

**CLE PRESENTATION TITLE:** “CCWCD’s Well Augmentation Subdistrict Trial: A New Era in South Platte Augmentation Plans?”

**SPEAKERS:** P. Andrew Jones, Esq., Lind, Lawrence & Ottenhoff. (Andy) – Applicant’s Perspective. Andy Jones represents the Well Augmentation Subdistrict of the Central Colorado Water Conservancy District (“WAS”), Applicant in Case No. 2003CW99. Mr. Jones was lead counsel in representing WAS in the case and at trial. Mr. Jones is currently representing WAS in its appeal of Case No. 03CW99 to the Colorado Supreme Court.

Bradford R. Benning, Esq., Petrock & Fendel, P.C. (Brad) – Objector’s Perspective. Bradford R. Benning: Brad Benning was formerly with White & Jankowski, LLC who represents one of the main objectors in the case, the City of Sterling. Mr. Benning was co-chair in the case and at trial for the City of Sterling.

**BRAD BENNING BIO:**

Mr. Benning is currently with Petrock & Fendel, P.C. Mr. Benning is a fourth generation Colorado native admitted to the Colorado bar (2000). Mr. Benning received his J.D. from the University of Denver College of Law in 2000 and has an undergraduate degree in geology from the University of Colorado.

Mr. Benning’s areas of expertise include: water rights litigation and transactional work including planning and acquisition of water supplies, changes of water rights, exchanges, augmentation plans, ground water rights, exempt water structures and wells, administrative proceedings before the Colorado Ground Water Commission. Mr. Benning’s areas of expertise also include: general civil litigation, local government, special district, land use, real estate, and appellate practice before the Colorado Supreme Court.

**SYNOPSIS<sup>1</sup>**

Because of the delayed effect well pumping has on the South Platte River, well users have to show they will have enough augmentation supplies available in the future to replace their depletions when those depletions eventually hit the River. Traditionally, augmentation plan applicants have been able to do this with augmentation plans supported by firm senior water

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<sup>1</sup> My presentation and thoughts expressed herein are my own. I am not speaking on behalf of my former firm, White & Jankowski, or for the City of Sterling. The information is intended for legal education and discussion purposes only. My thanks go out to White & Jankowski and my current firm, Petrock & Fendel, P.C. for encouraging me to make this presentation and in supporting the water bar and allowing me the time to do this.

rights – water rights that are physically and legally available during dry years. With demand ever increasing and climate change causing drier and changing conditions throughout the West, water supplies, use, and rights are being tested like never before. See also “*Climate Change in Colorado – A Synthesis to Support Water Resources Management Adaptation*”, *Western Water Assessment for the Colorado Water Conservation Board, CU-NOAA, 2008*.

Augmentation plans are no exception. With firm senior water rights at a premium or unavailable, augmentation plan applicants are many times relying on less firm supplies including junior water rights to try and support their plans. Augmentation plan applicants have also to varying degrees tried to rely on “augmentation wells” to support their plans. The concept of augmentation wells is that they are used to re-time depletions by pumping wet water to the South Platte River to replace depletions then accruing to the River, but creating their own depletions that will then need to be replaced in the future.

Unfortunately, reliance on these supplies is problematic and potentially injurious to vested water rights. Junior augmentation supplies are not firm - they are not legally and physically available much of the time. Consequently, whether and to what extent these junior augmentation supplies will be available in the future to replace its depletions is not known and subject to dispute. Augmentation wells are equally problematic and potentially injurious. Without the ability to demonstrate that firm augmentation supplies will be available to replace the future depletions caused by the augmentation wells themselves, injury is not prevented but instead amplified and pushed off into the future, causing the potential for even greater injury in the future.

Traditionally, such problems may have prevented an applicant from obtaining an augmentation plan. Fortunately, water users on the South Platte River have worked hard since 2003 to find solutions to this dilemma so as to allow junior well users the ability to obtain augmentation plans and the possibility of pumping while still protecting vested water rights from injury. This hard work lead to very creative solutions, including the use of projections that allow junior water rights to be effectively evaluated and used as augmentation sources. This creativity has enabled augmentation plans to continue to serve their legislative purpose by providing the maximum utilization of water while first and foremost preventing injury. All of the stipulated and decreed augmentation plans on the South Platte River since 2003 were the result of these efforts.

The Well Augmentation Subdistrict of the Central Colorado Water Conservancy District (“WAS”) tested this creativity and the legal aspects surrounding these issues at trial in Case No. 2003CW99. Faced with an overwhelming depletion debt owed to the South Platte River, ever drier conditions on the South Platte River, and the possibility of no well pumping being allowable under its augmentation plan for a substantial period of time, WAS departed from the other plans previously decreed in an effort to give its members the immediate ability to pump. In order to do so, WAS argued its junior augmentation supplies were relatively firm based on

predictions of future conditions. WAS attempted to show through various predictions that its junior water supplies would be available enough of the time to support the augmentation plan and pumping requested by WAS.

WAS further tested the limits with its use of augmentation wells, which formed the cornerstone of WAS's plan. WAS's augmentation wells were the single greatest augmentation source in the plan accounting for 13,000 to 28,000 acre-feet of pumping over the course of WAS's projection. Objector's argued that WAS's use of its augmentation wells was not supported by firm augmentation supplies. WAS again relied on future predictions of water availability to argue that the depletions from the augmentation wells would eventually be replaced during wet hydrologic cycles that WAS argued occur periodically on the South Platte River.

WAS further tested the limits by claiming that certain of its depletions were not required to be replaced. Specifically, WAS claimed that only 15.4 percent of its depletions from its wells in the Box Elder Creek basin were required to be replaced due to the hydrologic conditions that existed in the basin. WAS argued that because Box Elder Creek was an ephemeral stream that did not flow to the South Platte River, WAS's depletion obligation was drastically reduced. WAS also claimed that depletions from pumping of its member wells that occurred prior to 1974 were not required by statute to be replaced.

WAS further tested the limits by proposing new administrative tools to be used by the Division Engineer to provide WAS greater flexibility and ability to pump. One such tool was "delayed winter (non-irrigation season) replacement". This tool would give the Division Engineer the ability to allow WAS to delay its replacement of winter depletions based on a prediction that downstream senior reservoirs would timely fill despite WAS's winter depletions.

Another tool WAS proposed was a "well call." WAS recognized that a well cannot use its priority to call for water because such a call would not result in increasing the physical water supply to the well. WAS argued, however, that its wells should be entitled to an equal benefit under the priorities of its wells. WAS argued that the Division Engineer should be allowed to use the priority date of WAS member well(s) as the swing right in a bypass call so that WAS member wells could continue to pump and not replace depletions during a well call. WAS argued that both the well call and delayed winter replacement administrative tools were necessary to allow for the maximum utilization of water by well users such as WAS and prevent the waste of water flowing to more junior recharge water rights<sup>2</sup> and ultimately out of the State.

