

<p><b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p><b>GREGORY W. FELT,</b></p> <p>v.</p> <p>Respondent:</p> <p><b>CHAFFEE COUNTY BOARD OF COMMISSIONERS.</b></p>	
<p>Attorney or Party Without Attorney for the Petitioner:</p> <p>Name: Gregory W. Felt Address: P.O. Box 489 Salida, Colorado 81201 Phone Number: (719) 539-7476</p>	<p><b>Docket Number: 41020, 41021, 41022</b></p>
<p><b>ORDER</b></p>	

**THIS MATTER** was heard by the Board of Assessment Appeals on March 3, 2003, Debra A. Baumbach and Karen E. Hart presiding. Petitioner appeared pro se. Respondent was represented by Jennifer A. Davis, Esq.

**PROPERTY DESCRIPTION:**

Subject property is described as follows:

- Possessory Interest Recreation**
- (Chaffee County Schedule No. N342201188854 Docket 41020)**
- (Chaffee County Schedule No. N342201188807 Docket 41021)**
- (Chaffee County Schedule No. N342201188814 Docket 41022)**

Petitioner is protesting the 2002 actual value of the subject properties, three possessory interests related to boating and fishing activities on the Arkansas River.

## **ISSUES:**

### **Petitioner:**

Petitioner contends that his permits are split between Chaffee and Fremont counties; the Fremont county half is not taxed, the Chaffee county half is taxed. He believes his boating and fishing agreements are not possessory interests, but if the Board determines they are, the value is incorrect; the permits should be based on an annual term, rather than a five-year term.

### **Respondent:**

Respondent contends that Petitioner's permits create a possessory interest and were valued according to the Division of Property Taxation procedures and Colorado Statutes.

## **FINDINGS OF FACT:**

1. The Board, with Respondent's counsel's agreement, amended the petition to indicate the Respondent as the Chaffee County Board of Commissioners, as the valuation was set by special notice of valuation. The Board also consolidated dockets 41020, 41021, and 41022.

2. Petitioner, Mr. Gregory W. Felt, testified that docket numbers 41021 and 41022 involve his boating agreements with the Colorado Division of Parks and Outdoor Recreation (DPOR), doing business as the Arkansas Headwaters Recreation Area (AHRA). There is a moratorium on the issuance of new permits for commercial boating in the AHRA. There are currently 59 outfitters on the river but the target number is 45 commercial boating permits.

3. Mr. Felt does not believe that these agreements fit the definition of possessory interest. These agreements do not lend to exclusivity. Although the number of boaters is limited, the outfitters do not hold exclusive rights to the use of DPOR facilities or the surface of the river – all facilities and the river surface are shared with the public and other outfitters.

4. Mr. Felt testified that Condition 15, Section A of the agreements state that “no value shall be assigned to or claimed for the Agreement or for the occupancy or use of State or Federal lands or related waters granted thereupon... The use of the Agreement as collateral is not recognized by the Division.”

5. Mr. Felt testified that there is a rationing plan that is enacted when the use of the river must be restricted. The outfitters are limited in the number of boats they may operate under their permits on days of historic high use.

6. Mr. Felt testified that he believes the possessory interest methodology of valuation is flawed. He does not believe the use fees directly indicate the value of the possessory interest. The agreements are renewed every five years. Each spring the outfitter must go through a nearly identical process to reactivate his agreement. If the agreement is transferred to a new owner, the

transfer does not retain its previous holder's place in the five-year cycle. Outfitters have the option of maintaining a one-year agreement renewed annually or a five-year agreement; the only difference is a lowering of the property tax burden.

7. Mr. Felt testified that docket 41020, is the same kind of agreement as in the other two dockets with the main difference that this agreement has no limitation on the number of guide agreements available; there is no limit on the number or the capacity on this use. This agreement is for commercial wade fishing outfitters. Anyone can get into this business; there is no exclusivity. There is little regulation, follow-up, or control with the agreements.

