

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

CIVIL ACTION NO.

**CITY OF AURORA, COLORADO, a municipal corporation,
acting by and through its Utility Enterprise, Aurora Water,**

Plaintiff,

v.

**PS SYSTEMS, INC., a Colorado corporation
and RAR Group, LLC, a Colorado limited
liability company,**

Defendants.

**COMPLAINT FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT,
INVALIDITY, AND UNENFORCEABILITY
(JURY TRIAL DEMANDED)**

Plaintiff, the City of Aurora, a municipal corporation, acting by and through its Utility Enterprise, Aurora Water ("Aurora", or "the City"), hereby respectfully states its complaint for declaratory relief against PS Systems, Inc. ("PS Systems"), a Colorado Corporation, and RAR Group, LLC ("RAR"), a Colorado limited liability company, (collectively "PS") as follows:

NATURE OF THE CASE AND BACKGROUND

1. This is an action for declaratory relief arising in response to allegations by PS that the City of Aurora is infringing or will infringe two PS patents through use of the Aquifer Recharge and Recovery ("ARR") component of its Prairie Waters Project ("the Project" or "Prairie Waters"). Aurora seeks a declaratory judgment that the ARR component of this

planned major public water program does not infringe those patents, and that the patents are invalid and/or unenforceable.

PARTIES

2. Plaintiff, the City of Aurora, is a Colorado municipal corporation organized under the laws of the State of Colorado and located at 15151 East Alameda Parkway, Aurora, CO 80012. Aurora Water is a Utility Enterprise of the City of Aurora.

3. Defendant PS Systems is a Colorado corporation with its principal place of business located at 12081 W. Alameda Pkwy #230, Lakewood, CO 80228.

4. Defendant RAR is a Colorado limited liability company with its principal place of business located at 12081 W. Alameda Pkwy #230, Lakewood, CO 80228.

JURISDICTION AND VENUE

5. Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331 and 1338(a), and 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). A substantial part of the events giving rise to the claims alleged here occurred in this District and PS conducts business or resides in this District.

FACTUAL BACKGROUND

7. The statewide drought of 2002-2003 caused Aurora's reservoir supply to drop below 30% total capacity. Maintaining an adequate and safe water supply and planning to drought-harden that water supply is and will continue to be a high priority for Aurora.

8. In 2004, as part of long-range planning for water supply and treatment, Aurora began formal design and engineering studies for what would become the Prairie Waters

Project. When the Project is implemented in 2010, it will have the potential to increase the water supply available to the City's water system by 10,000 acre-feet annually.

9. The Prairie Waters Project will allow Aurora to recover its fully reusable water rights diverted through alluvial well fields near Brighton, Colorado. The alluvial well field water will be piped to three shallow infiltration ponds, where the water will percolate by gravity into 40-60 foot deep native sands and gravels in an Artificial Recharge and Recovery System ("ARR facility"). The ARR will be surrounded by a low-permeability barrier: a discontinuous two-part slurry wall connected by grout walls which in combination will restrict groundwater movement into and out of the ARR facility.

10. Extraction wells located inside the ARR low-permeability barrier will then remove water that has migrated from the infiltration ponds through the sand and gravels, removing most of the organic, nutrient, phosphorus, and sedimentary elements from the water before it will be piped for additional treatment via a 35-mile pipeline to an advanced purification facility located near the Aurora Reservoir.

11. The use of low-permeability barriers to control the underground movement of water such as that found in the Prairie Waters design is not new; low permeability barriers have been used in gravel pit water storage reservoirs in Colorado since the early 1990s and have been used in remediation of contaminated groundwater since 1984.

12. Diversion of alluvial groundwater or surface water into groundwater storage or recharge facilities is also not new; such facilities have been in use in Colorado since 1976.

GENERAL ALLEGATIONS

13. PS bases its assertions of infringement against the City on two patents: United States Patent No. 6,840,710 ("the '710 Patent"), which was filed on May 15, 2002 and issued on January 11, 2005 (attached here as Exhibit A), and United States Patent No. 7,192,218 ("the '218 Patent"), which was filed on February 23, 2005, and issued on March 20, 2007 (attached here as Exhibit B) (collectively the "PS Patents").