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<sup>2</sup> Many water users have obtained decreed recharge rights in an effort to take advantage of the excess flows in the Lower South Platte River at certain times of the year, primarily in Water District 64. Such recharge rights included recharge rights decreed in several major augmentation plans on the Lower South Platte River subsequent to 2003. These major augmentation plans involving hundreds of well users and farmers that rely to a great extent on recharge to support their own augmentation plans.

WAS also tested the limits by arguing it had no legal responsibility to ensure that its member wells complied with the terms and conditions of any augmentation plan decree. WAS further asserted that it was not responsible for replacing the well depletions from member wells that did not comply with WAS's decreed plan. Instead, WAS argued that the Division Engineer was responsible for ensuring compliance by WAS's member wells and Objectors only remedy for the illegal pumping by WAS member wells was to resort to filing individual lawsuits against any well owner found to be in violation of the decree.

The merits of these and other of WAS's claims as well of the issues surrounding well pumping, projections, administration, and enforcement were litigated in motions before trial and ultimately during an eight week trial before Judge Klein. This was Judge Klein's first augmentation plan case. The trial and several post-trial proceedings culminated in a decree that provided WAS with an augmentation plan and, consequently, the potential for future pumping of its member wells. The Decree, however, did not provide much of the relief WAS requested. Instead, the Decree was for the most part consistent with the positions and arguments made by Objectors in Case No. 03CW99 and with the many previously stipulated decrees on the South Platte River. WAS has now appealed Judge Klein's rulings in Case No. 03CW99 to the Colorado Supreme Court.<sup>3</sup>

While WAS has appealed the decision, WAS's ability to obtain an augmentation plan at all was in my opinion a major victory for WAS and unprecedented in light of *Aurora v. Simpson*, 105 P.3d 595 (Colo. 2005). In my opinion, WAS failed to meet its threshold burden of: (1) showing sufficient legally available augmentation supplies; (2) quantifying its depletions, namely from its member wells in the Box Elder Creek basin or from its 2006 member well pumping or based on the removal of half of WAS's wells from the plan in time, location and amount; and (3) by admitting it could not and would not prevent injury because WAS could not and would not ensure that its member wells complied with any terms and conditions of an augmentation plan necessary to prevent injury.

In hindsight, however, allowing WAS to obtain an augmentation plan may have been the best result for all involved. It provided WAS with an augmentation plan and, consequently, the possibility of pumping at some time in the future. It also provided Objectors and the River with accountability for 215 wells included in the plan and the ability to now regulate those wells in the prior appropriation system with protective terms and conditions. It also saved all parties involved from the continued litigation over the un-augmented pumping by these wells in yet another application or applications that would have been necessary upon dismissal.

Case No. 03CW99 was not only a significant case because of the unprecedented relief afforded WAS despite what I perceived as the plan's failings and the legal issues being argued

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<sup>3</sup> The Water Court record has not been completed and certified to the Colorado Supreme Court. Consequently, appellate briefing has not yet begun and no oral argument has yet been set.

but because of the real world context and time in which those issues were being argued. The relevancy of the case was apparent as it involved actual wells, farms, people, and use being affected at that time. The case involved actual administration by the Division Engineer at that time, as the parties were confronted by real and ongoing well use and enforcement actions throughout the litigation. The case also involved significant administration issues affecting all water users in Division 1. These administrative and enforcement issues enabled Objectors to better understand and see how WAS proposed that its plan operate and how the Division Engineer would administer that plan. This consequently gave the Objectors valuable insight into the necessity for specific terms and conditions governing that operation.

The case was also the first to squarely deal with the interplay between Substitute Water Supply Plans and the underlying Water Court augmentation plan and the question of injury. The case also involved Objectors of all types and from all locations on the South Platte River. This allowed the full issue of injury to the River to be addressed as well as provided for a great collaborative Objector effort.

Participating with the other Objectors and their attorneys throughout the litigation and in trial is something unparalleled in other forms of litigation and something I thoroughly enjoyed. My participation at that time as co-counsel for one of the main Objectors in the case, the City of Sterling, gave me the fortunate ability to understand and argue these issues in this historic case. It also reinforced my respect for the water bar, the Water Court, and the work water attorneys and engineers do.

## **OUTLINE OF ISSUES FOR CONSIDERATION AND DISCUSSION**

- I. History – Previous Augmentation Plans settling rather than going to trial on the South Platte River, including WAS’s big brother Central. My experience in crafting decrees in those cases, including Central Decree. Thought we had it done with Central. WAS had other ideas, however.
- II. Procedural History of Case. WAS case tested all facets of a water case and through its litigation not only was argued from a theoretical side but had the added benefit of being immediately relevant exposing the reality of augmentation plans, SWSPs, and there administration and enforcement.
- III. Augmentation plan is only as good as its administration and enforcement – Pumping limits and quotas illusory without effective monitoring, administration, and enforcement.
- IV. Applicant’s Burden of Proof – Was WAS Outcome Departure and in Contravention of *Aurora v. Simpson*?
- V. Reliance on Objector’s Evidence to Allow Plan to Be Decreed?

- VI. Too Large of A Plan Covering Too Much of the River? Would Smaller Plans Covering Smaller and More Defined Sections of River Be Better for All Involved?
- VII. Better outcome for WAS and the River if plan was dismissed or decreed? Are such plans sustainable for the River? For the farmer?
- VIII. Pretrial - Pretrial Motions and Discovery
- IX. Trial
- X. Decree

## **TIMELINE OF SIGNIFICANT EVENTS**

### **WAS Requested Continuance of May 2006 Trial Which Court Granted Subject to Certain Conditions**

1. Judge Klein granted WAS's request for continuance but gave WAS three options on proceeding in the case: (1) proceed to trial as scheduled in May 2006; (2) proceed with a SWSP hearing in May 2006 to determine if interim operation of wells under 2006 SWSP request was allowable or cause injury; (3) continue trial and the SWSP hearing but no pumping by WAS under SWSPs or otherwise until and if WAS obtained a decreed augmentation plan from the Water Court allowing pumping. WAS elected initially to proceed with SWSP Hearing.

### **SWSP Hearing**

2. SWSP Hearing Issues<sup>4</sup>:
  - a. Court removed requirement that SWSP be consolidated with the plan for augmentation given the continuance and possible injury in interim. Only reasonable interpretation of SWSP statute to provide relief to Objectors. Court ruled SWSP hearing could be bifurcated from trial on augmentation plan.
  - b. Standard of Review in SWSP Hearing
    - i. SEO and WAS's position – Rule 106 review.

