DATE FILED: November 18, 2016 11:14 AM

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Appeal from the District Court Water Division 1 Honorable James F. Hartmann Case No. **2012CW05**	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS IN DOUGLAS, JEFFERSON, ARAPAHOE, DENVER, BROOMFIELD, WELD, ADAMS, AND PARK COUNTIES	**▼COURT USE ONLY▼**
Opposer-Appellant: PARKER WATER AND SANITATION DISTRICT **v.** **Applicant-Appellee:** THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS **And** **Opposers-Appellees:** BIJOU IRRIGATION COMPANY AND BIJOU IRRIGATION DITCH; CENTENNIAL WATER AND SANITATION DISTRICT; CENTRAL COLORADO WATER CONSERVANCY DISTRICT; CITY AND COUNTY OF BROOMFIELD; CITY OF AURORA; CITY OF BRIGHTON; CITY OF COMMERCE CITY; CITY OF LOUISVILLE; CITY OF THORNTON; CITY OF WESTMINSTER; COORS BREWING COMPANY; EAST CHERRY CREEK VALLEY WATER AND SANITATION DISTRICT; FAIRMOUNT CEMETERY COMPANY; FARMERS HIGH LINE CANAL; FARMERS RESERVOIR AND IRRIGATION COMPANY; FULTON IRRIGATION DITCH COMPANY; HENRYLYN IRRIGATION DISTRICT; NEW BRANTNER EXTENSION DITCH; NORTHERN COLORADO WATER CONSERVANCY DISTRICT;	Case No. 2016SA291

PARKER WATER & SANITATION DISTRICT; PLATTE VALLEY IRRIGATION COMPANY; PUBLIC SERVICE COMPANY OF COLORADO; SOUTH ADAMS COUNTY WATER AND SANITATION DISTRICT; SOUTH SUBURBAN PARK AND RECREATION DISTRICT; THE DENVER COUNTY CLUB; THE UPPER CHERRY CREEK WATER ASSOCIATION; UNITED WATER & SANITATION DISTRICT **Appellee Pursuant to C.A.R. 1(e):** DAVID NETTLES, DIVISION ENGINEER, WATER DIVISION NO. 1; and DICK WOLFE, COLORADO STATE ENGINEER	
Attorney for Opposer-Appellant Parker Water and Sanitation District: Robert F. T. Krassa Krassa & Miller, LLC 2737 Mapleton Ave., Suite 103 Boulder, CO 80304-3836 Phone: (303) 442-2156 E-mail: bob@krassa.com Atty. Reg. #: 7947	
NOTICE OF APPEAL	

APPELLANT, Parker Water and Sanitation District ("Parker") hereby provides its Notice of Appeal, pursuant to Rule 3(d) of the Colorado Appellate Rules ("CAR").

1. **Description of the Nature of the Case:**

A. **Nature of the controversy.**

This appeal involves the interpretation of a May 15, 1940 agreement ("1940 Agreement") between the City and County of Denver, acting by and through its Board of Water Commissioners, ("Denver Water") and the members of Consolidated Ditches. The

1940 Agreement requires Denver Water to forgo further use of water rights with priorities pre-dating the agreement once used within Denver Water's system and to release that water to the "nearest convenient natural watercourse".

Denver Water releases water from Williams Fork Reservoir, stored under a 1935 priority date, and diverts it by exchange upstream on the Blue River at Dillon Reservoir or Roberts Tunnel, or releases water from Williams Fork Reservoir to satisfy Dillon Reservoir's obligations to Green Mountain Reservoir, which is senior to Denver Water's Blue River rights, and diverts water by substitution.

Consolidated Ditches contends that the 1940 Agreement applies to these exchanges and substitutions because they utilize water with an appropriation date preceding May 1, 1940 as the substitute supply. Denver Water contends that its exchanges and substitutions on the Blue River are post-1940 operations that are not governed by the 1940 Agreement.

Parker's participation in this appellate proceeding is for the purpose of defending the accepted understanding of the "character of exchange" rule, which is that the exchanged water has all of the legal characteristics of the source water, and that the legal characteristics of the exchanged water have nothing to do with the priority of the appropriative right of

exchange. Parker respectfully disagrees with the Water Court's analysis and conclusions regarding this principle as set out in section III (pages 6 through 8) of the July 12, 2016 Order which was incorporated by reference at paragraph 20 of the September 25, 2016 Order in Case 12CW5. However, as Parker understands the rulings of the Trial Court, there is an aspect of those rulings in which the Trial Court appeared to rule that the character of exchange rule should not be applied to Denver's exchange for equitable reasons. Parker advisedly does not take a position as to the issue whether the character of exchange rule should not be applied to Denver's exchange for equitable reasons.

B. **The judgment being appealed and basis for appellate jurisdiction.**

The judgment being appealed is the Findings of Fact, Conclusions of Law, Judgment and Decree of the Water Court, entered on September 30, 2016 (the "2016 Decree").

Denver Water and Consolidated Ditches filed competing motions under Rule 56, C.R.C.P., which led to the Water Court's July 12, 2016 Order Regarding Denver Water's Motion for Determination of Question of Law and Consolidated Ditches'

Motion for Partial Summary Judgment. The 2016 Decree is based upon and confirms the July 12, 2016 Order.

Before entering the 2016 Decree, the Water Court on September 25, 2016, issued its Order re: Denver Water's Motion for Entry of Decree.

Copies of the 2016 Decree, the July 12, 2016 Order and the September 25, 2016 Order are included in the appendix that accompanies this Notice of Appeal.

The Colorado Supreme Court has jurisdiction to review the 2016 Decree under Rule 1(a)(2) of the CAR. Supreme Court jurisdiction is appropriate under C.R.S. § 13-4-102(1)(d), which excludes the Court of Appeal's jurisdiction from final judgments of the district court in "water cases involving priorities or adjudications."

C. **Whether judgment or order resolved all issues pending before the trial court including attorney's fees and costs.**

The judgment resolved all issues pending before the trial court. No party requested attorneys' fees or costs.

D. **Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 53(b).**

The trial court did not enter a ruling under C.R.C.P. 54(b).

E. **Date the judgment or order was entered and the date of mailing to counsel.**

The date the judgment was entered is September 30, 2016. The trial court provided notice to all counsel electronically by posting the judgment on ICCES that same day.

F. **Whether there were any extension granted to file any motion(s) for post-trial relief.**

There were no extensions granted to file any motion for post-trial relief.

G. **Date any motion for post-trial relief was filed.**

Not applicable.

H. **Date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j).**

Not applicable.

2. Advisory Listing of the Issues to be Raised on Appeal (Parker's issues are the same as Issues C, D and E enumerated by Consolidated in its Notice of Appeal filed November 4, 2016):

A. Did the Water Court err by conflating the priority date of Denver Water's exchange of water from Williams Fork Reservoir to Dillon Reservoir with the priority of the substitute supply?

