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ADVANCE SHEET HEADNOTE  
May 16, 2022

**2022 CO 22**

**No. 21SA122, *Farmers Reservoir & Irrigation Co. v. Arapahoe Cnty. Water & Wastewater Auth.* – Water Law – Water Decree Interpretation – Terms and Conditions.**

The Farmers Reservoir and Irrigation Company (“FRICO”) filed an application with the water court to obtain a decree confirming absolute and conditional water rights to use natural runoff, drainage, waste, return flows, and seepage water accruing to the Beebe Seep Canal to supplement water deliveries to its shareholders to use for irrigation. Following a five-day trial, the water court issued a final judgment confirming and decreeing the water rights, contingent upon certain terms and conditions outlined in the final decree.

In this case, the supreme court considers whether the water court's inclusion of these terms and conditions violated FRICO's constitutional and statutory right to appropriate unappropriated water and whether the water court erred by awarding FRICO certain new water rights. The supreme court concludes that the water court's inclusion of these terms and conditions do not violate FRICO's

constitutional and statutory right, that these terms and conditions are supported by evidence in the record, and that the water court's award of the challenged water rights is not clearly erroneous.

Accordingly, the supreme court affirms the water court's final decree.

**The Supreme Court of the State of Colorado**  
2 East 14<sup>th</sup> Avenue • Denver, Colorado 80203

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**2022 CO 22**

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**Supreme Court Case No. 21SA122**

*Appeal from the District Court*

Water Division 1, Case No. 16CW3052

Honorable James F. Hartmann, Water Judge

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Concerning the Application for Water Rights of The Farmers Reservoir and  
Irrigation Company in Adams and Weld Counties.

**Applicant-Appellant/Cross-Appellee:**

The Farmers Reservoir and Irrigation Company,

v.

**Opposer-Appellees:**

Public Service Company of Colorado; Irrigationists Association; Central  
Colorado Water Conservancy District; Fort Morgan Reservoir and Irrigation  
Company; City of Brighton; City of Commerce City; Henrylyn Irrigation District;  
South Adams County Water and Sanitation District; Town of Lochbuie; Platte  
Valley Irrigation Company; City of Englewood; City of Aurora; Lower Latham  
Reservoir Company; Dream Weaver Holdings LLC; City of Thornton; Centennial  
Water and Sanitation District; Kevin Rein, State Engineer; and Corey DeAngelis,  
Division Engineer for Water Division 1;

and

**Opposer-Appellees/Cross-Appellants:**

Arapahoe County Water and Wastewater Authority, East Cherry Creek Valley  
Water and Sanitation District, and United Water and Sanitation District.

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**Judgment Affirmed**

*en banc*

May 16, 2022

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**JUSTICE BERKENKOTTER** delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT, JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE HART,** and **JUSTICE SAMOUR** joined.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 This case comes to us on appeal from a judgment of the Division 1 Water Court and concerns the right to use water that has been the subject of litigation for nearly two decades. In Case No. 02CW403, and again in Case No. 10CW306,<sup>1</sup> the Division 1 Water Court determined, among other things, that the Farmers Reservoir and Irrigation Company (“FRICO”) did not have a decreed right to use seepage water accruing to a ditch known as the Beebe Seep Canal. FRICO nonetheless continued to utilize the seepage water outside the priority system to make additional water available to its shareholders for irrigation.

¶2 Fast forward to April 18, 2016, when FRICO filed the underlying application to obtain a decree to use this seepage within the priority system. More specifically, FRICO sought a decree confirming absolute and conditional water rights to use unappropriated (1) water seeping from Barr Lake, and (2) natural runoff, drainage, waste, return flows, and seepage water arising in, flowing into, and accruing to the Beebe Seep Canal (the “Subject Water Rights”) to supplement

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<sup>1</sup> Findings of Fact, Conclusions of Law, and Order, *In re Farmers Reservoir & Irrigation Co.*, Civ. No. 02CW403 (D. Colo. Sept. 5, 2008) (“Case No. 02CW403”); Findings of Fact, Conclusions of Law, Judgment and Decree of the Water Court, *In re Arapahoe Cnty. Water & Wastewater Auth.*, Civ. No. 10CW306 (D. Colo. Apr. 2, 2014) (“Case No. 10CW306”).

water deliveries to its shareholders for irrigation. Following the culmination of stipulations with most of the twenty initial objectors and, ultimately, a five-day trial, the water court issued its final judgment confirming, adjudicating, approving, and decreeing FRICO's use of the Subject Water Rights contingent upon certain terms and conditions outlined within the water court's Amended Findings of Fact, Conclusions of Law, Judgment and Decree of the Court ("Amended Decree").

¶3 The issues raised by FRICO in this appeal concern three of the specific terms and conditions that the water court placed upon FRICO's use of the Subject Water Rights. The issue raised by three of the objectors in their cross-appeal concerns the water court's authority to grant certain of these new rights.

¶4 As articulated more fully below, we hold that the water court's findings, and its imposition of the challenged terms and conditions included in the Amended Decree, are supported by the record and did not violate FRICO's right to appropriate unappropriated water. We further conclude that the water court was within its authority to grant FRICO the absolute rights challenged by the three objectors in their cross-appeal. Accordingly, we affirm the judgment of the water court.

## I. Facts and Procedural History

### A. Overview

¶5 FRICO is a mutual ditch company that owns and operates a ditch and reservoir system that provides water to its more than 500 shareholders for irrigation in Weld and Adams counties. The underlying decree application involves the Barr Lake and Milton Lake Divisions of FRICO's system.

¶6 As outlined on the map below—which was admitted as an exhibit at trial—Barr Lake is situated approximately twenty miles upstream of Milton Lake. The Beebe Seep Canal, an unlined, private person-made ditch owned and operated by FRICO, is used to transport water from Barr Lake to Milton Lake. The Beebe Seep Canal collects seepage from Barr Lake that is discharged through toe drains and underflow from Barr Lake, which is collected in the interceptor ditch below the Barr Lake Dam, as well as seepage water captured in the Beebe Draw,<sup>2</sup> including surface runoff, accretions from groundwater aquifers, irrigation return flows, and irrigation wastewater.