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<sup>4</sup> Appeal of SWSP automatically re-refers C.R.S. § 37-92-308(4) SWSP because of consolidation with underlying water court action.

- ii. Judge Klein disagreed and ruled de novo review based on express language of C.R.S. § 37-92-308(4)(c) consolidating SWSP with underlying water case.<sup>5</sup>
- c. SWSP Standing: Only those Objectors who had appealed the SWSPs had standing in SWSP hearing.<sup>6</sup>
- d. Mootness: Prior SWSP approvals and conditions were moot to the extent the conditions of their approval were not the same as WAS's then currently pending 2006 SWSP.<sup>7</sup>

**WAS Changes Option and Elects to Forego SWSP Hearing and Not Pump Its Member Wells Unless and Until Augmentation Plan is Decreed Water Court Allowing Pumping and Subsequent Rulings before Trial**

- 3. Box Elder Creek. WAS proposed to replace only 15.4 percent of its member well depletions from wells in the Box Elder Creek basin. WAS's basis for this position was its argument that Box Elder Creek is ephemeral and disconnected from the South Platte

<sup>5</sup> Court distinguished C.R.S. § 37-92-308(3) and (5) which do not have similar provisions consolidating the SWSP with the underlying water case. The Court distinguished its ruling in Case No. 2005CW4 as that case involved a SWSP approved under C.R.S. § 37-92-308(5). The Court noted that de novo review under C.R.S. § 37-92-308(5) was problematic given the expedited review and without applying the APA to the record review would cause problems like requiring the court to make determinations of disputed facts without the benefit of having those fact subject to cross examination.

<sup>6</sup> This issue was further discussed in the recent Orphan Wells of Wiggins case, Case No. 04CW84, which was dismissed by Applicants in that case. Judge Klein ruled that standing regarding SWSPs is not limited to those individuals specifically and separately appealing the SWSP but includes parties incorporated by reference ("joined") in the appeal filed by another party. In the case, Sterling was the only party to have appealed OWW 2004 SWSP. In doing so, Sterling stated in its appeal: "all parties who have filed statements of opposition to this application including the State Engineer are parties pursuant to C.R.S. § 37-92-308(4)." Judge Klein stated that this statement was sufficient to "join" all other objectors in the case in the appeal of the SWSP. Judge Klein further allowed Sterling's 2004 SWSP appeal to serve as the appeal of the 2005 and 2006 SWSPs, despite no actual appeals of the 2005 and 2006 appeal being filed by any objector. Judge Klein ruled that under the SWSP statute the 2005 and 2006 SWSP are simply extensions of the earlier 2004 SWSP. Judge Klein consequently ruled that Sterling's appeal of the 2004 SWSP served as an appeal of the later SWSPs.

<sup>7</sup> Court ruled that issue of injury from the past SWSPs was not moot, only conditions for current interim operation. The Court ruled that injury from past SWSPs would be ruled on at trial and need not be considered during the SWSP Hearing.

River. Judge Klein Ruled that Depletion Replacement Must Be Based on Hydrological Conditions that Would Exist in Box Elder Creek Absent Well Pumping.

- a. Jurisdictional Question: Did filing of petition with Colorado Ground Water Commission to designate portion of Box Elder Creek Drainage a designated basin divest the Water Court of jurisdiction over WAS wells in drainage.
  - i. Answer: No. Water Court retains jurisdiction over cases filed prior to designation. *Sweetwater Dev. Corp. v. Schubert Ranches, Inc.*, 535 P.2d 215, 218-219 (Colo. 1975).
- b. Court Ruled that time, place and amount of depletion replacement based on hydrological conditions that would exist in Box Elder Creek absent well pumping.
- c. Consequence: Amount of replacement obligation to South Platte River was based on lagging to Box Elder Creek as if live stream to South Platte River.
  - i. Court did not rule on whether depletions injurious as this was a fact question.
  - ii. Judge Klein distinguished his holding in Central Case based on question presented and in Central question/issue was based on date of WRDAA of 1969. - Conditions that existed prior to that date – did the well pumping conditions exist prior to that date.
  - iii. Must start with presumption that water is tributary.
  - iv. Also CRS 37-92-103(10.5): determination of whether ground water is nontributary based on aquifer conditions existing at time of permit application.
  - v. Applicants cannot base argument on fact that well pumping has made Box Elder Creek basin nontributary. This violates prior appropriation system.
  - vi. Well pumping cannot be basis of claim that you don't have to replace depletions.

- vii. Prior appropriation trumps maximum beneficial use.
- viii. Maximum beneficial use is augmentation plan – augmentation plan is the mechanism that allows diversion of water out of priority, which is what allows maximum beneficial use.
- ix. Cannot reward junior water users and create super class of water rights allowing water rights to pump until connection of aquifer and stream is broken and then rely on that disconnection to claim nontrib or less depletions.

#### 4. Pre-1974 Well Pumping

- a. WAS asserted that no legal requirement to replace well depletions from pumping that occurred prior to 1974 (date of enactment of Groundwater Management Act). WAS argued to require such replacement would require the application of law ex post facto applying § 37-92-305(8) retroactively.
- b. Judge Klein disagreed.
- c. Water law had always made tributary ground water subject to the prior appropriation system. *Nevius v. Smith*, 279 P. 44, 45 (Colo. 1929).
- d. Supreme Court has previously recognized need to administer and protect stream from junior well pumping and Legislature may do so. *Fellhauer v. People*, 447 P.2d 986, 991 (Colo. 1969).
- e. 1969 WRDAA explicitly integrated tributary groundwater into appropriation system. C.R.S. § 37-92-102(1)(a).
- f. C.R.S. § 37-92-305(8) not ex post facto.
  - i. No vested right to withdraw tributary groundwater prior to 1974.
  - ii. Also prohibition on retroactive legislation does not apply to remedial or procedural statutes. The allowance of out-of-priority pumping covered by an augmentation plan, which replaces depletions, is merely a remedial

provision providing an opportunity to make diversions that would otherwise be curtailed under the priority system and providing a remedy to water rights that would otherwise be injured due to the diversion.

- iii. Legislature in C.R.S. § 37-92-205(8) intended retroactive application by requiring that post-pumping depletions from “any” pumping be replaced, no temporal limitation.