B. Under the character of exchange rule, do the obligations and attributes associated with the substitute supply

burden and attach to the water diverted by exchange or substitution?

C. Did the Water Court err by limiting the character of exchange rule to the amount and quality of a source of substitute supply?

3. Whether the transcript of any evidence taken before the trial court is necessary to resolve the issues raised on appeal.

No transcript of evidence is necessary to resolve the issues raised on appeal. There was no trial and there is no transcript of evidence. The July 12, 2016 Order and the 2016 Decree were based upon competing motions filed by Denver Water and Consolidated Ditches and the exhibits that the respective parties provided with their motions and briefs.

4. Whether the order on review was issued by a magistrate where consent was necessary.

The order on review was not issued by a magistrate.

5. The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers:

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6. Appendices containing copies of judgment and order being appealed.

Appendix A – Findings of Fact, Conclusions of Law, Judgment and Decree of the Water Court, entered on September 30, 2016.

Appendix B – July 12, 2016 Order Regarding Denver Water's Motion for Determination of Question of Law and Parker's Motion for Partial Summary Judgment

Appendix C – September 25, 2016 Order re: Denver Water's Motion for Entry of Decree.

Respectfully submitted this 18th day of November, 2016.

KRASSA & MILLER, LLC
Original duly signed by
Robert F. T. Krassa on file at
Krassa & Miller, LLC

By_____/s/_____
SPECIAL WATER COUNSEL FOR PARKER
WATER AND SANITATION DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on November 18th, 2016, I served, via United States Mail, postage prepaid the foregoing document on the following, and also served an information copy of the same via ICCES on all parties of record in Case 12CW5, Water Division No. 1.:

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/s/
_____

DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO 901 9th Avenue P.O. Box 2038 Greeley, CO 80632	DATE FILED: September 28, 2016 11:51 AM CASE NUMBER: 2012CW5 ▲ COURT USE ONLY ▲
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS IN DOUGLAS, JEFFERSON, ARAPAHOE, DENVER, BROOMFIELD, WELD, ADAMS, AND PARK COUNTIES	Case No: 2012CW5 (2004CW121) Div.: WD1

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE OF THE WATER COURT

THIS ACTION comes before the Court on motion of Applicant City and County of Denver, acting by and through its Board of Water Commissioners ("Denver Water") for entry of decree following the Court's Order of July 12, 2016 regarding motions under C.R.C.P. Rule 56, and follows the Court's order bifurcating certain issues described herein from the application filed by Denver Water to adjudicate the amount, timing and location of its reusable lawn irrigation return flows in Case No. 2004CW121. No trial or other evidentiary hearing was held. The Court, having considered the pleadings and other filings herein, and otherwise being fully advised in this matter, hereby finds and concludes as follows:

FINDINGS OF FACT

Based upon a preponderance of the evidence, the Court finds the following:

DEFINITIONS

1. Definitions

1.1. 1940 Agreement. The "1940 Agreement" is an agreement dated May 1, 1940 and effective as of January 1, 1941 between the City and County of Denver and members of the Consolidated Ditches of Water District No. 2, which precludes reuse of certain water rights by Denver Water as determined by this Court's amended ruling, order and decree in Water Division One in Case No. 81CW405 dated November 12, 1991, and the decisions of the Colorado Supreme Court in *City & County of Denver v.*

Fulton Irrigating Ditch Co., 506 P.2d 144 (Colo. 1972), and in *City & County of Denver v. Consolidated Ditches*, 807 P.2d 23 (Colo. 1991).

1.2. Bifurcated Issues. The Bifurcated Issues are those issues defined in the Court's January 10, 2012 Bifurcation Order entered in Case No. 2004CW121 WD1.

1.3. Blue River Decree. The Blue River Decree means the Findings of Fact, Conclusions of Law, and Final Judgment entered on October 12, 1955, in Consolidated Case Nos. 5016 and 5017 and the Findings of Fact and Conclusions of Law and Final Decree entered on October 12, 1955, in Consolidated Cases Nos. 2782, 5016, and 5017 by the United States District Court, District of Colorado and all supplemental or amendatory orders judgments, and decrees in said cases, including, without limitation, the Decree entered on April 16, 1964, and the Supplemental Judgment and Decree dated February 9, 1978.

1.4. Blue River System. The Blue River System consists of Dillon Reservoir and the Roberts Tunnel, which may divert water under rights with an appropriation date of June 24, 1946 as decreed in the Blue River Decree.

1.5. Blue-Williams Fork Exchange. Water diverted or stored out-of-priority at Dillon Reservoir or the Roberts Tunnel using the Williams Fork Reservoir Water Right as a source of substitute supply pursuant to the Blue River Decree.

1.6. Blue-Williams Fork Substitution. Water diverted or stored out-of-priority at Dillon Reservoir or the Roberts Tunnel using the Williams Fork Reservoir Water Right pursuant to the Blue River Decree including the October 5, 1955 Stipulation, as a substitution for water that would otherwise be owed to Green Mountain Reservoir due to the exercise of Denver Water's rights on the Blue River System in an amount needed to fill Green Mountain Reservoir.

1.7. Blue-Williams Fork Exchange or Substitution. The term Blue-Williams Fork Exchange or Substitution collectively refers to the terms Blue-Williams Fork Exchange and Blue-Williams Fork Substitution as defined above.

1.8. Deep Percolation or DP. "Deep Percolation" is calculated using the Cottonwood Curve and is the volume of Water Applied, as that term is defined in the LIRF Decree, to irrigated areas that percolates below the root zone to the groundwater aquifer.

1.9. Lawn Irrigation Return Flow or LIRF. "Lawn Irrigation Return Flow" or "LIRF" is a form of return flow from water that has been applied for irrigation of lawns, gardens, parks, golf courses, schools, greenways, landscaping, etc., which has not been

consumed by the plants being irrigated and which returns to the stream system as quantified in Case No. 2004CW121 WD1. LIRFs accrue to the stream as surface water return flow and lagged Deep Percolation.

1.10. LIRF Decree. LIRF Decree refers to the May 15, 2012 Findings of Fact, Conclusions of Law, Judgment and Decree entered by the Water Court for Water Division 1 in Case No. 2004CW121.

1.11. Moffat Tunnel Water. Return flows from the Fraser River and Williams Fork Diversion Projects pursuant to the decree in Civil Action 657, with a July 4, 1921 priority date.

1.12. Williams Fork Reservoir Water Right. Water Right decreed for the Williams Fork Reservoir with an appropriation date of August 15, 1935, decreed in former Water District No. 51 by the Grand County District Court in C.A. No. 657 on November 5, 1937.