¶7 The Milton Lake Division primarily receives its water from the South Platte River, through the Platte Valley Canal, but FRICO also holds a decree allowing

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<sup>2</sup> The Beebe Draw is hydrologically connected to the South Platte River and encompasses Barr Lake, the Beebe Seep Canal, and Milton Lake.

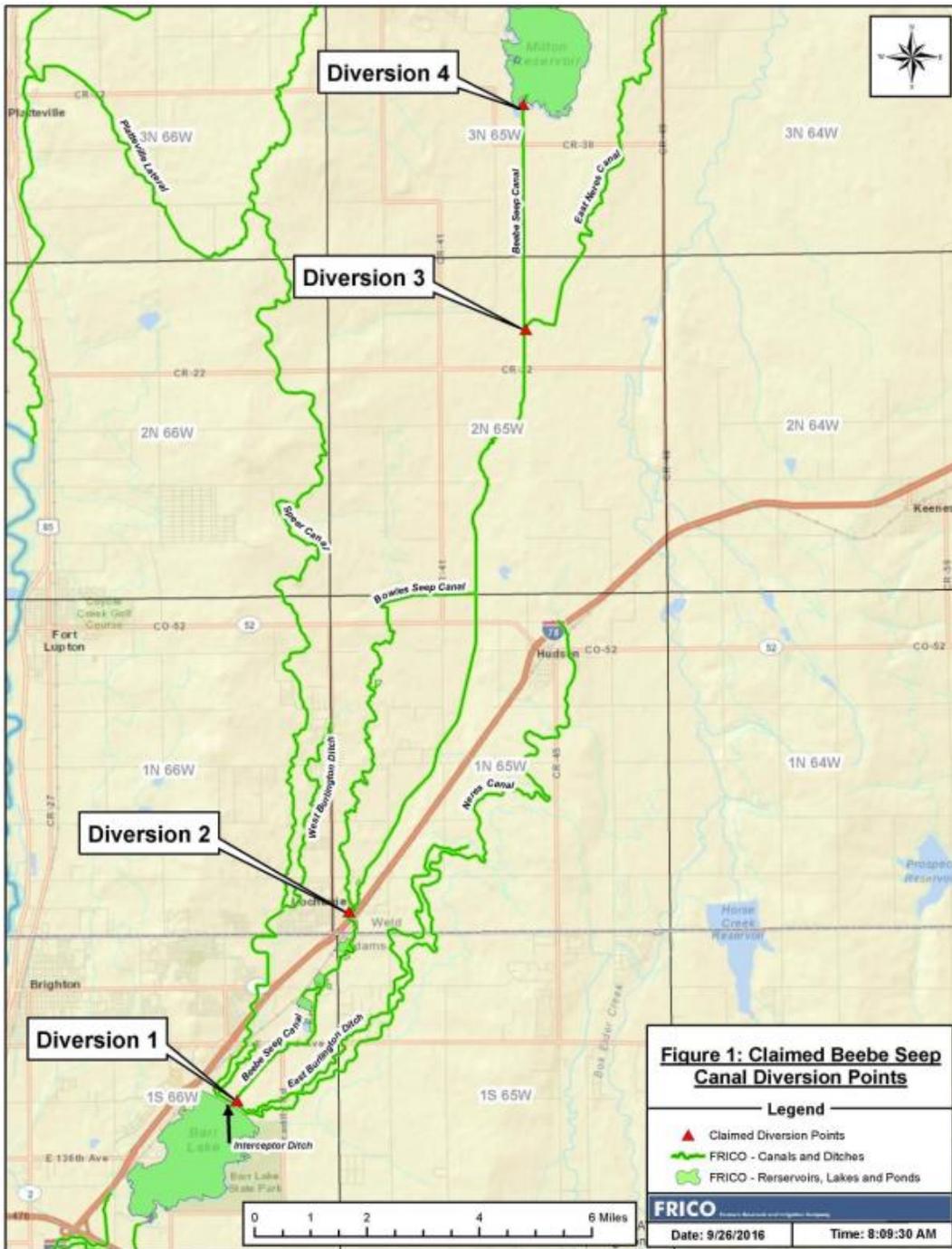
water to be diverted through the Burlington Canal to Barr Lake, where the water is then carried downstream through the Beebe Seep Canal to Milton Lake. While FRICO physically receives seepage water from the Beebe Seep Canal, it did not, before the decree issued in this case, have any decreed right to use this water.

¶8 The Beebe Seep Canal also includes diversion structures – the Bowles Seep Canal and East Neres Canal – that divert and deliver water for direct use to shareholders. The Subject Water Rights at issue here include both direct use and storage structures. Through its application, FRICO sought a decree confirming absolute and conditional rights to put the seepage water to direct use for irrigation through the Bowles Seep Canal or the East Neres Canal.<sup>3</sup> FRICO also sought a decree confirming its right to store the Subject Water Rights in Barr Lake, via the Beebe Seep Canal Pump Station or in Milton Lake, through use of what is described in the Amended Decree as the Milton Lake Seep Right, to later be used for irrigation. One of the issues at trial in this case was whether FRICO should have the right to beneficially use the Subject Water Rights – particularly the Milton

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<sup>3</sup> The water court decreed 27.0 cubic feet per second (“cfs”) for direct use of the Bowles Seep Canal Seep Right, of which 9.9 cfs is absolute and 17.1 cfs is conditional. For the East Neres Canal Seep Right, the water court decreed 43.0 cfs for direct use, of which 25.0 cfs is absolute and 18.0 cfs is conditional.

Lake Seep Right – as a supplement to its already-decreed water rights, particularly its 1909 Milton Lake Storage Right (“1909 Storage Right”).



## **B. Previous Decrees Related to the Subject Water Rights**

¶9 This is not FRICO's first rodeo. Prior to its present application, FRICO had been utilizing the seepage water accruing in the Beebe Seep Canal out of priority and without a decree as a means of delivering supplemental water to shareholders, in the full amount released, without deducting for transit losses (water lost to evaporation or seepage when it moves from one point to another). This practice was addressed by the water court in two prior orders: Case Nos. 02CW403 and 10CW306. In both instances, the water court concluded that FRICO did not have a decreed right to use the seepage water accruing to the Beebe Seep Canal.