8. Mr. Felt testified that Fremont County removed him from taxation. They have different schedule numbers, but the permits are the same. He believes he should not be taxed by Chaffee County as the same permits are not taxed by Fremont County.

9. Mr. Felt testified that the permit fees are not "rent". Some outfitters pay the same fees for their permits, but put their boats in and out on private lands rather than on government land.

10. Under cross-examination, Mr. Felt testified that the permits are issued by Colorado State Parks through the Recreation area. At this time, a new commercial boating agreement would need to be purchased as assets of an existing operation on the Arkansas River; then a new permit would be issued to the new owner. There is no plan on how to reduce to the 45 outfitter numbers. For the walk and wade permits, a new person could buy an existing business like the boating, or start a new one with the applicable insurance, etc. There are 59 commercial rafters to date. The number of walk and wade permits are 10 to 12. Restrictions would likely be based on the amount of use rather than the number of permits. A commercial operator must have an agreement to do walk and wade or rafting activities. The use fees they pay account for 80% of AHRA's operating budget for paying staff, maintenance of their facilities and campgrounds, and search and rescue; expenses for operations of the park and most capital improvements come from grants. Two-thirds of the putting in and out of boats is conducted on federal land, only 20% of walk and wade (use fees). Boat rationing is based on his historic use; he can run his boats or not run them and loan them to another outfitter. Non-use over time will cause him to lose his ration and someone else will get his ration. Historic use does not affect the amount of payment for the permit. Use fees are based solely on the gross receipts of the business. You can buy or sell rationed boats, but you cannot lease them; value to borrowing boats is that it holds your ration number and it is a good neighbor policy.

11. Under redirect, Mr. Felt testified that he does not think the wade and fish permits create a possessory interest. The valuation methodology is incorrect as it is using fees and not rent. His fees go to management, etc. and there is no exclusive right to a piece of property.

12. Upon questioning by the Board, Mr. Felt testified that some of his gross revenues reported by the AHRA for his "walk and wade" permit, docket 41020, are related to private property trips. He also operates on separately leased, private property.

13. Petitioner is requesting that his property have a zero value, as the permits do not create a possessory interest. If the Board determines that there is a possessory interest, Petitioner

believes the value assigned by Respondent is too high, as it is calculated on a five-year agreement term. He believes it should be calculated on an annual agreement basis.

14. Respondent's witness, Mr. Richard Roberts, a licensed appraiser with the Chaffee County Assessor's Office, testified that he took the Division of Property Taxation (DPT) class on possessory interests. They were told that, based on the Scott-Free California court case used by the Colorado Supreme Court in the Vail decision, river rafters should be considered a possessory interest. There are 3 criteria: 1) revenue generating capability; 2) ability to exclude others; and 3) duration of the possessory interest to derive a private benefit.

15. Mr. Roberts testified that he talked with the Arkansas Headwaters staff and used their information regarding permit holders in 2001, their final gross revenues, and user fees. He used this information in the valuation of the subject property, according to the DPT criteria. He researched Internet information posted by AHRA, which indicated what parts of the river were used by the outfitters. He spoke with the Fremont County Assessor. They decided to use 100% of the revenue to value exclusive rafters in each county, and to use a 50-50 split for rafters that used the river in both counties. They used a spreadsheet furnished to them by the DPT to determine the value of the possessory interest; they imputed the length of the lease, the total gross (which they split 50-50 for gross rent), and a discount rate of 13%. He determined the discount rate by calling banks and utilizing the Integra Survey. The assessment rate is 29% and the tax amount is \$17.02, \$23.84, and \$18.01 for the three subject properties.

16. Mr. Roberts testified that they tried to determine the exclusivity of a river. Rafting companies do have a possessory interest in California.

17. Upon questioning by the Board, Mr. Roberts testified that he considers the subject permits to be similar to a real estate lease.

18. Respondent's witness, Ms. Judith Kahl, Property Tax Specialist III with the Division of Property Taxation and a Certified General Appraiser, testified that Exhibit 3 is the basic procedure for valuing possessory interest in the DPT manual. Assessors are required to follow the published manuals.