PROCEDURAL MATTERS

2. Name and Address of Applicant.

City and County of Denver, acting by and through its Board of Water Commissioners
1600 West 12th Avenue
Denver, Colorado 80204-3412.

3. Description of the Applicant. Denver Water is a home rule municipal corporation of the State of Colorado. Denver Water derives its authority and power to operate a water supply system under the State Constitution, the Denver City Charter and provisions of state law. Pursuant to the Denver City Charter, Denver Water provides all treated and raw water necessary for the full development of land within the City and County of Denver. Pursuant to water service agreements, Denver Water serves as the water utility for other governmental entities outside the City and County of Denver, but within Denver Water's service area, providing treated potable water and raw water necessary to serve the full development of all land within the service area. Denver Water also has commitments to provide approximately 68,000 acre-feet of treated and raw water annually to customers outside its service area under fixed amount contracts. From time to time, Denver Water provides treated potable water and raw water to customers under temporary arrangements.

4. Overview and Description of this Matter. On April 30, 2004, Denver Water filed an application ("Application") to among other things: (1) quantify LIRFs attributable to Denver Water's service area; (2) use LIRFs as a substitute supply in existing decreed exchanges; and (3) use LIRFs as a substitute supply in existing and future augmentation plans. In addition to

these claims, Denver Water sought clarification of its right to reuse return flows from one of its supplies which contribute to Denver Water's LIRFs, that supply being the Williams Fork Reservoir Water Right. Specifically, Denver Water asserted that the C.A. 657 Water Right is not subject to the Ruling in Case No. 81CW405 WD1 or a May 1, 1940 Agreement between Denver Water, Consolidated Ditches, and various ditch companies, if the C.A. 657 Water Right is "exchanged to another structure acquired after 1940 or under an exchange priority junior to May 1, 1940" within Water Division 5 and conveyed through the Blue River System for use in Water Division 1. (Application, Case No. 2004CW121 ¶¶ 3.1.15-16, 10.7).

In Case No. 2004CW121, Denver Water filed an unopposed motion to bifurcate the Bifurcated Issues for resolution in a separate matter. On January 10, 2012, the Water Court granted Denver Water's motion to bifurcate, and ordered that "All issues involving the scope and effect of the 1940 Agreement, including but not limited to the issue of whether water rights decreed in C.A. 657, Grand County District Court, are not subject to the 1940 Agreement if stored in Dillon Reservoir by exchange from Denver Water's 1935 Williams Fork Reservoir priority, and imported to the east slope through the Roberts Tunnel, are hereby bifurcated for separate trial ("Bifurcated Issues")." The Court ordered that the Bifurcated Issues would be bifurcated into Case No. 2012CW5. The Court also ordered that all Opposers to Case No. 2004CW121 shall remain parties to Case No. 2012CW5, and "[a]ll claims and defenses are reserved, and no party waives any claims or defenses they may have asserted in [Case No. 2004CW121]." The LIRF Decree was subsequently entered by the Court on May 15, 2012.

5. Notice. Notice of the Bifurcated Issues was provided with the filing of the Application filed in Case No. 2004CW121. The Water Clerk provided resume notice and notice by newspaper publication of the Application in the counties of Adams, Arapahoe, Broomfield, Denver, Douglas, Jefferson, Weld and Park counties. The Water Clerk also provided a copy of the Application to those landowners identified in section eight of the Application. The time for filing statements of opposition in this matter has expired. All notices of this matter required by law have been fulfilled and the Water Court has jurisdiction over the subject matter of this Decree, and over all persons and property affected by the Decree, irrespective of whether they or its owners have appeared.

6. Opposers. The following entities filed timely statements of opposition to Denver Water's Application filed in Case No. 2004CW121, and were made parties to this matter under the Court's January 10, 2012 Bifurcation Order: Arapahoe County Water and Wastewater Authority ("ACWWA"); City of Aurora, acting by and through its Utility Enterprise ("Aurora"); Bear Creek Development Corporation ("Bear Creek"); Bijou Irrigation Company ("Bijou Company"); Bijou Irrigation District ("Bijou District"); City of Brighton ("Brighton"); City and County of Broomfield ("Broomfield"); Central Colorado Water Conservancy District and the Groundwater Management Subdistrict of the Central Colorado Water Conservancy District and the Well Augmentation Subdistrict of the Central Colorado Water Conservancy District ("Central"); Centennial Water and Sanitation District ("Centennial"); Center of

Colorado Water Conservancy District ("Center of Colorado"); City of Commerce City ("Commerce City"); Consolidated Ditches of Water District No. 2 ("Consolidated Ditches"); Coors Brewing Company ("Coors"); Colorado Water Conservation Board ("CWCB"); Denver Country Club ("DCC"); East Cherry Creek Valley Water and Sanitation District ("ECCV"); City of Englewood ("Englewood"); Fairmount Cemetery Company ("Fairmount"); Farmers' High Line Canal and Reservoir Company ("Farmers Highline"); Farmers Reservoir and Irrigation Company ("FRICO"); Fulton Irrigation Ditch Company ("Fulton"); Glenmoor Country Club ("Glenmoor"); City of Greeley acting by and through its Water and Sewer Board ("Greeley"); Henrylyn Irrigation District ("Henrylyn"); City of Lakewood ("Lakewood"); City of Louisville ("Louisville"); New Brantner Extension Ditch Company ("Brantner"); Northern Colorado Water Conservancy District ("Northern"); Parker Water and Sanitation District ("Parker"); Platte Valley Irrigation Company ("PVIC"); Public Service Company of Colorado d/b/a Xcel Energy ("PSCo"); South Adams County Water and Sanitation District ("South Adams"); South Suburban Park and Recreation District ("South Suburban"); State and Division Engineers ("SEO"); City of Thornton ("Thornton"); United Water and Sanitation District ("United"); Upper Cherry Creek Water Association ("UCCWA"); and City of Westminster ("Westminster").

7. Withdrawals of Statements of Opposition. The following Opposers have withdrawn their statements of opposition to the Bifurcated Issues: CWCB; ECCV; Englewood; Bear Creek; Lakewood; Glenmoor; Henrylyn. None of the remaining Opposers stipulated to this Decree and all of their rights of appeal and to participate in further proceedings are reserved.

DENVER WATER'S CLAIM FOR CONFIRMATION OF ITS RIGHT TO REUSE WILLIAMS FORK RESERVOIR WATER RIGHT BY EXCHANGE OR SUBSTITUTION FOR WATER DELIVERED THROUGH THE ROBERTS TUNNEL

8. Scope and Extent of the 1940 Agreement. The Court finds that water delivered through the Roberts Tunnel from water released from Williams Fork Reservoir either by the Blue Williams Fork Exchange or Substitution is not subject to the 1940 Agreement. The Court's findings are set forth in its July 12, 2016 Order Regarding Denver Water's Motion for Determination of Question of Law and Consolidated Ditches' Motion for Partial Summary Judgment.