¶10 In 2008, in Case No. 02CW403, the water court made findings as to the seepage water accruing in the Beebe Seep Canal and concluded that FRICO was "not entitled to claim water attributed to the seepage gain accruing to the Beebe [Seep] Canal" under its senior water rights and that seepage flows into ditches cannot be used independent of existing priorities on the river. Thus, the water court held that FRICO did not have a decreed right to appropriate the seepage water collecting along and accruing to the Beebe Seep Canal.

¶11 Later, in 2014, in Case No. 10CW306, the water court reaffirmed that the Beebe Seep Canal seepage water was not decreed as another supply source or diversion point for FRICO to use to fill Milton Lake.

¶12 Nonetheless, based on what the water court below described as a “misconception” of these orders, FRICO continued to use this seepage water for the benefit of its shareholders. Specifically, FRICO used the seepage water out of priority to offset transit losses that would otherwise have reduced the amount of water FRICO delivered to shareholders, via release from Barr Lake, by nearly forty-seven percent.

### **C. Pertinent Events Preceding Trial**

¶13 In its April 18, 2016, application, FRICO identified its intended options for the Subject Water Rights’ use: (1) store them in Barr Lake, by way of the (yet-to-be-constructed) Beebe Seep Canal Pump Station, for later release and use for irrigation; (2) store them in Milton Lake, through use of the Milton Lake Seep Right, for later release and use for irrigation; or (3) put the water to direct use for irrigation through the Bowles Seep Canal and the East Neres Canal. Twenty parties, including the State Engineer and Division Engineers (the “Engineers”), filed in opposition to FRICO’s application.

¶14 Before trial, FRICO entered into a stipulation with all of the opposing parties except East Cherry Creek Valley Water and Sanitation District, Arapahoe County Water and Wastewater Authority, and United Water and Sanitation District (collectively, “EAU”).

#### **D. Trial Over Appropriation of the Subject Water Rights**

¶15 At trial, FRICO presented evidence of its past use and future intent to appropriate the Subject Water Rights, as well as its shareholders' need for additional water for irrigation. In doing so, it argued that shareholders use water diverted in priority from the Beebe Seep Canal at the East Neres Canal and the Bowles Seep Canal directly for irrigation purposes. It further asserted that the shareholders later use seepage inflows that are stored in Milton Lake in priority and then released through the Gilmore Canal—an outlet canal below Milton Lake—for irrigation. The Milton Lake Seep Right, FRICO asserted, could serve as additional water for shareholders' use during years when FRICO is unable to fill Milton Lake with its 1909 Storage Right or to offset losses resulting from releases in years when Milton Lake does fill with the 1909 Storage Right. In particular, FRICO presented evidence that it had previously diverted the absolute portion of the Milton Lake Seep Right in priority both before and after Milton Lake's initial fill under its 1909 Storage Right, and its shareholders had put the water to beneficial use.

¶16 FRICO called two witnesses at trial: Scott Edgar, FRICO's General Manager, and Heather Thompson, P.E. Edgar testified as to FRICO's day-to-day practices and operations, including its maintenance, delivery, allocation, and storage systems. Specifically, Edgar testified concerning FRICO's practice of diverting

water for delivery and release to shareholders, and he admitted, as he had in his discovery responses, that it was FRICO's practice to use seepage gains out of priority to offset transit losses, despite the previous orders from the water court in Case Nos. 02CW403 and 10CW306 expressly prohibiting such conduct.

¶17 FRICO called Thompson to testify as an expert in water resources engineering, water rights administration, and water rights accounting. Thompson testified as to FRICO's operations at the Milton Lake Division and its claimed need for additional water beyond its 1909 Storage Right. After quantifying the amount of water available to meet the irrigation needs of FRICO's shareholders, Thompson testified to the following:

Q. [D]oes that indicate to you that the Milton system is also water short?

A. It does, because the consumptive irrigation requirement is 1.8 acre-feet per acre, but the water supply under a full allocation scenario is only approximately .6 acre-feet per acre.

Q. And does the Milton Lake system always deliver a full allocation?

A. It does not.

Q. So the Milton division would be even more water short in the years that the full allocation is not delivered; is that correct?

A. Yes, that's correct.

¶18 While asserting that the Milton Lake Division is water short (meaning that shareholders generally do not have enough water under existing water rights to meet their full irrigation needs) and could benefit from additional supply,

Thompson acknowledged that the 1909 Storage Right did not include a refill right. Thompson also posited that the Milton Lake Seep Right could be used to fill or refill Milton Lake, or it could be used to offset losses resulting from releases.

¶19 Thompson also testified as to the seepage gains diverted at the East Neres Canal and the Bowles Seep Canal that FRICO subsequently delivered to shareholders for irrigation. After reviewing FRICO's accounting of the seepage gains diverted for irrigation when in priority, Thompson testified that the East Neres Canal Seep Right was made absolute<sup>4</sup> on July 2, 2011, when 4.2 cubic feet per second ("cfs") of seepage gains were diverted without there being a downstream call. She testified that "[i]t was free river [that] month, and that water was put to beneficial use," specifically because it was "delivered to shareholders and used for irrigation." Similarly, Thompson testified that the accounting indicated that FRICO diverted 1.1 cfs of seepage gains at the Bowles Seep Canal on July 25, 2011, which established its appropriation date because it "was the first date that . . . could show that seepage gains were diverted in-priority and beneficially used."

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<sup>4</sup> An absolute water right is one that is granted permanent status within the priority system once it has been appropriated and put to beneficial use. *See Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1148 (Colo. 2001).