19. Ms. Kahl testified that a taxable possessory interest is a private party entering into a lease, permit, license, contract, concession, or other agreement with a government entity for its use in a business. It is basically a use situation where a private party has entered into an agreement to use government-owned property in a business. The three criteria used by Mr. Roberts were outlined in the Vail Associates, Colorado Supreme Court case. Her understanding of the subject property permits is that a fee is paid to the DPOR and AHRA by private individuals that then use the property in a revenue generating capacity so that it fits the criteria of being a taxable possessory interest based on the Court. Colorado Revised Statute 39-1-103(17)(a)(I), (II), and (III) shall be used to value possessory interests. Assessors must use actual fees paid over the term of the lease, unless it is shown that the actual contract rents or fees to be paid are not representative of market. They determine the fee value, the discount rate, and the effective tax rate, and then they discount the value based on the term of the lease, which in this case is a five-year term. Mr. Roberts followed the procedures as outlined in the manual on how you collect the information. The valuation methodology is statutory, so there is no other value methodology available. She does not believe the

exclusions listed on page 7.87 of Exhibit 3 apply to this case.

20. Ms. Kahl testified regarding the exclusivity criteria. It is the ability of the possessory interest owner to exclude others from making the same use of the interest. The possessory interest is marked by some degree of control and some degree of exclusivity; neither absolute control nor absolute exclusivity is required. Vail says a private individual is paying a fee to use public property to generate revenue; therefore they should pay a tax on that use. She believes Chaffee County followed the Colorado Supreme Court decision and the DPT procedures in the manuals.

21. Under cross-examination, Ms. Kahl testified that the Colorado Revised Statutes outline the use of the actual fees paid over the term of the lease. She believes there is a direct correlation between the fee and the benefit of use. If use fees are the only information the assessor has, that is all they can use.

22. Upon questioning by the Board, Ms. Kahl testified that a possessory interest is tied to government property. A possessory interest would have to be for government land with a fee to use the property in a revenue generating capacity. Regarding the fees, it is important to know why the fee is being charged and where the use is taking place.

23. In redirect, Ms. Kahl testified that the fees paid by Petitioner to the AHRA are user fees and that is what is used in the valuation of possessory interests.

24. Upon further questioning by the Board, Petitioner, Mr. Felt, testified that a permit is needed for a rafting business on the river, whether the putting-in and taking-out activities occur only on private land, as DPOR has asserted the authority to manage the recreation on the river. About 80% of his wade fishing trips are conducted on private land; part of it is leased from a rancher and part of it is owned by his guide – he leases both sides of the river. He pays the use fee to conduct wade trips on private lands to the landowner; payment does not come from AHRA. He has submitted to DPOR every trip he has put in, taken out, where he launched, etc. For his wade fishing, he reports every trip, every person he took, and where he took them. You can ascertain to the person or to the dollar how much of this is on private and how much is on public. The figures used by Mr. Roberts includes his total gross revenues for wade fishing within the AHRA; there is no distinguishing between his private or public land use. The vast majority of the revenues for the walk and wade permit are generated from private property. The fees AHRA fees are to manage the activity on the river; it is not about the use of specific public land sites. His fees are for the right to float the river.

25. Upon further questioning by the Board, Respondent's witness, Ms. Kahl testified that private land is already taxed and the scenario such as Petitioner's walk and wade permit for private land use is not addressed in the DPT procedures. She questions how to make the distinction and the percentage when it is managed by a government entity. There needs to be a lot more information from the permittee to make the distinction of how much is on private and how much is on public and would that affect that final fee.

26. Respondent assigned an actual value as follows to the subject properties for tax year 2002:

<u>Docket</u>	<u>Schedule Number</u>	<u>Actual Value</u>
41020	N342201188854	\$ 3,709.00
41021	N342201188807	\$ 4,786.00
41022	N342201188814	\$23,285.00

## **CONCLUSIONS:**

1. Petitioner presented sufficient probative evidence and testimony to prove that the tax year 2002 valuation of the subject property was incorrect for docket 41020.