14. The '710 Patent is entitled "Underground Alluvial Water Storage Reservoir and Method" and lists Stanley R. Peters, Randall R. Beeson, and Donald O. Summers as inventors. RAR owns the '710 Patent by assignment.

15. The '218 Patent is entitled "Direct Recharge Injection of Underground Water Reservoirs" and lists Stanley R. Peters and Donald O. Summers as inventors. PS Systems owns the '218 Patent.

16. Mr. Peters, a named inventor on both the '218 and '710 Patents, was aware of pre-existing slurry-wall technology for lined gravel pits for several years before PS filed its applications for the patents at issue here. In 1991-92, Mr. Peters learned about slurry wall lining technology when he visited the first slurry wall-lined gravel pit in the State of Colorado, the Siebring Reservoir (also called the Herbst Pit) during its construction. Also, in 1994, Mr. Peters was employed onsite during the construction of the second slurry wall reservoir in Colorado, the South Dahlia Pit. Mr. Peters did not disclose the design or existence of these installations to the USPTO in the application process for either of the PS Patents.

17. On November 2, 2005, counsel for PS sent a letter to the City stating that the Project as proposed might utilize certain technology recited in the claims of the '710 Patent. In

response to that assertion, the City sought an analysis of whether the ARR design was covered by the claims of the '710 Patent, obtained a written non-infringement opinion, and conveyed that information to Defendants.

18. On March 20, 2007, counsel for PS sent a letter to the City, stating that the City might utilize certain beneficial technology recited in the claims of the '218 Patent through its ARR system planned for the Project, and further stating PS would be pleased to work with the City to construct an underground reservoir as described in the '218 Patent. On March 23, 2007, counsel for the City provided PS with instructions for obtaining the City's protocol to qualify to bid on construction. PS never submitted an application to qualify for construction of any portion of the Project.

19. The City then sought an analysis of whether the ARR design was covered by the claims of the '218 Patent. It has obtained a written non-infringement opinion on the '218 Patent.

20. On June 21, 2007, the City published its Preliminary Official Statement ("POS") regarding the proposed issuance of over \$420 million in water improvement revenue bonds for the Prairie Waters Project. On June 25, 2007, counsel for PS sent a letter addressed both to bond counsel for the City of Aurora and to underwriters' counsel for the issuance objecting to the City's disclosures regarding the PS patents in the POS, and setting out its position that a reasonable royalty would be \$125.7 million for Aurora's alleged use of its technology. This communication caused considerable turmoil in the context of the pending debt transaction.

21. In July 2007, Aurora provided PS with design drawings for the ARR in order to demonstrate to PS that the City would not infringe either PS patent through use of the ARR design. The City also agreed to a meeting with PS in order to attempt to understand the basis for PS' demands, and to explain the City's position regarding non-infringement and invalidity of the PS patents. PS did not agree with the City's position, and concluded the meeting by stating that if the City did not enter into an acceptable agreement with PS, it would be forced to litigate.

22. In response, Aurora suggested the parties mediate the dispute, in the hope that the principals of PS would agree to a reasonable solution. Formal mediation took place on August 31, 2007; the parties were unable to reach an accord.

23. The City's planned use of the ARR design will not infringe either the '710 or the '218 Patents. Based on PS' conduct and statements to Aurora, Aurora has a reasonable expectation that PS will initiate suit against Aurora for patent infringement. All parties necessary for a determination have been joined in the action and no administrative remedies exist that Aurora can invoke to resolve the controversy.

24. Aurora will defer construction of the ARR facility if either of the PS Patents is adjudged valid, enforceable, and a final judicial determination is made that the City's use of the ARR design infringes either patent.