¶20 EAU called its own expert, Matt Bliss, P.E., an expert in water rights, water resources, groundwater rights, water rights accounting, water rights administration, and water supply planning. EAU relied on Bliss's testimony to argue that FRICO's claim in the application concerning the Milton Lake Seep Right should be denied outright because the seep right would not make more water available to shareholders but, instead, displace water that could otherwise be diverted into Milton Lake under the 1909 Storage Right. Bliss testified that, in his view, FRICO's claim to make the Milton Lake Seep Right absolute was based on diversions in a year in which FRICO diverted zero acre-feet under existing storage rights for Milton Lake. FRICO accomplished this, Bliss explained, by paper-filling its senior 1909 Storage Right, thereby creating capacity for the storage of the junior Milton Lake Seep Right.<sup>5</sup> Bliss also suggested that if the water court granted the application, it should include terms and conditions on the Milton Lake Seep Right to prevent FRICO from using the new junior right to manipulate the priority

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<sup>5</sup> A paper fill is an accounting procedure that is used, for example, when water is stored under a junior water right *before* a senior water right has filled. See Colo. Div. of Water Res., *General Administration Guidelines for Reservoirs* 1, 13 (2011) <https://dnrweblink.state.co.us/dwr/DocView.aspx?id=3579805&dbid=&cr=1> [<https://perma.cc/XM2P-E8XS>]. This would require the reservoir to charge the amount stored against the senior water right and would count toward the senior water right's volumetric limit. *Id.*

system and substantially expand Milton Lake's fill capacity beyond its 1909 Storage Right.

### **E. The Water Court's Amended Decree with Respect to the Subject Water Rights**

¶21 On October 6, 2020, the water court issued its Findings of Fact, Conclusions of Law, and Judgment. The court directed FRICO to circulate a proposed decree based on the Judgment, and it granted the opposing parties additional time thereafter to comment on FRICO's proposed decree. FRICO submitted a proposed final decree on December 15, 2020, containing all the parties' suggested revisions.

¶22 On December 20, 2020, the water court entered its Findings of Fact, Conclusions of Law, Judgment and Decree of the Court ("Decree"), which approved the Subject Water Rights, including those at the Bowles Seep Canal and the East Neres Canal, in addition to those at Barr Lake and Milton Lake. However, the Decree also imposed some limitations on the Subject Water Rights – pertinent to this appeal are the limitations in paragraphs 29, 30, and 36.

¶23 These paragraphs read, in relevant part, as follows:

29. Transit Losses. . . . For the purpose of quantifying the Subject [Water] Rights, FRICO shall account for the amount of water released from Barr Lake *and Milton Lake* for delivery to shareholders and then calculate the amount of transit loss if assessed by the Division Engineer. This will ensure that FRICO does not divert seepage water out-of-priority or divert others' recharge water and will allow certainty that FRICO is delivering the correct amount of water released from storage to shareholders. This will also ensure that FRICO accurately accounts for deliveries from FRICO's other water

rights and the amount attributable to seepage water diverted in priority. This will assure that FRICO is not expanding the Subject [Water] Rights, in the event there is seepage water available above the amounts decreed to FRICO, for other water users to appropriate. . . .

30. Out-of-Priority Inflows. . . . FRICO will not divert water, or place a call, under the Barr Lake Seep Right or Milton Lake Seep Right if there is any water in the [owe-the-river (“OTR”)<sup>6</sup>] accounts in those respective reservoirs. When FRICO cannot divert under the Milton Lake Seep Right because of the presence of water in the OTR account in Milton, *all inflows of Seepage Inflow in Milton Lake shall be accounted for as [out-of-priority seepage inflow (“OOPSI”)] in FRICO’s OTR account consistent with paragraph 20.2.1 above.*

. . . .

36. Milton Lake—One Fill. Milton Lake is entitled to *one annual fill* from diversions under its existing 1909 Storage Right *or* from the Milton Lake Seep Right. When Milton Lake has filled or achieved its winter fill level, no additional in-priority diversions under the Milton Lake Seep Right can occur during that water year, except to increase from the winter fill to the normal fill level.

(Emphases added.)

¶24 FRICO subsequently filed a motion for reconsideration, requesting, among other things, that the court omit certain limiting language in these three paragraphs. FRICO argued that the record did not support the water court’s limitations and deprived FRICO of its constitutional right to appropriate unappropriated water to put to beneficial use. In response, EAU argued that the

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<sup>6</sup> An OTR account tracks water that is stored out of priority in a reservoir.

record and the law did, in fact, support the limiting language in paragraphs 29, 30, and 36.

¶25 On February 22, 2021, the water court entered an order denying FRICO's motion regarding these limiting conditions. The order stated, in relevant part,

The Court has considered the arguments of counsel in the pleadings and the contents of the record, and the Court finds that there are ample facts in the record to support the provisions of paragraphs 29, 30, and 36 as written. The Court purposely included the language found in those three paragraphs based on the evidence presented at trial and to prevent injury to other water users. The Court agrees with the arguments presented by EAU in their response to FRICO's motion for reconsideration.

¶26 The water court then entered an Amended Decree, which constituted the water court's final judgment.

¶27 FRICO appealed the terms and conditions of paragraphs 29, 30, and 36 of the Amended Decree to this court.<sup>7</sup> EAU filed a cross-appeal opposing the water

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<sup>7</sup> FRICO raises the following three issues on appeal:

1. Whether the water court infringed on FRICO's constitutional and statutory right to appropriate unappropriated water by limiting Milton Lake to one annual fill from diversions under its existing 1909 Storage Right and the claimed new, junior Milton Lake Seep Right.
2. Whether the water court infringed on FRICO's constitutional right to appropriate unappropriated water by requiring FRICO to account for all seepage inflow to Milton Lake as out of priority when there is water in FRICO's Milton Lake OTR account.
3. Whether the water court lacked jurisdiction to require FRICO to account for transit losses on releases from Milton Lake for delivery to stockholders "for

court's finding that evidence presented at trial supported FRICO's claim to make a portion of the East Neres Seep Right and the Bowles Seep Canal Right absolute.<sup>8</sup>

¶28 After outlining the standard of review and certain relevant legal principles, we turn our attention to each of these issues.

## II. Analysis

¶29 First, we identify the applicable standards of review. Next, we discuss Colorado's prior appropriation system and the various terms and conditions that a water court may include in a decree to limit the use of a water right. Then, we discuss the law surrounding the water court's exercise of ancillary jurisdiction over this case and the water court's decision to grant absolute portions of the claimed water rights. Finally, we conclude that the water court did not err by awarding FRICO the new water rights or by placing certain limitations on the use of the Subject Water Rights. Therefore, we affirm the water court's judgment and Amended Decree.