5. Opposers’ Motion for Summary Judgment – Opposers Argued WAS Application Must Be Dismissed Based on WAS’s Request for Continuance WAS Admitting It Needed Continuance to Develop Augmentation Supplies Necessary to Support Plan WAS Plan. Motion Denied by Judge Klein. He ruled that whether augmentation plan will result in material injury to senior appropriators is a factual question based on the evidenced to be presented at trial. *City of Aurora v. State Engineer*, 105 P.3d 595, 615 (Colo. 2005). In his denial, Judge Klein made several interesting points.
  - a. “An augmentation plan must be denied if the applicant is unable to prove the amount, location, and timing of depletions, the availability of legally available replacement water and the lack of material injury to vested water rights and at the time of trial. *City of Aurora*, 105 P.3d 615.... Although an applicant need not have replacement water when applying, parties to a water trial must abide by case and trial management orders. In other words, proving the existence of replacement water at trial requires applicants to acquire replacement water long enough before trial to meet case and trial management deadlines.... Opposers contend that such augmentation plans force vested water rights holders to ‘wait and see’ whether applicants will be able to avoid injury to vested water rights holder.... Opposers are correct that disclosure deadlines do not contemplate that applicants can continue to secure replacement sources all the way up to and through trial.”
  - b. An applicant for a plan for augmentation need not have available replacement supplies at the time the application is filed. In his order, Judge Klein stopped short of saying the Applicant could wait until the time of trial to acquire available augmentation supplies. He instead said that applicant must acquire replacement supplies long enough before trial to meet all case and trial management deadlines.

- i. What happened at trial: WAS kept offering new agreements and new claimed sources of water through trial. Judge Klein allowed such evidence to be heard.
  - ii. Opposers objected but the types and amount of supplies did not come close to rectifying WAS's replacement plan shortfall so this was not strenuously pursued.
6. WAS's Pending Change Cases. WAS had several change of water rights cases pending, which were approved in SWSPs. The changed rights were to serve as sources of supply for WAS augmentation plan. These SWSPs were appealed by several objectors, including SWSP appeals filed in the augmentation plan case, 03CW99. WAS moved to dismiss these appeals from the augmentation plan case and strike certain appeals<sup>8</sup>. Certain objectors sought to consolidate these appeals in Case No. 03CW99. WAS argued that the merits of these change rights were not at issue in Case No. 03CW99.<sup>9</sup> The Court held that C.R.S. § 37-92-308(4) only refers to consolidation with regard to plans for augmentation and not change of water right SWSPs. The Court, therefore, dismissed the appeal of these change of water rights from consideration in Case No. 03CW99.
7. Illegal WAS Member Well Pumping in 2006. During Irrigation Season of 2006, Objectors became aware that certain WAS members were continuing to pump their wells despite Judge Klein's Order prohibiting pumping. Objectors requested power records from WAS, which WAS would not provide or did not have and would not request. Objectors requested power records from the Division Engineer, which the State Engineer refused to provide.<sup>10</sup> State Engineer sought a protective order preventing the discovery of the Division Engineer's power and other records it had compiled on WAS member

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<sup>8</sup> WAS moved to strike certain appeals as untimely. Judge Klein ruled the appeals were timely and stated that the thirty days in which appeals must be filed must be construed to mean thirty days from actual mailing of the State Engineer decision on the SWSP, not the date of the State Engineer decision itself.

<sup>9</sup> At trial, however, WAS tried to rely on these yet undecreed changed rights as available augmentation supplies supporting WAS's augmentation plan. Opposers moved to exclude testimony and evidence on these pending changed water rights. Judge Klein declined to have a trial within a trial on these changes rights and he limited testimony about them to general discussion but not to show any specific amount of available augmentation water.

<sup>10</sup> Division Engineer's Office was very helpful at the outset. Decision was made at some point later, however, by State Engineer's Office and Attorney General's Office that better course was to have Court rule on production of power records rather than open up issues related to violation of privacy concerns and other State records concerns.

wells during the 2006 irrigation season. Judge Klein denied the DEO's request for protective order, but did allow redaction of personal information such as addresses, telephone numbers, and financial information of the WAS members.

- a. Scope of discovery was very broad and in close cases balance must be struck in favor of discovery. *Silvia v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002).
  - b. Power records not protected under Colorado Open Records Act. CORA does not ip so facto supplant civil rules of procedure and discovery in litigation. *Martinelli v. District Court*, 612 P.2d 1083, 1094 (Colo. 1980).
  - c. Power records not protected as work product. Work product doctrine not applicable to power records are not confidential information. Also, need and benefit to truth finding process trumps any protection as the power records are the most efficient and comprehensive source of information regarding actual pumping of WAS member wells, and issue relevant to WAS augmentation plan and injury. Power records are also the sole source of information on actual pumping of wells that lack flow meters.
8. Motion for Concerning Authority of State and Division Engineer – Whether a decree approving a plan for augmentation may authorize or delegate to the State Engineer or the Division Engineer for Water Division No. 1, rather than the water court, the authority to determine the amount, location, and time that replacement water is to be provided under the plan.
- a. This issue manifested itself in several ways in WAS's proposed decree, most notably in WAS proposed (1) winter administration – aggregation of winter depletions; (2) well call; and (3) other decree provisions requiring the Division Engineer to administer WAS Plan to allow for “maximum utilization of water.”
  - b. Delayed Winter Replacement – aggregation. WAS proposed that its wells be allowed to divert during the winter – nonirrigation season out of priority on the assumption that the senior water reservoirs traditionally calling for water over the winter would fill in the spring regardless of WAS's depletions to the river. WAS's depletions from winter pumping would not injure the senior reservoirs because they would fill any way.

- c. Well call. WAS argued that its wells should be allowed to “call” for water just like any other water right. However, a well cannot physically “call” for water because a call would not provide more water for diversion by the well. Consequently, WAS sought the ability to have the Division Engineer use a “well call” like a bypass call to allow WAS wells to be the swing call (the priority date of the WAS wells being the date of the call) so as to allow WAS’s wells to continue to divert and not replace depletions in the river, but at the same time freeing up water from junior water rights to provide water to more senior downstream reservoirs.
  - d. Other provisions requiring plan be administered to allow for the “maximum utilization of water by WAS”.
  - e. Court deferred ruling until after trial. After trial, Judge Klein ruled these provisions of the proposed decree were unlawful.
    - i. Only legislature can alter a person’s right to water under its priority and these provisions affect water users throughout the basin.
    - ii. No legal precedent for these provisions.
    - iii. Turns traditional call upside down by allowing junior well to call for water
    - iv. SEO/DEO no authority to place or utilize a well call, even if it is for maximum utilization of water.
    - v. Other affected water users never put on inquiry notice that their rights could be affected by such a well call provision, so Court has no jurisdiction over claim.
    - vi. Court unconvinced by WAS’s argument that without well call, recharge junior to WAS wells downstream are benefitted by the traditional administration because many years reservoirs fill early so excess water just flows to downstream junior recharge or out of the State. Terms and conditions not about preventing injury to Applicant, WAS, but about preventing injury to other water rights.
9. Motion to Amend Application. Less than two months before trial, WAS sought to amend its application to remove roughly half of its member wells from the case (449 wells reduced to 219 wells). In the Motion, WAS agreed that it was required to replace

depletions from its member well pumping that occurred while the removed wells were included in the plan.