The Court finds that the Blue River System water imported by Denver has a priority date of 1946, whether Denver imports the water after diversion in priority or after an out-of-priority diversion by operation of the Blue-Williams Fork Exchange or Substitution with substitute water released from Williams Fork Reservoir. Imported water attributed to the Blue River Decree is not subject to the 1940 Agreement with Consolidated Ditches, and Denver may reuse or successively use that water, provided such uses are consistent with the Blue River Decree. Accordingly, Denver Water may fully reuse, successively use, exercise its right of

disposition over LIRFs from return flows from water diverted through the Blue River System using the Blue-Williams Fork Exchange or Substitution.

9. Modification of Paragraph 24.5 of the LIRF Decree. Paragraph 24.5 of the LIRF Decree provides that:

> Denver Water and Consolidated Ditches entered into a December 7, 2011 Stipulation regarding the bifurcated issues described in Paragraph 4 above. Pursuant to the Stipulation by and between Denver Water and Consolidated Ditches, Denver Water shall reduce the amount of its Reusable LIRFs by 8.3 percent, to be applied after Deep Percolation is lagged to the stream, until the underlying issues are resolved by agreement or litigation in Case No. 2012CW05, Water Division One. The amount of 8.3 percent is an approximate measure of the disputed LIRFs for the purposes of the December 7, 2011 stipulation only, and shall not be binding upon Denver Water or Consolidated Ditches after final resolution of the bifurcated issues in Case No. 2012CW05.

The Court finds that the 8.3 percent reduction in LIRFs is no longer required based on findings in this decree. Accordingly, Denver Water may fully reuse the return flow, including LIRFs, from water diverted or delivered through the Blue River System using the Blue-Williams Fork Exchange or Substitution.

10. Accounting. Denver Water's LIRF accounting forms attached as Exhibit N to the Decree entered in Case No. 2004CW121 WD1 may be modified to account for the reusability of its LIRFs from sources delivered through the Blue River System using the Blue-Williams Fork Exchange or Substitution.

CONCLUSIONS OF LAW

Based upon and fully incorporating the Findings of Fact set forth above, this Court concludes as a matter of law that:

11. Incorporation of Findings of Fact. The foregoing Findings of Fact are incorporated herein as if set out in full to the extent they constitute Conclusions of Law.

12. Jurisdiction. The Water Court has jurisdiction to enter the requested decree. The Court has jurisdiction of the subject matter of this case and all persons affected hereby, whether they have appeared or not, pursuant to C.R.S. §§ 37-92-203, 37-92-302 and 37-92-304 (2010).

13. Application. This Application was filed with the Water Court pursuant to C.R.S. § 37-92-302. Timely Statements of Opposition were filed as indicated above. The time for

filing additional Statements of Opposition has expired. § 37-92-302(1)(c). Full and adequate notice of the claims adjudicated herein has been given in the manner required by law.

14. Dominion and Control. Denver Water has demonstrated that it has maintained dominion and control over its LIRFs, through its continued intent to recapture its LIRFs, and its ability to distinguish its water from other water in the stream. *Public Service Co. v. Willows Water Dist*., 856 P.2d 829 (Colo. 1993). Dominion over water shall not be lost to the owner or user thereof by reason of use of a natural watercourse in the process of carrying such water to the place of its use or successive use. C.R.S. § 37-82-106(2).

15. Reuse of Foreign Waters by Exchange. Subject to a contrary contractual agreement, an appropriator who lawfully introduces foreign water into a stream system from an unconnected stream system may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the stream into which it is introduced. C.R.S. § 37-82-106(1) (2010).

16. Burden of Proof Met. Denver Water has satisfied all legal requirements for the entry of this decree.

17. The Right to Reuse LIRFs is Personal. The right to reuse foreign imported water is personal to Denver Water. *See* C.R.S. § 37-82-106(2) (2010).

18. Bifurcated Issues Resolved. Denver Water may exercise its right of reuse, successive use, and disposition with regard to return flows from water diverted through the Blue River System using the Blue-Williams Fork Exchange or Substitution.

JUDGMENT AND DECREE OF THE COURT

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

19. Incorporation of Findings of Fact and Conclusions of Law. The foregoing Findings of Fact and Conclusions of Law are incorporated herein as if set out in full.

20. Order. The Court's determination of legal and factual issues set forth in its July 12, 2016 Order Regarding Denver Water's Motion for Determination of Question of Law and Consolidated Ditches' Motion for Partial Summary Judgment are incorporated into this decree. The Blue River System water imported by Denver has a priority date of 1946, regardless of whether Denver imports the water after diversion in priority or after an out-of-priority diversion enabled by Denver's decreed exchange plan, with substitute water released from Williams Fork Reservoir. Imported water attributed to the Blue River Decree is not subject to the 1940

Agreement with Consolidated Ditches, and Denver may reuse or successively use that water, provided such uses are consistent with the Blue River Decree.

21. Accounting. Denver Water may modify its LIRF accounting forms attached as Exhibit N to the Decree entered in Case No. 2004CW121 WD1 to account for the reusability of its LIRFs from sources delivered through the Blue River System using the Blue-Williams Fork Exchange or Substitution.

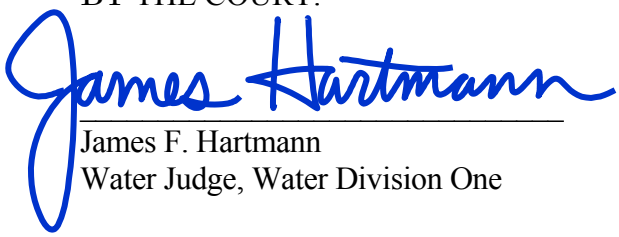
22. Right to Use Return Flows from Water Delivered through the Roberts Tunnel under the Williams Fork Exchange or Williams Fork Substitution. Denver Water is entitled to fully use, reuse, successively use, and exercise its right of disposition with regard to return flows from water diverted through the Blue River System using the Blue-Williams Fork Exchange or Substitution.

23. Removal of 8.3 Percent LIRF Reduction. The 8.3 percent reduction applied to LIRFs set forth in paragraph 24.5 of the LIRF Decree is no longer necessary. Thus, Denver Water shall no longer be required to reduce its LIRFs quantified under the LIRF Decree by 8.3 percent including LIRFs quantified from water applied beginning in 1977 that have not yet returned to the public stream.

24. Captions. The captions in this decree are for convenience of reference only, and shall not define or limit any of the terms or provisions hereof.

Entered this 30th day of September, 2016.