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the purpose of quantifying the Subject Rights" even though the Subject Rights do not arise in or below Milton Lake.

<sup>8</sup> EAU's cross-appeal raises one additional issue:

Whether the facts that gave rise to the water rights granted to FRICO by the water court satisfied the definition of "appropriation" under section 37-92-103(3)(a), C.R.S. (2021), or whether the water court erred in awarding FRICO new water rights.

## A. Standards of Review

¶30 On appeal, we accept a water court’s factual findings “unless they are so clearly erroneous as to find no support in the record.” *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 660 (Colo. 2011); see also *Grand Valley Water Users Ass’n v. Busk-Ivanhoe, Inc.*, 2016 CO 75, ¶ 21, 386 P.3d 452, 460. We review a water court’s conclusions of law de novo. *Burlington Ditch*, 256 P.3d at 661.

## B. Relevant Legal Principles

¶31 Under Colorado law, natural stream water is considered public property for public use. *Dill v. Yamasaki Ring, LLC*, 2019 CO 14, ¶ 24, 435 P.3d 1067, 1074. Because water rights are classified as usufructuary rights in Colorado, an individual or entity cannot own water but, instead, may own the right to use the water within the bounds of the prior appropriation system. *Burlington Ditch*, 256 P.3d at 661; *Grand Valley*, ¶ 28, 386 P.3d at 461.

¶32 An appropriation, under Colorado’s prior appropriation system, occurs when a person or entity places “a specified quantity of water to an actual beneficial use.” *Burlington Ditch*, 256 P.3d at 661. The need to place the water “to an actual beneficial use” ensures that the appropriation adheres to “[t]he anti-speculation doctrine, which has existed in Colorado prior appropriation water law since its inception in Territorial and early-Statehood days” and seeks to “prevent[]

unlawful enlargements, as well as curb[] the appropriation of water not needed for actual beneficial use.” *Id.*

¶33 The General Assembly has defined beneficial use as “the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made.” § 37-92-103(4), C.R.S. (2021). Once an appropriation is established and the appropriator has placed the water to beneficial use, the water right vests. *Dill*, ¶ 24, 435 P.3d at 1074. The water right may then be used based on its priority relative to other junior and senior water rights drawn from a common source. *See id.*; *see also* § 37-92-103(10) (“‘Priority’ means . . . the relative seniority of a water right or a conditional water right in relation to other water rights . . . [that] deriv[e] their supply from a common source.”).

¶34 The holder of a water right may file an application with the water court to request that the right be adjudicated and memorialized in a water decree. *See Dill*, ¶ 25, 435 P.3d at 1074. Significantly, “a water right owner is not entitled to have his or her water right administered within the priority system until he or she obtains a judicial decree confirming the water right.” *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200, 1208 (Colo. 2010). A decree serves to “confirm[] a pre-existing water right” that has already been achieved by way of appropriation. *Dill*, ¶ 25, 435 P.3d at 1074 (quoting *Shirola v. Turkey Cañon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 748 (Colo.

1997)). Once a water court adjudicates an appropriation and issues a decree, the water right is legally enforceable. *Id.*; *V Bar Ranch*, 233 P.3d at 1208. However, a water court may impose certain terms and conditions in connection with the exercise of said water right. *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 48 (Colo. 1996) (noting that water decrees may be subject to terms and “conditions designed to protect other appropriators against injury”).

¶35 Bearing these legal principles in mind, we turn to the issues before us.

### **1. The Water Court Did Not Err by Imposing a One-Fill Limitation on Diversions to Milton Lake**

¶36 FRICO takes issue with the language in paragraph 36 of the Amended Decree, which provides that “Milton Lake is entitled to *one annual fill* from diversions under its existing 1909 Storage Right *or* from the Milton Lake Seep Right,” and that “[w]hen Milton Lake has filled or achieved its winter fill level, no additional in-priority diversions under the Milton Lake Seep Right can occur during that water year, except to increase from the winter fill to the normal fill level.” (Emphases added.) It contends that restricting the Milton Lake Seep Right in this manner improperly limits the right to serve only as a supplemental supply under its first fill. This, FRICO argues, is unconstitutional, inconsistent with Colorado law, and is not supported by the evidence in the record. We disagree.

¶37 Our constitution makes clear that “[t]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied.” Colo. Const.

art. XVI, § 6. This right is further grounded in statute. *See* § 37-92-305(9)(a), C.R.S. (2021) (“No claim for a water right may be recognized or a decree therefor granted except to the extent that the waters have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to a beneficial use . . .”). Though this right is both constitutional and statutory, it is not absolute.

¶38 For example, the right may not be exercised in a manner that would cause injury to other water users: “No water storage facility may be operated in such a manner as to cause material injury to the senior appropriative rights of others.” § 37-87-101(1)(a), C.R.S. (2021). To that end, water courts maintain the authority to impose terms and conditions on the exercise of water rights to prevent injury to other water users. *See Bijou Irrigation Co.*, 926 P.2d at 48. As such, a water court may include a term or condition in a decree—such as a “one-fill rule”—in order to prevent injury to senior appropriative water rights without impeding upon a party’s right to appropriate unappropriated water. *See Burlington Ditch*, 256 P.3d at 667. A one-fill limitation, in particular, serves to “set and administer diversion limitations on storage rights to prevent unlawful enlargement and injury to junior appropriators.” *Id.*

¶39 Preventing the unlawful enlargement of a decreed water right is particularly important when dealing with a storage right because “[s]torage itself is not a beneficial use;” rather, it is the subsequent use—such as for irrigation—that

constitutes “the beneficial use for which water is stored.” *Id.* at 663. This court has continued to recognize the benefit of the one-fill limitation, including the benefit it provides to the State Engineer’s Office, which may use it as a mechanism to “curtail diversions that may unlawfully enlarge a decree.” *Id.*; see *North Sterling Irrigation Dist. v. Simpson*, 202 P.3d 1207, 1211 (Colo. 2009) (concluding that a fixed water year, accompanied by a one-fill limitation, enables the State Engineer’s Office to lawfully limit and enforce storage rights). Such a rule serves to prevent injury to other appropriators.