25. The City of Aurora requests a declaratory judgment to resolve uncertainty and controversy with respect to the rights and of the City to implement the ARR component of the Prairie Waters Project, and regarding the validity, enforceability, and scope of the PS patents.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment of Non-Infringement of the '710 Patent)

26. The City of Aurora incorporates by reference paragraphs 1–25 of this Complaint as though set forth here in full.

27. An actual and justifiable controversy exists between the parties with respect to the scope and infringement of the '710 Patent, namely, whether the ARR component of the Prairie Waters Project infringes any valid claims of the '710 Patent.

28. By reason, *inter alia*, of amendments, and statements, and omissions made in and to the United States Patent and Trademark Office during the prosecution of the applications that issued as the patents-in-suit, PS is estopped from construing the claims of the '710 Patent in a way that may cover Aurora's ARR component of the Prairie Waters Project.

29. Pursuant to 28 U.S.C. §§ 2201 and 2202, the City of Aurora is entitled to a declaration that the City's intended ARR component of the Prairie Waters Project does not infringe any claims of the '710 Patent.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment of Invalidity of the '710 Patent)

30. The City of Aurora incorporates by reference paragraphs 1–29 of this Complaint as though set forth here in full.

31. To the extent they are alleged to be infringed, the claims of the '710 Patent are invalid for failure to meet one or more of the requirements of Title 35 of the United States Code, including the requirements of 35 U.S.C. §§102, 103, 112, and other applicable statutes.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment of Unenforceability of the '710 Patent)

32. The City of Aurora incorporates by reference paragraphs 1–31 of this Complaint as though set forth here in full.

33. The City of Aurora requests this Court to exercise its declaratory judgment powers and declare that the '710 Patent is unenforceable due to inequitable conduct practiced during the prosecution of the '710 Patent.

FOURTH CLAIM FOR RELIEF
(Declaratory Judgment of Non-Infringement of the '218 Patent)

34. The City of Aurora incorporates by reference paragraphs 1–33 of this Complaint as though set forth here in full.

35. An actual and justifiable controversy exists between the parties with respect to the scope and infringement of the '218 Patent, namely, whether the ARR component of the Prairie Waters Project infringes any valid claims of the '218 Patent.

36. By reason, *inter alia*, of amendments, statements, and omissions made in and to the United States Patent and Trademark Office during the prosecution of the applications that issued as the patents-in-suit, PS is estopped from construing the claims of the '218 Patent in a way that may cover Aurora's ARR component of the Prairie Waters Project.

37. Pursuant to 28 U.S.C. §§ 2201 and 2202, the City of Aurora is entitled to a declaration that the City's intended ARR component of the Prairie Waters Project does not infringe any claims of the '218 Patent.

FIFTH CLAIM FOR RELIEF
(Declaratory Judgment of Invalidity of the '218 Patent)

38. The City of Aurora incorporates by reference paragraphs 1–37 of this Complaint, as though set forth here in full.

39. To the extent they are alleged to be infringed, the claims of the '218 Patent are invalid for failure to meet one or more of the requirements of Title 35 of the United States Code, including the requirements of 35 U.S.C. §§102, 103, 112, and other applicable statutes.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, City of Aurora, prays for the following relief in its favor and against PS:

A. For a declaration that the ARR component of the Aurora Prairie Waters Project does not infringe any valid claim of U.S. Patent No. 6,840,710;

B. For a declaration that the claims of U.S. Patent No. 6,840,710 are invalid;

C. For a declaration that U.S. Patent No. 6,840,710 is unenforceable;

D. For a declaration that the ARR component of Aurora's Prairie Waters Project does not infringe any valid claim of U.S. Patent No. 7,192,218;

E. For a declaration that the claims of U.S. Patent No. 7,192,218 are invalid;

G. For an order entering judgment awarding the City its costs and reasonable attorneys' fees for this action;

H. For such other and further relief that this Court deems appropriate.

JURY TRIAL

The Plaintiff, City of Aurora, requests a jury trial on all claims for which a right to a jury exists.

Dated: November 9, 2007

Respectfully Submitted,

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