BY THE COURT:



James F. Hartmann
Water Judge, Water Division One

DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO 901 9th Avenue P.O. Box 2038 Greeley, CO 80632	DATE FILED: November 18, 2016 9:24 AM CASE NUMBER: 2012CW5
CONCERNING THE APPLICATION FOR WATER RIGHTS OF **THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS** IN DOUGLAS, JEFFERSON, ARAPAHOE, DENVER, BROOMFIELD, WELD, ADAMS, AND PARK COUNTIES	▲ COURT USE ONLY▲ Case No: 2012CW05 Div.: 1

ORDER RE: DENVER WATER'S MOTION FOR DETERMINATION OF QUESTION OF LAW AND CONSOLIDATED DITCHES' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the court on the City and County of Denver's ("Denver") motion for determination of a question of law. Consolidated Ditches of Water District No. 2[1] ("Consolidated Ditches"), an opposing party in this action, separately filed a motion for partial summary judgment. The questions raised by Denver and Consolidated Ditches in their respective motions are identical: whether a 1940 water-use agreement between these parties prevents Denver from reusing return flows after its first use of Blue River System[2] water imported from the western slope across the Continental Divide. In addition to the original motions and the corresponding responses and replies filed by Denver and Consolidated Ditches, the court also received a response to Denver's motion from Central Colorado Water Conservancy District and an *amicus curiae* brief from Western Slope Amici[3] in opposition to Consolidated Ditches' motion.

[1] Consolidated Ditches of Water District No. 2 is an organization presently consisting of the following member ditch companies: New Brantner Extension Ditch Company, Brighton Ditch Company, Farmers Independent Ditch Company, Fulton Irrigation Ditch Company, Lupton Bottom and Lupton Meadows, Meadow Island No. 1, Meadow Island No. 2, Beeman Ditch and Milling Company, Platteville Irrigating and Milling Company, Platte Valley Irrigation Company, and Western Mutual Ditch Company.

[2] The Blue River System includes water Denver diverts from the Snake River, Blue River, and Ten Mile Creek.

[3] The entities joining the Western Slope Amici brief include the Colorado River Water Conservation District, Summit County Board of Commissioners, Middle Park Water Conservancy District, Eagle River Water and Sanitation District, Upper Eagle Regional Water Authority, Grand Valley Water Users Association, Orchard Mesa Irrigation District, Ute Water Conservancy District, and Palisade Irrigation District.

This court previously ruled, in Case No. 1981CW405, that the prohibition on the reuse of water imported from the western slope imposed on Denver under the 1940 agreement with Consolidated Ditches applies only to water owned, appropriated, or acquired by Denver on or before May 1, 1940, the effective date of the agreement. This finding was upheld by the Colorado Supreme Court in *Denver v. Consolidated Ditches Co. of District No. 2*, 807 P.2d 23, 26 (Colo. 1991).

Denver's Blue River System water right was decreed in 1955, with an appropriation date of June 24, 1946. Because this source of water was not owned, appropriated, or acquired by Denver prior to May 1, 1940, the court finds it falls outside the provisions of the 1940 agreement, and Denver is not limited to a single use of this source of imported water, pursuant to section 37-82-106, C.R.S. The court is not persuaded by Consolidated Ditches' argument that because Denver releases water stored in Williams Fork Reservoir—a structure located on the western slope with a storage water right decreed to Denver prior to May 1, 1940—to replace out-of-priority diversions Denver makes from the Blue River System, the court should find that Blue River System water takes on the character of the exchanged water, i.e. the pre-1940 priority date of the Williams Fork Reservoir water right.

I.

Under C.R.C.P. 56(h), "[a]t any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of material fact necessary for determination of the question of law, the court may enter an order deciding the question." "The purpose of Rule 56(h) is to 'allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds.'" *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995) (quoting 5 Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985)). In reviewing a motion for determination of question of law, a court may decline to enter an order deciding the question if there exists a genuine dispute over any material fact necessary for the determination of the question of law. C.R.C.P. § 56(h); *Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011).

Summary judgment is appropriate under C.R.C.P. 56(c) where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 360 (Colo. 1994); *City of Westminster v. Church*, 167 Colo. 1, 15-16, 445 P.2d 52, 59 (1968). It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo. 1993); *Elm Distrib., Inc. v. Tri-Centennial Corp.*, 768 P.2d 215, 218 (Colo. 1989). Once the moving party demonstrates that no material facts are in dispute, the burden shifts to the nonmoving party to establish a triable issue of fact. *AviComm, Inc. v. Colo. Public Utilities Comm.*, 955 P.2d 1023, 1029 (Colo. 1998). The non-moving party must point to specific facts; "reliance upon allegations or denials in the pleadings will not suffice." *Ginter v. Palmer & Company*, 585 P.2d 583, 585 (Colo. 1978). "If the nonmoving party cannot allege sufficient evidence to make out a triable issue of fact, a trial would be useless and the court should grant summary judgment if the movant is so entitled as a matter of law." *See id*.

II.

Prior to May 1, 1940, Denver operated three large streambed reservoirs to provide water to its customers: Antero Reservoir, Cheesman Reservoir, and Eleven Mile Canyon Reservoir. At that time, the state engineer did not charge streambed reservoirs for evaporation or seepage losses. Denver operated the reservoirs using a gauge height measurement, meaning water stored in the reservoirs was maintained at a steady gauge height, so that the amount of water discharged from each reservoir equaled the amount of river water flowing into that reservoir, less evaporation losses. The gauge height accounting method did not account for or replace evaporation losses. Concerned about the evaporation and seepage losses Denver's three reservoirs were causing to the South Platte River watershed, several irrigation companies banded together under the name Consolidated Ditches Company of District No. 2 to work with Denver to reach a mutually acceptable agreement whereby Denver would replace these losses. Negotiations led to an agreement between Consolidated Ditches, its individual members, the state engineer, and Denver, signed on May 1, 1940, which provides in Section 4 that Denver:

> may make or permit any nonconsumptive use of water to create electric power, to dilute sewage, or the like while such water is on its way to its place of principal and ultimate beneficial use; and [Denver] agrees that it will not use or attempt to use or lease any water, irrespective of source, which shall have been once used through its municipal water system and such water shall be allowed to become part of the nearest convenient natural water course.

Disagreements between Denver and Consolidated Ditches regarding the scope of the restrictions found in Section 4 of the 1940 agreement have arisen since 1967, when Denver negotiated a contract with Coors Brewing Company to replace water diverted upstream by Coors with effluent generated downstream from Denver's wastewater treatment plant. Several ditch companies that signed the 1940 agreement voiced opposition to the Denver-Coors agreement, claiming Denver was attempting to reuse water in contravention of the 1940 agreement. Denver and Coors responded by filing a complaint for declaratory relief arguing that Section 4 of the 1940 agreement had been terminated in 1966 by correspondence between the Division One Engineer and Denver regarding the amount of evaporation losses Denver was required to replace between May and August of 1966. *See* Civil Action 18402, Adams County District Court. In support of its argument that the 1940 agreement had been terminated, Denver relied on a 1965 statutory amendment found at section 148-7-17(5), C.R.S., which granted the state engineer authority to order water to be released from streambed reservoirs to account for stream depletions caused by evaporation.[4] In the alternative, Denver argued in its complaint for declaratory relief that the 1940 agreement violated Denver's charter prohibiting property transfers that were not first ratified by a vote of its electors.