¶40 To support its argument, FRICO points to Thompson’s expert testimony that the Milton Lake Division was water short and displayed a need for additional water beyond that provided by its 1909 Storage Right to meet shareholder irrigation needs. In her testimony, Thompson noted that Milton Lake does not always deliver its full allocation under the 1909 Storage Right—which she conceded did not include a refill right. Nonetheless, in her view, the Milton Lake Seep Right could provide another means of reaching Milton Lake’s full allocation or provide a means of offsetting losses resulting from releases. Her testimony, however, was refuted by EAU’s expert, Bliss.

¶41 Bliss testified that FRICO essentially manipulated its claim to make the Milton Lake Seep Right absolute because it based its diversions on a year in which FRICO diverted zero acre-feet under the 1909 Storage Right. FRICO did that, Bliss

explained, by creating capacity for the storage of the Milton Lake Seep Right by paper-filling its 1909 Storage Right.

¶42 True, as FRICO points out, the water court was not ultimately persuaded by EAU's argument, based on Bliss's testimony, that the absolute claim for the Milton Lake Seep Right should be *dismissed outright* because it did not satisfy the exhaustion requirements described in *Upper Eagle Regional Water Authority v. Wolfe*, 2016 CO 42, ¶ 21, 371 P.3d 681, 687 (involving a claim for conditional water rights). But the water court was also not completely persuaded by Thompson's testimony, and, FRICO's argument aside, there is no real question that the water court considered Bliss's concerns in entering its October 6, 2020, Findings of Fact, Conclusions of Law, and Judgment, and later in determining what terms and conditions to impose.

¶43 Specifically, EAU's closing brief detailed their concerns about FRICO's use of the new junior water right, if awarded, to fill Milton Lake in lieu of its existing absolute water rights, and whether the junior Milton Lake Seep Right would be used to manipulate the priority system to the detriment of EAU and other water users. In its October 6, 2020, Findings of Fact, Conclusions of Law, and Judgment, the water court addressed EAU's concerns by describing how the operation of the Milton Lake Seep Right would not result in manipulation of the priority system so long as it was used as an alternate fill source for Milton Lake. The water court

subsequently added paragraph 36, at EAU's request. Then, when FRICO sought reconsideration of paragraph 36's inclusion, EAU responded by repeating the same concerns it raised in its closing brief. And, when the water court denied FRICO's motion for reconsideration, the water court expressly noted its agreement with the arguments presented by EAU in their response to FRICO's motion for reconsideration.

¶44 Thus, the one-fill limitation in paragraph 36 serves to protect other water users from injury. This is because operation of the Milton Lake Seep Right in lieu of the 1909 Storage Right, in connection with the single-fill limit, makes a like amount of water available to other appropriators. We further conclude that the limitation imposed in paragraph 36 of the Amended Decree is supported by Bliss's testimony that, without this type of limitation, FRICO could use the new junior right—which would add a second decreed source of physical supply of water to Milton Lake—to expand the 1909 Storage Right and to manipulate the priority system to the detriment of other water users.

¶45 And, as the water court noted, the limitation still allows FRICO to utilize its Milton Lake Seep Right under certain circumstances: "Although Milton Reservoir typically fills each year, there are occasions when FRICO is unable to fill the reservoir with its existing sources." This limitation thus allows FRICO to use diversions under the Milton Lake Seep Right to supplement water sources from

its senior rights to Milton Lake on those occasions. And, rather than effectively permitting the enlargement of the total volume of water FRICO may store in Milton Lake beyond that of the 1909 Storage Right, *see Burlington Ditch*, 256 P.3d at 667, the water court emphasized Milton Lake’s one-fill limitation in paragraph 36 as a means of prohibiting FRICO from improperly enlarging its senior storage right and preventing injury to other appropriators.

¶46 Under these circumstances, the water court did not violate FRICO’s constitutional or statutory right to appropriate unappropriated water to put to beneficial use. Rather, the water court properly maintained limits on such use to prevent injury to other water users, expressly confirming that it “purposely included the language found in [this] paragraph[] based on the evidence presented at trial” and that the language was incorporated “to prevent injury to other water users.” Because the limitation was necessary to prevent injury to other water users and was not clearly erroneous, we affirm the water court’s inclusion of paragraph 36 in the Amended Decree.

## **2. The Water Court Appropriately Required FRICO to Classify Seepage Inflows as OOPSI When Water is Present in Its OTR Account**

¶47 FRICO next contends that the water court violated FRICO’s constitutional and statutory right to appropriate unappropriated water to put to beneficial use

and that the limiting condition set forth in paragraph 30 of the Amended Decree is not supported by the record.

¶48 This limiting condition relates to FRICO's Milton Lake OTR account. An OTR account is an administrative accounting method used to track out-of-priority inflows stored in a reservoir. See Colo. Div. of Water Res., *General Administration Guidelines for Reservoirs* 1, 30 (2011) <https://dnrweblink.state.co.us/dwr/DocView.aspx?id=3579805&dbid=&cr=1> [<https://perma.cc/XM2P-E8XS>]. This accounting method measures water inflow fluctuations—unmeasured gains or losses from the reservoir—that are then accounted for in the reservoir's OTR account as a means of maintaining the proper mass balance. *Id.*

¶49 Specifically, this limiting condition prevents FRICO from diverting water, or placing a call under the Subject Water Rights, particularly the Milton Lake Seep Right, when there is water in the division's OTR account. Furthermore, it provides that when "FRICO cannot divert under the Milton Lake Seep Right because of the presence of water in the OTR account . . . all inflows of Seepage Inflow in Milton Lake shall be accounted for as OOPSI in FRICO's OTR account."

¶50 FRICO argues that this limit represents an unconstitutional infringement on its right to appropriate and store unappropriated water. Specifically, it contends that when there is no call on the South Platte River below the Powell Spillway,

during free river conditions,<sup>9</sup> the seepage inflows amount to unappropriated water that it may store and deliver to shareholders even when there is water in the Milton Lake OTR account. FRICO additionally claims that this limitation would essentially require it to fill its Milton Lake OTR account with unappropriated water while also trying to drain the same account so that it may properly store the Milton Lake Seep Right. We disagree.