a. Issues:

- i. Whether Court has jurisdiction over removed wells and owners of removed wells.
  1. Court ruled initially that it did not have in rem jurisdiction over the removed wells or personal jurisdiction over the owners of those wells. Court only has jurisdiction over the augmentation plan. No substituted service on these owners and resume notice not sufficient. Court cannot require a well owner obtain an augmentation plan.
  2. Court later reconsidered this ruling after trial and ruled Court did in fact have in rem or quasi in rem jurisdiction over these wells when they were in the plan and covered under SWSPs. This was based on resume notice and fact that these wells and owners are directly affected by and part of plan for augmentation. Judge Klein ruled that he did not need to determine whether he had personal jurisdiction over the well owners. Judge Klein ruled that the wells were “designated property” that was “affected” by the augmentation plan. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27 (Colo. 1997); *Baker v. Young*, 798 P.2d 889, 891 (Colo. 1990). Each of the wells must be identified in the plan and the main purpose of the plan is to benefit the wells by allowing them to divert out of priority and affects the very water right itself. Consequently, WAS was responsible for replacing depletions from the removed wells that occurred while they were included in the plan under SWSPs.
- ii. Whether Applicants Motion to Amend was really a voluntary dismissal.
  1. Only one claim, augmentation plan, so no claims being dismissed. No separate claim for each well.

2. Court likened this amendment as a “decrease in the amount of use” which is considered an amendment under the UWCR 4(b).<sup>11</sup>
- iii. Whether the terms proposed by WAS is amending were sufficient. WAS proposed that its removed wells be allowed to separate augmentation plans and associated SWSPs, removed wells can’t divert under WAS plan until they are added back in later, that removed wells may be added in later, and WAS not responsible for removed well depletions except the depletions that resulted from pumping under WAS SWSPs approved in 2003, 2004, and 2005. Court found three of the four conditions acceptable but found the Court could not rule on a condition allowing the wells to be added in later as that was a term and condition to be heard and decided at trial.
- iv. WAS requested the Court reconsider its Order requiring depletions from pre-1974 well pumping be replaced. WAS requested this relief to the extent the pre-1974 order interfered with the conditions for amendment proposed by WAS. WAS argued that because the Court had ruled it had no jurisdiction over individual well owners and their wells, WAS was not obligated to replace depletions from pumping that occurred prior to WAS filing applications in the case. The Court denied WAS’s Motion. Judge Klein further clarified that the Water Court has the ability to prevent injury, which necessarily included ongoing depletions from past pumping from wells included in the plan.

## XI. Trial

### a. Evidentiary Issues at Trial

- i. Judge Ordered parties to provide opposing counsel and their experts with electronic excel spreadsheets showing basis of numbers and calculations rather than just adobe document or copy.

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<sup>11</sup> At trial, it was proven that virtually the same number of farms and irrigated acreage existed despite the amendment. Most of the farms had multiple wells, with one well serving as a primary supply and the other wells serving as backup or emergency supplies only. The 230 wells withdrawn were likely primarily these back up wells. The amendment was proven to be not a decrease in use but simply a decrease in replacement obligation by WAS. WAS presented no evidence to rebut this or to prove that the roughly half of depletions eliminated by the amendment actually correlated to the roughly half of wells eliminated as no well by well analysis was performed by WAS.

- ii. Modeling - Mass Balance – Applicant’s objection to Objectors use of mass balance analysis in Box Elder Creek Basin to show pre-well land post-well conditions.
  1. Applicability of ASTM Standards? ASTM Standard Guide for Application of a Ground-Water Flow Model to a Site-Specific Problem. ASTM Designation D 5447 – 93. Past and updated Standards.
  2. H-I model adopted by U.S. Supreme Court in *Colorado v. Kansas* on Arkansas River uses mass balance
  3. *Aurora v. Simpson* – qualifications for admissibility of model in water case.
  4. *People v. Shreck*, 22 P.3d 68 (Colo. 2001)
  5. *People v. Ramirez*, 155 P.3d 371 (Colo. 2007)
    - a. Pursuant to CRE 702 expert testimony must be both reliable and relevant.
    - b. Reliability determined by whether scientific principles underlying expert’s testimony are reasonably reliable and whether expert is qualified to opine on such matters.
    - c. Testimony is not “speculative” simply because an expert's testimony is in the form of an opinion or stated with less than certainty, i.e., “I think” or “it is possible.” If such were the case, most expert testimony would not be admissible, as rarely can anything be stated with absolute certainty, even within the realm of scientific evidence.
    - d. Instead, speculative testimony that would be unreliable and therefore inadmissible under CRE 702 is opinion testimony that has no analytically sound basis. Admissible expert testimony must be grounded in “the methods and procedures of science rather than subjective belief or unsupported speculation.”

- e. The proponent “need not prove that the expert is undisputably correct or that the expert's theory is generally accepted in the scientific community. Instead, the [party] must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy CRE 702’s reliability requirements.”
- f. However, a court may reject expert testimony that is connected to existing data only by a bare assertion resting on the authority of the expert. The danger of this type of speculative testimony, i.e., opinion testimony that has no sound scientific basis, is that what appears to be scientific testimony but is really not may carry more weight than it deserves. Thus, in determining that an expert's testimony is unreliable and should therefore not be admitted under CRE 702, it is not enough for a court to conclude that the testimony is “speculative.” Instead, as stated earlier, the court must consider whether the scientific principles underlying the testimony are reasonably reliable, and whether the expert is qualified to opine on such matters. The standard of admissibility under CRE 702 is reliability and relevance, not certainty.
- g. An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. Consequently, an expert's failure to state the basis for an opinion does not of itself render the testimony unreliable or otherwise inadmissible under the Colorado Rules of Evidence. The expert may in any event be required to disclose the underlying facts or data on cross-examination pursuant to CRE 705.
- h. The testimony must also be relevant meaning useful to the trier of fact to resolve the disputed issues. However, its probative value must outweigh any danger of unfair

prejudice, confusion, or result in undue delay, our results in needless cumulative evidence. CRE 403.

