkelman
Subject: Case: 2008CV138; Transaction: 19830348 - Notification of Service

To: Ronald William Carlson
From: LexisNexis File & Serve
Subject: Service of Documents in Alpensee Water District, a Colorado Municipal Corporation and Farmer's Korner, Inc., a Colorado corporation, Plaintiffs, v. State of Colorado, Department of Transportation and Designated Non Parties

You are being served documents that have been electronically submitted in Alpensee Water District, a Colorado Municipal Corporation and Farmer's Korner, Inc., a Colorado corporation, Plaintiffs, v. State of Colorado, Department of Transportation and Designated Non Parties through LexisNexis File & Serve. The details for this transaction are listed below.

Court: CO Summit County District Court 5th JD
Case Name: Alpensee Water District, a Colorado Municipal Corporation and Farmer's Korner, Inc., a Colorado corporation, Plaintiffs, v. State of Colorado, Department of Transportation and Designated Non Parties
Case Number: 2008CV138
Transaction ID: 19830348
Document Title(s):
- Defendant's Prehearing Brief (6 pages)
- Exhibit A to Defendant's Prehearing Brief (2 pages)
- Exhibit B to Defendant's Prehearing Brief (5 pages)

Authorized Date/Time: May 14 2008 12:18PM MDT
Authorizer: Skippere S Spear
Authorizer's Organization: CO Attorney General
Sending Parties:
State of Colorado, Department of Transportation Served Parties:
Alpensee Water District, a Colorado Municipal Corporation
Farmer's Korner, Inc.

Check for additional details (and view the documents) online at:
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