The trial court ruled against Denver on both grounds, holding that Denver had the right to reuse and successively use water it imports from the western slope, absent an agreement to the contrary; however, the court further ruled that the 1940 agreement with Consolidated Ditches barred

[4] The state engineer's authority to order releases from streambed reservoirs to replace evaporation losses is now located at section 37-84-117(5), C.R.S.

Denver from using imported water more than once. The court also found that Denver had abandoned that portion of the water which returned to Denver's wastewater treatment plant after Denver's initial use of the water. Denver appealed and the resulting appellate case was *City and County of Denver v. Fulton Irrigating Ditch Co.*, 506 P.2d 144 (Colo. 1972).

The Colorado Supreme Court in *Fulton* affirmed the water court's ruling that Denver, absent an agreement to the contrary, had the right to reuse and successively use water imported from the western slope. *Id.* at 149. The Court also affirmed the water court's conclusion that Section 4 of the 1940 agreement had not been terminated. *Id.* at 153. The Supreme Court further held that Denver's charter prohibits the sale or disposition of property without a vote; however, because the 1940 agreement only limits Denver's use of the water, and does not extend to the sale or disposition of water, the charter was not applicable and a vote was not required. *Id.* The Court reversed the trial court's ruling that Denver abandoned the effluent and found instead that Denver does not lose dominion over water returning to its wastewater treatment plant. *Id.* at 149. The Court posited but left open the questions of whether the 1940 agreement violated public policy or whether the agreement applied to water appropriated by Denver after May 1, 1940, because Denver had not raised those issues in its complaint for declaratory relief. *Id.* at 153.

Denver holds decreed rights to several sources of Colorado River basin water originating on the western slope of the Continental Divide, including water rights in the Fraser River and Williams Fork River, each of which has a priority date of July 4, 1921. Denver has a decreed right to store 93,637 acre-feet ("a/f") of water in Williams Fork Reservoir, located on the western slope, and that storage right has a priority date of 1935. Denver imports water from the Fraser and Williams Fork rivers to the eastern slope through the Moffat Tunnel. Denver does not have a mechanism in place to transport water from Williams Fork Reservoir directly to the Moffat Tunnel and thus Denver, at times, uses water stored in Williams Fork Reservoir as a source of substitute water in an exchange plan for water it diverts out-of-priority from the Fraser and Williams Fork rivers. Denver uses water imported from the Fraser and Williams Fork rivers only once, per the 1940 agreement with Consolidated Ditches.

Denver also owns decreed rights to water diverted from the Blue River System, which is also located on the western slope. The Blue River System water right was decreed in the United States District Court for Colorado in 1955, with an administration priority date of 1946. Denver uses the Roberts Tunnel to transport Blue River System water to the eastern slope. The Roberts Tunnel is situated south of the Moffat Tunnel. Water diverted from the Blue River System can either be placed in the Roberts Tunnel directly from the stream or stored in Dillon Reservoir, where the water can later be transported to the Roberts Tunnel as needed by Denver. Denver also uses water stored in Williams Fork Reservoir as a source of substitute water in its decreed Blue River System exchange plan, allowing Denver to divert water from the Blue River System out-of-priority.

In 1981, Denver filed an application with this court for approval of a plan to augment certain tributary wells with return flows from water imported from the western slope, including water from the Blue River System. *See* Case No. 1981CW405, Water Division One. Consolidated Ditches opposed the application and again argued that the 1940 agreement prohibited Denver from making any re-use or successive use of imported western slope water. After a lengthy trial was held on Denver's application, the water court issued detailed factual findings and legal conclusions

regarding the scope and effect of the 1940 agreement. As germane to the issue presented in the current motions, this court ruled that the restriction on Denver's re-use or successive use of imported western slope water applies only to water Denver appropriated prior to May 1, 1940, and that Denver may reuse or successively use western slope water with appropriation dates after May 1, 1940. This court reasoned that the principal purpose of the 1940 agreement was to account for evaporation losses from Denver's three streambed reservoirs and that return flows were merely incidental to the primary goal of replacing evaporation losses.

To support its finding that the primary purpose of the 1940 agreement was to replace evaporation losses, the court considered the amount of water Denver imported from the western slope in 1940, which was 38,672 a/f. The aggregate evaporation losses from the three reservoirs in 1940 was 10,142 a/f, and the amount of effluent returned to the stream after Denver's first use of the water was 12,506 a/f. The court found that Denver's effluent return flows exceeded its reservoir evaporation losses by 2,364 a/f in 1940, and therefore the purpose of the 1940 agreement for Denver to replace evaporation losses had been accomplished with the amount of water Denver imported in 1940.

The court then compared the 1940 operational numbers to data gathered in 1978, which at the time of trial was the year of Denver's highest yearly importation of western slope water. In 1978, Denver imported 224,240 a/f of water from the western slope, the evaporation losses from the three reservoirs was 13,911 a/f, and Denver returned 74,110 a/f of effluent to the stream after its first use of imported water. This resulted in 60,199 a/f of imported water being placed in the South Platte system above Denver's replacement requirement of 13,911 a/f.

This court noted that when Denver and Consolidated Ditches signed the 1940 agreement, they were aware that a large volume of Blue River System water would be available for Denver to import in the future, that return flows would increase significantly as Denver imported more western slope water, and that evaporation losses from the three reservoirs would remain relatively consistent over time. The court observed that it was unlikely Denver would intend to confer such a "bonanza" of additional water to Consolidated Ditches in the form of increased return flows, or that Consolidated Ditches would have taken the position in 1940 that it was entitled to the increased return flows, as this would have made it less attractive for Denver to negotiate the agreement. The court approved Denver's re-use and successive use of sewage return flows derived from Colorado River sources appropriated after May 1, 1940, as replacement water sources in the augmentation plan decreed in 1981CW405. This court also ruled that the 1940 agreement would terminate if the state engineer ordered Denver to release water from any of the three streambed reservoirs to replace evaporation losses.

Both Denver and Consolidated Ditches appealed portions of the 1981CW405 ruling[5] to the Colorado Supreme Court in *City and County of Denver v. Consolidated Ditches Co. of District No.*

[5] Denver appealed the court's ruling upholding the validity of the 1940 agreement prohibiting Denver from reusing or successively using western slope water sources with appropriation dates prior to May 1, 1940, and Consolidated Ditches appealed the court's ruling that the 1940 agreement would be terminated if the state engineer, pursuant to section 37-84-117(5), C.R.S., ordered Denver to release water from any of the three reservoirs to replace evaporation losses.