¶51 Certainly, we acknowledge the constitutional and statutory right to appropriate and store unappropriated waters and place that water to beneficial use. Colo. Const. art. XVI, § 6; § 37-92-305(9)(a). But FRICO is not simply storing unappropriated water and putting it to beneficial use. Characterizing it as such is an oversimplification. Contrary to FRICO's argument, the existence of free river conditions does not permit FRICO to circumvent its accounting requirements. This is because the circumvention of those requirements would necessarily injure both the river and the water rights of other appropriators by preventing the recirculation of water held out of priority. *See Burlington Ditch*, 256 P.3d at 661

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<sup>9</sup> When operating under free river conditions "there is sufficient natural supply to satisfy all water uses, whether decreed or undecreed," *Empire Lodge*, 39 P.3d at 1149 n.14, thereby potentially allowing additional water to become available for appropriation.

“Injury involves diminution of the available water supply that a water right holder would otherwise enjoy . . . .”).

¶52 FRICO must *first* resolve any present injury to the South Platte River – and senior appropriators – caused by its storage of seepage inflow in Milton Lake while there is water in its OTR account *before* it may store the Milton Lake Seep Right. Thus, the paragraph 30 condition does not violate FRICO’s constitutional and statutory right to store unappropriated waters but, instead, places limits upon the right where its exercise causes injury to other water users. *See Bijou Irrigation Co.*, 926 P.2d at 48.

¶53 This condition also aligns with the Engineers’ duty to “administer, distribute, and regulate the waters of the state,” § 37-92-501(1), C.R.S. (2021). As part of their duties, the Engineers are tasked with accounting for diversions and attributing them, in priority, to available water rights. *Upper Eagle*, ¶ 17, 371 P.3d at 686; *see also* § 37-92-502(2)(a), C.R.S. (2021) (“Each diversion shall be evaluated and administered on the basis of the circumstances relating to it and in accordance with provisions of this article and the court decrees adjudicating and confirming water rights.”).

¶54 This condition assists the Engineers in their duty to order that a reservoir maintain an OTR account and to order the release of the water improperly stored “to [e]nsure that such released waters are delivered to those owners or users of

water rights who are entitled to the same and to [e]nsure that the release will not cause damage.” § 37-92-502(3).

¶55 Finally, FRICO’s arguments regarding paragraph 30 ignore its stipulation with the Engineers not to divert water under the Milton Lake Seep Right when there is water in the Milton Lake OTR account. The stipulation provides that FRICO must account for *all* seepage inflows to Milton Lake as OOPSI<sup>10</sup> owed to the river. While FRICO argues that this stipulation does not apply during free river conditions, the stipulation does not actually say that. In fact, the stipulation does not distinguish at all between when free river conditions do and do not exist.

¶56 And, despite FRICO asserting the contrary, it “may stipulate away valuable rights provided it is not in violation of public policy.” *USI Props. E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). We conclude, under these particular circumstances, that FRICO stipulated away the right to divert such water and that its stipulation does not constitute a violation of public policy.

¶57 FRICO must pay its debt to the river before accruing more water via the Milton Lake Seep Right. This serves to make the river whole while also allowing FRICO to obtain water for storage and subsequent use by its shareholders.

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<sup>10</sup> OOPSI is water used out of priority.

¶58 Thus, the water court’s inclusion of the condition in paragraph 30 of the Amended Decree does not run afoul of FRICO’s constitutional and statutory right to appropriate and store unappropriated water, is consistent with the parties’ pre-trial stipulation, and is necessary to prevent injury to other water users. Because the water court’s finding is supported by ample evidence in the record, it is not clearly erroneous. For all of these reasons, we affirm the water court’s inclusion of the limitation in paragraph 30 of the Amended Decree.

### **3. The Water Court Had Ancillary Jurisdiction Over Quantifying Transit Losses in the Gilmore Canal**

¶59 FRICO’s final argument concerns the limiting condition the water court imposed in paragraph 29 of the Amended Decree. It provides: “For the purpose of quantifying the Subject [Water] Rights, FRICO shall account for the amount of water released from Barr Lake *and Milton Lake* for delivery to shareholders and then calculate the amount of transit loss if assessed by the Division Engineer.” (Emphasis added.)

¶60 Because the Beebe Seep Canal is situated between Barr Lake and Milton Lake, and due to the structure of those divisions, all of FRICO’s claimed points of diversion are located above Milton Lake. Meanwhile, many of FRICO’s shareholders within the Milton Lake Division receive their water by way of the Gilmore Canal, which is nested below Milton Lake. FRICO argues that the water court lacked jurisdiction to require it to calculate and quantify transit losses

resulting from releases *in and below* Milton Lake through the Gilmore Canal because the Subject Water Rights that FRICO sought decreed rights to were accruing to the Beebe Seep Canal *above* Milton Lake. Again, we disagree.

¶61 Water courts have exclusive jurisdiction over all water matters. § 37-92-203(1), C.R.S. (2021). “[A]n action for determination of a water right or a change of water right, each of which concerns the right to use of water, is a water matter within the exclusive jurisdiction of the water judge.” *Crystal Lakes Water & Sewer Ass’n v. Backlund*, 908 P.2d 534, 540 (Colo. 1996) (quoting *Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 180 (Colo. 1991)); *see also* *Tonko v. Mallow*, 154 P.3d 397, 404 (Colo. 2007) (“Water matters involve determinations regarding the right to use water, the quantification of a water right, or a change in a previously decreed water right.”). And a water matter, as this court has previously stated, turns on “the legal right to *use . . .* water (acquired by appropriation).” *Crystal Lakes*, 908 P.2d at 540 (quoting *Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 640 (Colo. 1987)); *see also* *Glover v. Serratoga Falls LLC*, 2021 CO 77, ¶ 17, 498 P.3d 1106, 1113 (“Whether a claim constitutes a water matter turns on the distinction between ‘actions involving the *use* of water and those involving the *ownership* of a water right.’” (quoting *Kobobel v. Colo. Dept. of Nat. Res.*, 249 P.3d 1127, 1132 (Colo. 2011))). And when the right to use water is affected by the water court’s determination,

then the issue constitutes a water matter within the water court's jurisdiction. *See Crystal Lakes*, 908 P.2d at 541-42.