- i. Standard of review of trial court's decision on the admissibility of expert evidence is highly deferential as trial court vested with broad discretion over its evidence which it has the superior ability to weigh at trial. Therefore, will not be overturned unless decision was manifestly erroneous.
6. Calibration – Did Objectors need to or fail to calibrate model. Judge Klein ruled mass balance does not need to be calibrated as that term is used because the mass balance inherently and simply considers all inflows and outflows to a hydrologic system and resulting change in storage, which is the essence of the analysis. The mass balance also closely matches observed values and the facts presented regarding the history of Box Elder Creek and this analysis was consistent among the many Objectors' experts. Additionally, WAS's expert himself relied on the mass balance in his analysis of the Box Elder Creek basin in first understand what was going on in the basin. These findings were also supported by the findings of the Ground Water Commission.
- iii. Expert opinion – whether an expert can testify on ability of WAS to acquire leases in the future. Expert opinion that there will “always” be senior ditch water in transition from agricultural use to municipal means there will always be such water for lease. Is this based on reasonably reliable scientific principles? Any scientific basis? Testimony by Judge Klein allowed.
- iv. Qualifying experts in specific areas of expertise – qualification of expert in water rights administration.<sup>12</sup>

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<sup>12</sup> See Recent FRICO case, Div. 1, Case No. 02CW403. Many water experts testified. These experts were qualified as experts under a myriad of different areas of expertise, the most basic of which was water resources engineering. My understanding is that they were all allowed to testify to relatively the same areas and disputed issues as water engineers despite the myriad of different qualifications each was qualified as an expert under.

- b. C.R.C.P. 41 Motion to Dismiss. Objectors argued WAS failed to meet its threshold burden of adequately quantifying depletions and its available augmentation supplies in time location amount and that injury could be prevented as required by *Aurora v. Simpson*. These failures included:
- i. Failure to quantify depletions in the Box Elder Creek basin
  - ii. Failure to prove the legally available replacement supplies<sup>13</sup>; and
  - iii. Failure to demonstrate WAS can and will ensure compliance by its members with an augmentation plan and depletions from any noncompliance would be replaced so as to prevent injury.
  - iv. Judge Klein reserved ruling until after trial. After trial, he denied the motion.<sup>14</sup>
- c. Adjusting on the Fly
- i. WAS call assumptions. WAS changed its call assumption argument mid-trial and proposed a minimum 65% call assumption.
  - ii. Box Elder Creek. WAS changed its Box Elder Creek position mid-trial and proposed its 15.4 % replacement be adjusted upwards every three years by one percent.
  - iii. New leased and other supplies offered by WAS throughout trial.
- d. Injury to Objectors.
- i. Direct injury to downstream water rights by loss of water due to unreplaced depletions.

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<sup>13</sup> WAS also failed to quantify its member well depletions from its 2006 member well pumping and correctly quantify its depletions from its reduction of member wells in the plan. These were not, however, addressed in the Motion.

<sup>14</sup> My opinion is that this was in direct contravention of *Aurora v. Simpson*. Also, in Judge Hays, Judge Klein's predecessor, granting of a Motion to dismiss in the *Sportsmen's Ranch*, Judge Hays dealt with almost identical failures in proof and denied the plan, which denial was upheld by the Colorado Supreme Court in *Aurora v. Simpson*.

- ii. Increased augmentation obligations from increased and longer calls due to unreplaced depletions.
  - iii. Rebound calls on upstream water rights due to unreplaced depletions.
  - iv. Increased calls and longer duration of calls against Objector's water rights.
- e. Judge Klein took judicial notice of prior South Platte decrees including projections.

## XII. Decree

- a. Primary Legal Concepts Relied on by the Court.
  - i. The prior appropriation system and protection of senior rights trumps concept of maximum utilization if there is a conflict between the two.
  - ii. Augmentation plans are the legislature's method of maximum utilization.
  - iii. Augmentation plan's purpose and is to prevent injury to both senior and junior water rights, which must be established.
  - iv. Purpose of augmentation plan is not to prevent injury to augmentation plan applicant or its water rights.
  - v. South Platte River is over-appropriated so law presumes well pumping results in injury to senior water rights.
  - vi. Applicant bears the initial burden to show (1) the amount, location, and timing of depletions, (2) the availability of its replacement supplies to replace those depletions or prove that its proposed depletions will be non-injurious.
  - vii. Applicant must make a reasonably accurate determination of these elements based on reliable evidence. *City of Aurora*, at 607, 615. Uncertainties, however, are not fatal to the plan for augmentation. *Public Serv. Co. of Colo. v. Willows Water Dist.*, 856 P.2d 829, 835 (Colo. 1993).
  - viii. A proposed plan of augmentation that relies upon a supply of augmentation water which, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation

water is limited in duration, so long as the terms and conditions of the plan prevent injury to vested water rights. C.R.S. § 37-92-305(8).

- ix. A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including water leased on a yearly or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a substitute water supply plan approved pursuant to section 37-92-308 or is such source is decreed for such use. C.R.S. § 37-92-305(8).
  - x. Terms and conditions must require replacement of out-of-priority depletions that occur after any groundwater diversions cease. C.R.S. § 37-92-305(8).
- b. Priority Date for Determining if Depletions Out of Priority<sup>15</sup>: WAS required to replace depletions based on the priority date of its most junior well (2002), unless accounting is provided for either individual wells or groups of wells.<sup>16</sup>
- c. Depletions.
- i. Box Elder Creek Depletions included in the Plan and must be replaced by lagging 100 % of its depletions to Box Elder Creek as if Box Elder Creek were a live stream flowing to the South Platte River.
  - ii. All pre-1974 Depletions included in the plan and must be replaced.

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<sup>15</sup> Judge Klein initially relied on *City of Central*, 125 P.3d 424, in ruling that the date of the filing of the augmentation plan application, February 28, 2003, was the date upon which the plan and its depletions would be administered for the purposes of determining whether the depletions were out of priority. Riverside Reservoir Company filed a Motion to Reconsider this issue, which was joined by WAS, asking that the priority date of the WAS wells should be the basis for determining the priority date for replacement of WAS depletions. Judge Klein granted Riverside's Motion and subsequently changed his position on this in the final decree.

<sup>16</sup> WAS presented no evidence at trial on how it would or could do this. Objectors also pointed out that this was a major undertaking to address and account for considering WAS and its plan covers over 200 miles of the South Platte River and separate tributaries spanning Water Districts 1 and 2 and involves 215 wells in 6 reaches of the River each involving separate and multiple dry up points, senior calling rights, different augmentation sources and other administrative and physical difficulties. If and when WAS chooses to do this, it will require a major undertaking and could lead to additional litigation of this matter.

- iii. Depletions caused by WAS Member Well pumping in 2006 that WAS failed to quantify must be replaced, the quantification of which was provided by Objectors and adopted by the Court.
- iv. Depletions from wells dropped from plan that were the result of pumping that occurred under SWSPs in 2003-2005 were required to be replaced. Judge Klein Ordered WAS to quantify these amounts.
- v. When WAS removed wells from plan they reduced depletions pro rata. WAS provided no evidence of the basis for the pro rata reduction at trial. Objectors presented evidence that virtually same amount of irrigated acreage was still in the plan and virtually the same number of farms. Court held that WAS's pro rata reduction in depletions based on the removal of roughly half of the wells in the plan had no basis. Judge Klein ordered WAS to correctly quantify these depletions based on the amount of irrigated acreage still in the plan and not in proportion to the number of wells in the plan.<sup>17</sup>
- vi. Winter Soil Moisture: WAS could not reduce consumption by taking credit for retained winter soil moisture, which shall be assumed to be lost to evaporation. Judge Klein ruled WAS presented no analysis justifying such a credit.
- vii. Use of Presumptive Depletion Factors or WAS's IDSCU method to quantify depletions. WAS's option to elect each year which one to use and for which wells but must give Objectors notice and obtain the Division Engineer's approval prior to April 15 of each year. The Division engineer is required to provide a "reasonable basis" for disapproving the use of the IDSCU method.