2, 807 P.2d 23 (Colo. 1991). The Supreme Court upheld this court's ruling that the 1940 agreement only precludes Denver from reusing or successively using effluent return flows derived from decreed western slope water rights with appropriation dates preceding May 1, 1940. *Id.* at 26. In its opinion, the Supreme Court recognized that Blue River System water was not subject to the 1940 agreement, based on its appropriation date of 1946:

> Of the 224,240 acre-feet of transmountain water imported by Denver in 1978, only 81,188 acre-feet came from the Frasier and Williams Fork River Diversion Projects, both of which had appropriation dates prior to May 1, 1940, and 143,052 acre-feet, or almost two-thirds of the total transmountain importation, came from the Blue River Diversion Project, which had an appropriation date of June 24, 1946, and was not subject to the 1940 agreement.

Id. at 36 (emphasis added). Consistent with this court's conclusion, the Supreme Court also recognized that the principal purpose for the 1940 agreement was to replace evaporation losses and reduce the burden of Denver's three streambed reservoirs on the river system, and that Denver and Consolidated were aware that importation by Denver of western slope water would continue to increase over time. *Id.* at 36-37.

Neither Denver nor Consolidated Ditches appealed the portion of this court's ruling which allowed Denver to reuse and successively use sewage return flows derived from Colorado River basin sources appropriated after May 1, 1940, and thus Denver has been reusing post-May 1, 1940 imported water to replace out-of-priority depletions for certain of its tributary wells. Instead, Denver argued several other grounds on appeal that the entire 1940 agreement was no longer valid or applicable to all of Denver's imported water, regardless of whether the source was appropriated pre- or post-May 1, 1940. The Supreme Court upheld the 1940 agreement, and it is with this history in mind that the court now turns to the specific issue raised in the present motions.

III.

While it is clear to both Denver and Consolidated Ditches that the Blue River System water rights were decreed to Denver in 1955, with an administrative priority date of 1946, these parties disagree whether Denver's use of water from Williams Fork Reservoir in the Blue River System exchange converts the "character" of Blue River System water diverted by exchange to the Williams Fork Reservoir's 1935 priority date. Consolidated Ditches believes the 1935 priority date of the substitute supply defines the "character" of the water right because the exchange allows Denver to divert at times when its 1946 Blue River System water right would otherwise be called out by downstream senior appropriators. This, according to Consolidated Ditches, makes the Williams Fork Reservoir water right the "operative right" under the 1940 agreement, and pursuant to this court's ruling in 1981CW405 Denver may not reuse Blue River System water unless it is diverted under its 1946 direct-flow right, as opposed to through an exchange. In support of this argument, Consolidated Ditches focuses on the Supreme Court's language in *Centennial Water & Sanitation Dist. v. Broomfield*, 256 P.3d 677, 684 (Colo. 2011), that "diversions at the upstream

point take on the character of the water right used as a source of downstream substitute supply." Consolidated Ditches' reliance on this language to support its position is misplaced.

Four elements must exist for a substitution and exchange to operate: (1) the source of substitute supply must be above the calling water right; (2) the substitute supply must be equivalent in amount and of suitable quality to the downstream appropriator; (3) there must be available natural flow at the point of upstream diversion; and (4) the rights of others cannot be injured when implementing the exchange. *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 435–36 (Colo. 2005) (quoting *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1155 (Colo. 2001)). When referring to the upstream diversion taking on the "character" of the downstream substitute supply, this court believes the Supreme Court is referring to an exchange operator's upstream diversions being limited by the amount and quality of water that the operator is able to substitute downstream. This ensures the downstream senior water user receives that which would have been available if the upstream diversion had not occurred. If the operator is unable to provide a sufficient supply of a suitable quality of water for use by the downstream senior water user—including use in the exchange of the downstream senior water user's own rights, pursuant to section 37-80-120(2), C.R.S.—the upstream out-of-priority diversion cannot occur.

Denver's Blue River System exchange is itself a decreed water right with a priority date of 1946, and the exchange operates on the western slope within the established priority system. *See Broomfield*, 256 P.3d at 682. An exchange neither increases nor decreases the overall supply of water in the system; however, an exchange may make water unavailable to other water users whose rights are operated between the exchange's two diversion points. *Central*, 125 P.3d. at 436. As such, if there is a senior water right operating within the same stretch of river as Denver's Blue River System exchange and there is insufficient water available to operate both rights simultaneously, Denver's exchange must yield to the senior water right, regardless of the priority date for Denver's substitute water supply.[6] *See id.* at 442 ("Central's rights of exchange are subject to the legitimate call of water rights senior to the priority of Central's rights of exchange and substitution, and are able to call out water rights junior to the priority of Central's rights of exchange and substitution.").

Despite Consolidated Ditches' assertion to the contrary, the priority date of a decreed exchange[7] does not transform to an earlier date merely because the source of substitute supply has an earlier priority date. To hold otherwise would require this court to disregard one of the core principles of Colorado's priority system: that a priority date may relate back to the date when the appropriator took the "first step" toward securing the water right. *Central*, 125 P.3d at 443. The "first step" involves the "concurrence of the intent to appropriate water for application to beneficial

[6] Consolidated Ditches argues in its brief that the priority date for an exchange only establishes a priority date with respect to other exchanges and not all water rights. This same argument was presented in *Central* and the Supreme Court, in footnote 4, dismissed the argument and concluded that adjudication fixes the priority date for an exchange vis-à-vis all other decreed water rights. *Central*, 125 P.3d at 442 n.4.

[7] An exchange may also be operated under administration by the state engineer without the water user first obtaining a water court decree. Section 37-80-120, C.R.S. A non-adjudicated exchange, however, is not assigned a priority date and thus is not operated within the prior appropriation system. *Empire Lodge*, 39 P.3d at 1155.

use with an overt manifestation of that intent through physical acts sufficient to constitute notice." *City of Aspen v. Colo. River Water Conservation Dist.*, 696 P.2d 758, 761 (Colo. 1985). If the court ruled as requested by Consolidated Ditches—that the priority date for an exchange is established by the priority date of the source of substitute supply and not the date the first step was taken to appropriate the exchange—it would result in many senior water rights, operating between exchange diversion points, losing their priority dates to exchanges that first operated after the senior rights were decreed. There may, of course, be instances when the first step for an exchange involves the appropriation of the water source that is later used as the substitute supply. Such is not the situation here, as the United States District Court has already determined the administrative priority date for Denver's Blue River System is 1946—nine years after Denver secured its Williams Fork Reservoir storage right—and Consolidated Ditches may not challenge that finding in the current action.