¶62 Furthermore, this court has held that a "water court may resolve ancillary issues presented in [a] case that are not water matters" when the "resolution of those ancillary issues would directly affect the outcome of water matters within the exclusive jurisdiction of the water court." *Id.* at 543. Put differently, once a water court has jurisdiction over a water matter, it maintains exclusive jurisdiction over other subjects and matters considered ancillary or attendant to the original matter. *See id.*

¶63 In light of the evidence that FRICO had previously been using OOPSI accruing to the Beebe Seep Canal to offset transit losses for two decades, thus increasing the amount of water available for delivery to shareholders—even though two separate court orders explained that FRICO had no right to the seepage inflows—the water court necessarily had exclusive and ancillary jurisdiction over this matter. Because the Gilmore Canal is part of the greater FRICO system and the Milton Lake Division, the water court necessarily had jurisdiction to require FRICO to account for transit losses in the Gilmore Canal to prevent similar actions from occurring through the release of the Milton Lake Seep Right.

¶64 Despite the prior orders in Case Nos. 02CW403 and 10CW306, FRICO continued to use seepage water accruing in the Beebe Seep Canal to offset the transit losses otherwise attributable to releases of water from Barr Lake through the Beebe Seep Canal, Bowles Seep Canal, and East Neres Canal. This ultimately increased the amount of water delivered to FRICO shareholders for beneficial use by as much as forty-seven percent.

¶65 In fact, FRICO continued to claim that it possessed the right to use seepage water accruing to the Beebe Seep Canal under its prior decrees until the water court expressed its significant concern regarding this view mid-trial. Under these specific circumstances, the water court necessarily had jurisdiction to require that FRICO account for transit losses in the Milton Lake Division, including here in the Gilmore Canal. Because the Gilmore Canal is part of the greater FRICO system, and particularly the Milton Lake Division, the water court – under these particular circumstances – necessarily could impose a condition to prevent injury to other water users. Such a requirement seeks to ensure that FRICO does not engage in similar behavior regarding the release of the Milton Lake Seep Right. As the water court indicated in paragraph 29, such transit loss accounting was necessary to “ensure that FRICO does not divert seepage water out-of-priority,” as Edgar, FRICO’s General Manager, admitted that it had done in the past.

¶66 Evidence of FRICO’s long-standing past practice of diverting seepage water out of priority within the Milton Lake Division supports the water court’s inclusion of this condition to ensure that FRICO properly accounts for the water it is entitled to use under the Subject Water Rights awarded in the present case and is necessary to prevent injury to other water users. As such, the water court did not err by requiring such transit loss accounting, and thus we affirm the inclusion of paragraph 29 in the Amended Decree.

#### **4. FRICO Placed Absolute Portions of the Bowles Seep and East Neres Seep Canals Seep Rights to Beneficial Use**

¶67 EAU argues that because FRICO diverted seepage water out of priority at the Bowles Seep Canal and the East Neres Seep Canal, FRICO should not now be able to claim such diversions as the basis for an absolute water right. EAU also contends that FRICO did not know how or where the water would be used, thus making the diversions speculative. We disagree.

¶68 Appropriation, pursuant to section 37-92-103(3)(a), requires “the application of a specified portion of the waters of the state to a beneficial use.” However, “no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation.” *Id.* One way such speculation occurs is when the appropriator “does not have a specific plan and intent to divert, store, or otherwise capture,

possess, and control a specific quantity of water” to put toward a beneficial use. § 37-92-103(3)(a)(II).

¶69 In contrast, a water right is considered absolute or perfected “only by *actual* application of the water to beneficial use.” *Burlington Ditch*, 256 P.3d at 662 (emphasis added). Conditional water rights require “reasonable diligence in actualizing the intended appropriation,” whereas an absolute water right “confirms that an appropriative right has vested,” which includes the identification of the right’s place in the priority system and the amount of the water right conferred. *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1147–48 (Colo. 2001). Thus, the examination of an absolute water right no longer rests on the intended use but, instead, on the actual beneficial use of the specified quantity of water.

¶70 At trial, FRICO’s expert, Thompson, testified to FRICO’s practice of diverting seepage inflows at the Bowles Seep Canal and East Neres Canal during free river conditions that FRICO thereafter delivered to its shareholders for irrigation. Specifically, Thompson testified that the East Neres Canal Seep Right was made absolute on July 2, 2011, when 4.2 cfs of seepage gains were diverted, and the Bowles Seep Canal Right was made absolute on July 25, 2011, when 1.1 cfs of seepage gains were diverted in priority without there being a downstream call (i.e., during free river conditions).

¶71 EAU objected, arguing that FRICO's past diversions of seepage at the Bowles Seep Canal and the East Neres Canal were out of priority and that FRICO should not be able to rely on those diversions as the basis for an absolute water right. They also asserted that FRICO's diversions were speculative because FRICO did not necessarily know how or where free water would be used at the time it was diverted. However, EAU, through its expert, Bliss, also conceded that the Bowles Seep Canal and East Neres Canal were capable of, and in fact had been, delivering unappropriated seepage to shareholders from the Beebe Seep Canal. Bliss additionally conceded that FRICO's shareholders had a demonstrated need for additional water. Thus, there is ample evidence in the trial record that FRICO had been diverting a measurable, and accounted for, amount of unappropriated water in priority at the Bowles Seep Canal and East Neres Canal, which FRICO was thereafter putting to beneficial use.

¶72 Thus, we conclude that the water court did not err in awarding FRICO the absolute portions of the East Neres Canal Seep Right and the Bowles Seep Canal Seep Right. Therefore, we affirm the water court's inclusion of this award in its Amended Decree.

### **III. Conclusion**

¶73 For the above stated reasons, we conclude that the challenged limitations in the Amended Decree do not violate FRICO's constitutional and statutory right to

appropriate unappropriated water for beneficial use. We further conclude that the water court's factual findings concerning these limiting conditions and its award to FRICO of the challenged water rights are not clearly erroneous. Thus, we affirm the water court's Amended Decree.