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<sup>17</sup> At trial, it was proven that virtually the same number of farms and irrigated acreage existed despite the amendment. Most of the farms had multiple wells, with one well serving as a primary supply and the other wells serving as backup or emergency supplies only. The 230 wells withdrawn were likely primarily these back up wells. The amendment was proven to be not a decrease in use but simply a decrease in replacement obligation by WAS. WAS presented no evidence to rebut this or to prove that the roughly half of depletions eliminated by the amendment actually correlated to the roughly half of wells eliminated as no well by well analysis was performed by WAS. Judge Klein ruled that WAS's experts assumption that a proportionate number of depletions was removed from the plan had no basis as WAS had only conducted a farm by farm analysis and not a well by well analysis.

- viii. Use of Presumptive Depletion factors results in a specific annual acre-foot pumping limit that is to be enforced against each well.
- ix. Use of the IDSCU method is based on monthly calculations of depletions for irrigation wells only. The method uses actual data on irrigated acreage, climate data, soil moisture, surface water supplies used to irrigate same acreage if any, crop patterns applied to irrigation efficiencies, effective precipitation, and return flows to determine the Net Crop Irrigation Water Requirement (“NCIWR”) and consequently the consumptive use. The calculations must be completed within two weeks before the end of the month for which the calculations are performed. Wells using the IDSCU method do not have an express pumping limit, instead their cu is tracked and limited so as not to exceed the pumping quota for the well.

d. Projection Tool.

- i. Court recognized that projection must demonstrate before WAS pumps its wells that WAS owns or controls legally reliable replacement supplies sufficient to replace the delayed depletion that will be caused by that pumping.
- ii. Projection is a multi-year<sup>18</sup> forecast generated prior to the start of the irrigation season each year that is used to determine the allowable pumping in year one of the projection and to show depletions from that pumping and earlier past depletions can be replaced in the future.
  - 1. Projection shows monthly depletions and replacements and is updated monthly.
  - 2. Projection can be updated each year.
- iii. Depletion Call Assumption
  - 1. The primary controlling aspect of the projection is its call assumption – the amount and duration of calls during the projection year and period.

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<sup>18</sup> The Decree provides the projection shall be 7 years or the length of time sufficient to demonstrate that replacements will always exceed depletions, whichever is longer.

2. WAS argued that the call assumption should be based on a five year running average to begin running immediately after the first projection, provided that at least a 65% minimum call must be assumed.
3. Objectors argued that year round calls have occurred and could occur again in the future, especially considering calls were likely to become longer and more frequent. Consequently, Objectors argued year round call should be assumed.
4. Court recognized that calls are likely to become more frequent and longer in duration in the future.
  - a. Municipalities poised to reuse water so less effluent return flows in South Platte River. Implicates 71,000 acre-feet of water/year.
  - b. Trend based on conditions is more frequent calls.
  - c. Tighter regulation of South Platte River.
  - d. Greater use of storage because of conditions taking more water out of River.
  - e. Large number of new absolute water rights and conditional water rights that would be diverting in future, rights that were just being developed over the call period analyzed.
5. Court recognized WAS call assumption would over-estimate actual free river conditions anytime free river conditions were less than 128 days during a year, such as during dry periods. The Court, therefore, ruled WAS's call assumption could not be used as it would not prevent injury.
6. Court also ruled, however, that year round call assumption proposed by Opposers was not reasonable. The Court recognized that while a year round call has occurred and is possible in the future and that call conditions are likely to become more severe such conditions have not occurred for any substantial length of

time. The Court also ruled he could only rule on evidence before him.

7. Consequently, the Court ruled that Year 1 of projection was to be based on call conditions that existed from April 2002-March 2007, which was at the time period of the worst drought to have ever actually occurred.
8. The Court also ruled that the Remaining Years 2 through 7 of the Projection shall be based on previous five-year running average or previous year's actual conditions, whichever is more stringent. The five year average for any month shall be based on the five year average for that same month during the five year period. The Court stated that this recognizes that the historical call average is reasonably accurate and the use of the previous year's condition in conjunction with this will avoid the Projection Tool's delay in reacting to the onset of a drought and be protective during a drought.
9. Projection subject to retained jurisdiction of Court to adjust projection. WAS can use this to make the assumptions less stringent if it can show that Projection Tool assumptions have overestimated the need for replacement water by at least 20 percent over the preceding seven years.

iv. Replacement Supplies.

1. New and any Future Junior Water rights that were not yet decreed (Water Rights with Priority Junior to July 31, 1915).
  - a. Junior recharge: Could be used while pending<sup>19</sup> but must be used in accordance with the Division Engineer's Recharge Protocol. Once decreed use must be according to decree.

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<sup>19</sup> Judge Klein ruled that the law allows water be diverted and used without a decree when free river conditions exist. *City of Lafayette v. New Anderson Ditch Co.*, 962 P.2d 955, 960 (Colo. 1998). Judge Klein further ruled that Objectors presented no evidence that the Division Engineer's Recharge Protocol failed to calculate accretions or injured water users, and there is no statutory procedure that would allow calculation prior to decree. WAS should not be deprived of this beneficial use of water, which right is provided by the Colorado Constitution, Art. XVI, § 6.