2. Respondent presented sufficient probative evidence and testimony to prove that the tax year 2002 valuation of the subject property was correct for dockets 41021 and 41022.

3. The Board had two issues to address in this case. 1) Do the Petitioner's Special Use Agreements to use the Arkansas River for boating and fishing create possessory interests; and 2) If there are possessory interests, are the interests properly valued by Respondent? We will address these issues separately.

4. As to question one, the Board was convinced that Petitioner's Special Use Agreements do create a possessory interest. A possessory interest is a right to the possession and use of publicly owned property for a period of time less than perpetuity. (Board of Commissioners v. Vail Associates, Inc., 19 P.3d 1263 (Colo. 2001)).

5. The Colorado Supreme Court listed three criteria as necessary when determining whether a possessory interest can be considered taxable. The three criteria are 1) An interest that provides a revenue-generating capability to the private owner independent of the government property owner; 2) The ability of the possessory interest owner to exclude others from making the same use of the interest; and 3) Sufficient duration of the possessory interest to realize a private benefit there from.

6. As to criteria one, the Special Use Agreements allow the Petitioner to generate revenue from government property. The agreements create a privilege to use the river for commercial purposes and give Petitioner an exclusive right to the river for commercial use for private gain, even though there are no vested rights to river access and the access and/or use may be limited or denied at anytime, dependent on river conditions and boat rationing. We recognize that the agreements do not tie directly to parcels of government land, although they do regulate commercial use of the Arkansas River. The policy of Colorado is that rivers and streams are public property. Section 5 of Article XVI of the Colorado State Constitution and CRS 37-92-102(1)(a). An operator may not conduct a for-profit rafting or fishing activity on the river without the Agreement. Petitioner clearly generates income from his activities on the river, fulfilling criteria one.

7. As to criteria two, the Special Use Agreements create an exclusive use. No commercial operation can occur on the river without the Agreement. The California case cited in the Vail decision states that concurrent uses of property are not necessarily inconsistent with exclusivity. The Oregon case cited in Vail states that “Although a possessory interest always is marked by some degree of control and some degree of exclusivity, neither absolute control nor absolute exclusivity is required.” We recognize that there are numerous commercial operators on the river. However no commercial use may be made of the river without a Special Use Agreement. Petitioner has a special right to use the river for profit, a right that is held only by owners of Special Use Agreements. We see no significant difference between multiple rafting agreements on the same stretch of river and multiple cattle grazing permits on the same blocks of federal land. Both instances allow private parties to use government property for financial gain and limit the use of said government property for financial gain to only those that hold permits. Petitioner fulfills the requirements of criteria two.

8. Regarding criteria three, Petitioner’s agreements cover a time period of five years, being of sufficient duration of the possessory interest to realize a private benefit there from, fulfilling criteria three requirements.

9. Having determined that the subject properties meet all three criteria as set by the Colorado Supreme Court in the Vail case, we believe Petitioner’s Special Use Agreements create a possessory interest.

10. The Board will next address question two, whether the subject properties were properly valued.

11. Regarding dockets 41021 and 41022, the Boating Agreements, we believe Respondent properly valued the subject properties in these two dockets. Respondent used the valuation methodology prescribed in C.R.S. 39-1-103(17) and the Department of Property Taxation’s Assessor’s Reference Library, Volume Three.

12. The Board was not persuaded by Petitioner’s arguments that the Agreements should be treated as annual agreements, due to the required re-submission of the application information during each year of the agreement. The agreements clearly show five year terms and Respondent properly calculated the value of the agreements based on the lease terms set forth in the agreements. The Board affirms Respondent’s assigned valuations for dockets 41021 and 41022.

13. Regarding docket 41020, the Walk and Wade Fishing Agreement, the Board was not convinced that the possessory interest was correctly valued. The activities under this permit are conducted on both the public river and on private property. The private property is under separate lease by Petitioner from the landowner. The Assessor used all revenues reported under this permit to the AHRA to value the possessory interest. The reported revenues included revenues from activities on private property. CRS 39-1-103(17)(II)(B) requires the exclusions of “...income of the holder of the possessory interest that is not directly derived from and directly related to the use or occupancy of the possessory interest.” We do not believe that such revenues generated from private property activities should be included in the valuation of a possessory interest. The taxable possessory interest can only result from the use of government property, using fees generated from the government property use.

14. The Walk and Wade Fishing Rider to the AHRA Special Use Agreement states in

Page 1 of 4, paragraph 1, paraphrased, that a Colorado Outfitters Registration is required for any Contractor involved in the taking of fish on public lands or waters with the State of Colorado. This registration is required to obtain the AHRA Special Use Agreement. This would imply that such a registration is not required for the taking of fish on private lands or waters. We believe this further supports our position that revenues realized by the Petitioner from private property activities should not be included in the possessory interest value calculation for the activities on public property.

15. The Board concluded that Respondent should recalculate the value of the possessory interest in docket 41020 to reflect only public property generated revenues.

### **ORDER:**

For dockets 41021 and 41022, the petitions are denied.

For docket 41020, Respondent is ordered to recalculate the possessory interest value using only public property generated revenues.

The Board retains jurisdiction for docket 41020 for a period of twenty-five calendar days of the issuance of this order. Petitioner is ordered to submit his business records regarding this docket to Respondent, including a breakdown of revenues from both public and private sources within ten calendar days of the receipt of this order. Respondent has ten calendar days within receipt of Petitioner's records to recalculate the possessory interest value using public land activity income. Respondent shall then exchange this information with the Petitioner and the Board. Both parties shall then have five calendar days to notify the Board as to whether they are in agreement to the revised value, or whether a further hearing is needed to determine the value of the possessory interest.

### **APPEAL:**

Petitioner may petition the Court of Appeals for judicial review within 45 days from the date of this decision.

If Respondent alleges procedural errors or errors of law by this Board, Respondent may petition the Court of Appeals for judicial review within 30 days from the date of this decision.



DATED and MAILED this 24<sup>th</sup> day of April, 2003.

**BOARD OF ASSESSMENT APPEALS**

Debra A. Baumbach  
Debra A. Baumbach

Karen E. Hart  
Karen E. Hart

This decision was put on the record

APR 23 2003

I hereby certify that this is a true  
and correct copy of the decision of  
the Board of Assessment Appeals.

Penny S. Lowenthal  
Penny S. Lowenthal



**BOARD OF ASSESSMENT APPEALS,  
STATE OF COLORADO**  
1313 Sherman Street, Room 315  
Denver, Colorado 80203

Petitioner:

**GREGORY W. FELT,**

v.

Respondent:

**CHAFFEE COUNTY BOARD OF COMMISSIONERS.**

Attorney or Party Without Attorney for the Petitioner:

Name: Gregory W. Felt  
Address: P.O. Box 489  
Salida, CO 81201  
Phone Number: (719) 539-7476

**Docket Number: 41020,  
41021, 41022**

**AMENDMENT TO ORDER**

**THE BOARD OF ASSESSMENT APPEALS** hereby amends its 2003 Order in the above-captioned appeal to reflect that the Petitioner was protesting the 2001 actual value of the subject property.

In all other respects, the April 24, 2003 Order shall remain in full force and effect.

**DATED/MAILED** this 30<sup>th</sup> day of April, 2003.

This amendment was put on the record

**APR 29 2003**

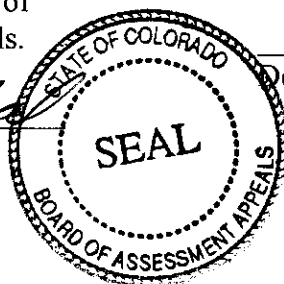
**BOARD OF ASSESSMENT APPEALS**

*Karen E Hart*

Karen E. Hart

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

*Penny S. Lowenthal*  
Penny S. Lowenthal



*Debra A. Baumbach*  
Debra A. Baumbach