- i. Can only be used in Projection to the extent and amount recharge water has actually been diverted to recharge. Cannot assume will get additional recharge. Must be based on actual deliveries
  - b. Junior Storage
    - i. Can only be used in Projection to the extent and amount of water has actually been diverted to storage. Cannot assume will get additional storage. Must be based on actual deliveries
    - ii. Was given the option to account for and apportion any storage over the Projection period, if it accounts for evaporation, seepage or other losses.
2. Current or any Future Changes of Water Rights Not Yet Decreed. Can be used pursuant to approved SWSP or Interruptible Supply Agreement, unless reversed or modified on appeal, until decreed and then in accordance with decree. Objectors must receive specific notice of claim to use of this water.
3. Augmentation Wells
  - a. Can only be decreed in context of augmentation plan and only if augmentation plan is approved. Water is available if conditional right is sought in conjunction with an augmentation plan but it may only be decreed in context of and if the augmentation plan is approved. *Aurora v. Simpson*.
  - b. Can only be relied on as augmentation supply and pumped to the extent other water supplies are legally available to replace the depletions from the augmentation well themselves. Additional augmentation well pumping,

however, cannot be used to replace augmentation well depletions, other supplies must be available.<sup>20</sup>

- c. Can only be used in Year One of Projection and not any other years of the Projection.
  - d. Can only be used if owns or has signed agreement allows WAS to use and the period of use limited to duration of signed agreement.
  - e. Pumping 100% consumptive.
4. Senior Water Rights (Water Rights with Priority Senior to July 31, 1915)
- a. Projected deliveries in Year One of Projection to be based on 2002-2006 recorded deliveries, adjusted as necessary based on decrees changing the use of those rights to allow for use as augmentation in WAS plan.
  - b. Projected deliveries in Year 2 and after based on running 5-year average of 5 years immediately preceding the projection, or actual deliveries, whichever is less.
5. Leased Water Rights. WAS cannot rely on predictions that it will get leases in the future. Only signed leases WAS has in hand can be used in projection and only for term of signed lease.<sup>21</sup>

e. Quotas<sup>22</sup>:

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<sup>20</sup> In October 18, 2007 Ruling, Judge Klein was open to considering whether a “reasonable level of augmentation well pumping” could be proposed. This was ultimately rejected in the final decree as it could not be substantiated by WAS in the many post-trial iterations of the decree and motions to reconsider argued at that time.

<sup>21</sup> In his initial October 18, 2007 Ruling, Judge Klein was willing to allow WAS to project leases it thought it might get based on the 5 year average of leases it had previously obtained or the previous year’s amount, whichever was less. Objectors filed a Motion to Reconsider this which was granted and eliminated this from final Decree, requiring only signed leases in hand at the time of the projection could be used.

<sup>22</sup> While use of quotas was decreed, it is worth considering for administrative purposes what, for example, a 5%, 15% or 20% quota actually looks like to a farmer. In reality, it allows a farmer to pump very little and one might argue when the percentage drops below 20% is unrealistic as it allows a farmer only to irrigate his lawn rather than a

- i. Was required to set a quota limit – annual acre-foot **consumptive use** limit each year for each member well. The quotas are required to be adjusted monthly based on WAS’s actual depletions and augmentation supplies.
  - ii. Quotas can be transferred between members of WAS and the Central Colorado Water Conservancy District Groundwater Management Subdistrict (“GMS”). Any such transfer must be on notice to Objectors and the Division Engineer and completed no later than April 15 of the year the transfer is sought to be implemented.
- f. Replacement: Replacement of depletions required on a daily basis. Aggregation of replacements is expressly prohibited.
  - i. Specific locations within each Reach and the percentage of replacement requirement at each location expressly set forth in decree.
  - ii. Division Engineer to ensure water in excess of WAS replacement supplies shepherded downstream between Reaches, including past dry-up points, to the extent excess needed to replace depletions in downstream Reaches.
  - iii. WAS required to install bypass structures at certain dry-up points that include the Western Mutual Ditch, Lower Latham Ditch, and Bijou Canal.
  - iv. Transit loss to be assessed by Division Engineer. No credit for transit losses as credit against depletions in reach.<sup>23</sup>
- g. Enforcement. WAS required to ensure compliance by its members with the plan and replace any and all member well pumping, including unauthorized/illegal well pumping.

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cash crop in any economical way. For this reason, clearly communicating and explain the quotas to farmers and effective administration and enforcement of such quotas is key to successful implementation of any augmentation plan relying on less than full pumping of wells such as through the use of quotas.

<sup>23</sup> Judge Klein ruled WAS failed to prove how its credit loss would be quantified and determined and that no engineering basis justifying the credit was provided either by WAS or the Division Engineer. Objector’s experts provided expert testimony (Joe Tom Wood, P.E., Gary Thompson, P.E., and Mike Sayler, P.E.) was nearly impossible to quantify and that WAS substantially underestimated the amount of transit losses due to evaporation and phreatophyte consumption. Objectors’ experts testified a detailed study was necessary to determine what if any credit was appropriate.

- h. Secondary augmentation plans permitted for WAS member wells.
- i. Delayed Winter Administration and Well Call. Judge Klein ruled these provisions of the proposed decree were unlawful. Specifically, he ruled that:
  - i. Only legislature can alter a person's right to water under its priority and these provisions affect water users throughout the basin.
  - ii. No legal precedent for these provisions.
  - iii. Well call turns traditional call upside down by allowing junior well to call for water and this
  - iv. SEO/DEO no authority to place or utilize a well call, even if it is for maximum utilization of water.
  - v. Delayed winter administration disregards statutory mandate for Division Engineer to administer, distribute, and regulate the waters of state in accordance with Colorado law and to curtail out of priority water use.
  - vi. Delayed winter administration not comparable to upstream storage statute C.R.S. § 37-80-120(1) because no similar statutory authorization for delayed winter administration.
  - vii. No rules promulgated by the State or Division Engineer allowing this either.
  - viii. Wells are protected by not having to replace in priority depletions, which is what statute expressly contemplates as available remedy to wells. Well call would create alternative to augmentation plans and turn traditional call on its head and is unprecedented departure from practice and statute.
  - ix. WAS experts failed to consider injury to other water users in implementation of well call and delayed winter administration.
  - x. Objectors experts testified well call would lead to increased and longer duration calls.

- xi. Too many unknowns and uncertainties not clarified at trial.
  - xii. Even if these tools could maximize use, the principle of maximum use is inferior to the protection of the rights provided by the prior appropriation system of water rights.
  - xiii. Other affected water users never put on inquiry notice that their rights could be affected by such a well call provision, so Court has no jurisdiction over claim or reservoirs or rights in question.
  - xiv. Court unconvinced by WAS's argument that without well call, recharge junior to WAS wells downstream are benefitted by the traditional administration because many years reservoirs fill early so excess water just flows to downstream junior recharge or out of the State. Terms and conditions not about preventing injury to Applicant, WAS, but about preventing injury to other water rights.
- j. Definition of Call Need Not Be Included in Decree. Judge Klein ruled it has several definitions and Division Engineer did not testify that definition was necessary so that he could administer the plan.
- k. Perpetual Retained Jurisdiction. Perpetual retained jurisdiction especially considering nature of WAS plan and fact the amount of pumping, if any, will change from year to year with steady state depletions at full pumping – 100 % quota possible at some point.

Please feel free to call me if you have any questions regarding these materials or the information presented or if you would like to discuss the case or any of the issues further. I would also be happy to provide you with emailed copies of the discussed Water Court documents, rulings, and final decree and other documents referred to herein. Thank you for your support of the water bar.

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