Finally, this court determined in 1981CW405 that Denver met its obligation to replace evaporation and seepage losses from its three reservoirs by relinquishing its right, pursuant to the 1940 agreement, to reuse and successively use Frazier River and Williams Fork River water imported from the western slope. An important consideration in the court's ruling in 1981CW405 was that Denver had historically imported ample amounts of water from its pre-May 1, 1940 sources to meet its annual evaporation replacement obligation. Denver asserts that it has continued to import the same amount of Frazier River and Williams Fork River water since the ruling was issued in 1981CW405, and that it will continue to do so in the future. Consolidated Ditches does not challenge Denver's assertion in this regard. Therefore, it does not appear that Consolidated Ditches will be arguing in the present action that Denver will use the Blue River System exchange to decrease the amount of Frazier River and Williams Fork River water it imports, thereby reducing the amount of water subject to the 1940 agreement. Rather, it appears that Consolidated Ditches is attempting to secure additional water for its own use from return flows of water Denver imports from sources decreed after May 1, 1940, which, as the court previously found in 1981CW405, is beyond the amount of water Denver is contractually obligated to relinquish under the 1940 agreement.

IV.

Based on the forgoing, the court finds that Blue River System water imported by Denver has a priority date of 1946, regardless of whether Denver imports the water after diversion in priority or after an out-of-priority diversion enabled by Denver's decreed exchange plan, with substitute water released from Williams Fork Reservoir. Imported water attributed to the Blue River System decree is not subject to the 1940 agreement with Consolidated Ditches, and Denver may reuse or successively use that water, provided such uses are consistent with the Blue River System decree.

Dated: July 12, 2016

BY THE COURT

James Hartmann

James F. Hartmann
Water Judge, Water Division One

DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO 901 9th Avenue P.O. Box 2038 Greeley, CO 80632	DATE FILED: September 18, 2006 7:23 AM CASE NUMBER: 2012CW5
CONCERNING THE APPLICATION FOR WATER RIGHTS OF **THE CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS** IN DOUGLAS, JEFFERSON, ARAPAHOE, DENVER, BROOMFIELD, WELD, ADAMS, AND PARK COUNTIES	▲ COURT USE ONLY▲ Case No: 2012CW05 Div.: 1

ORDER RE: DENVER WATER'S MOTION FOR ENTRY OF DECREE

This matter comes before the court on the City and County of Denver's (Denver) motion for entry of decree. Central Colorado Water Conservancy District[1] (Central) filed a response to Denver's motion and requests that certain additional terms and conditions be included in the final decree. Denver replied and challenges whether Central has standing to request inclusion of additional terms and conditions in the decree because Central was not a party to the written contract entered into by Denver and Consolidated Ditches of Water District No. 2[2] (Consolidated Ditches) in 1940 (1940 agreement). Central filed a supplemental response to address Denver's argument that Central lacks standing. Parker Water and Sanitation District (Parker)

[1] Two subdistricts of Central, the Groundwater Management Subdistrict of the Central Colorado Water Conservancy District and the Well Augmentation Subdistrict of the Central Colorado Water Conservancy District, are also opposing parties in this action and were included in Central's response.

[2] Consolidated Ditches of Water District No. 2 is an organization presently consisting of the following member ditch companies: New Brantner Extension Ditch Company, Brighton Ditch Company, Farmers Independent Ditch Company, Fulton Irrigation Ditch Company, Lupton Bottom and Lupton Meadows, Meadow Island No. 1, Meadow Island No. 2, Beeman Ditch and Milling Company, Platteville Irrigating and Milling Company, Platte Valley Irrigation Company, and Western Mutual Ditch Company.

filed a response to Denver's reply, contesting Denver's position that Central lacks standing, but Parker does not oppose Denver's request for entry of decree.

The primary purpose of the operational agreement between Denver and Consolidated Ditches is to replace seepage and evaporation losses from Denver's in-channel reservoirs and, although Central is not a signatory, the 1940 agreement nonetheless benefits Central in at least two significant ways. First, Denver's contractual reservoir evaporation replacement obligation ensures that other water users, such as Central, have water available for their use that would have otherwise been in the river but for evaporation losses from Denver's reservoirs. Second, Central and other water users have reaped an indirect benefit by having imported water made available to them after Denver's initial use of the water, above and beyond the amount of evaporation losses Denver is required by law to replace.

In its objection to Denver's proposed decree, Central zealously argues that the 1940 agreement is the principal safeguard in place to preserve Central's water rights from injuries occasioned by Denver's un-replaced reservoir evaporation losses. However, Central's assurance that its water rights will be protected includes not only the 1940 agreement, but also the State Engineer's statutory administrative authority to require Denver to release water from the in-stream reservoirs to replace evaporation depletions. *See* C.R.S. § 37-84-117(5). The State Engineer's duty to monitor the amount of reservoir depletions and require Denver to fully replace those depletions exists separate and apart from the provisions of the 1940 agreement. Moreover, by requesting that the court order Denver to import a minimum volume of non-reusable western slope water each year that far exceeds the amount necessary to satisfy evaporation depletions, an inference arises that Central may be motivated by a desire to continue to reap the benefit of additional foreign water being placed in the South Platte River by Denver, as opposed to merely assuring that Denver replaces its reservoir evaporation depletions. The court concludes that there are ample safeguards in place to ensure that Denver replaces all out-of-priority depletions from its in-stream reservoirs without requiring, as a decree condition, that Denver to import a specific amount of non-reusable western slope water each year.

The court further finds that Central, as an opposing party, most certainly has the right to participate in this action and require Denver to prove that imported water from the Blue River System is available in sufficient quantities, timing, quality, and location for use as sources of replacement or substitute water in Denver's augmentation and exchange plans so that injury to Central's water rights will not occur. Notwithstanding Central's right to participate in this action, the court finds that the decree language proposed by Central, as set forth in sections 24, 25, and 26 in Central's proposed decree, is not necessary to protect Central's water rights. Therefore, the language proposed by Central in those three sections will not be included in the final decree.

Central's request to include decree language requiring Denver to adhere to the current Division of Water Resources (DWR) guidelines regarding reservoir administration is not appropriate for several reasons. First, the guidelines were prepared merely as a basic guide to DWR staff for the administration of reservoirs and they are not intended to serve as rules or regulations governing the storage of water. Second, the Blue River System decree provides the parameters of Denver's western slope Blue River exchange, and this court has no authority to modify that decree.

Central also requested revisions set forth in sections 6, 7.9, 7.10, and 8 of Central's proposed decree. Because Denver has not objected to the revisions to these four sections, the court will include Central's proposed revisions to those four sections in the decree.

The court grants Denver's motion to enter the decree, and the trial will be vacated.

I. BACKGROUND

In 1940, Denver and Consolidated Ditches entered into a contract whereby Denver agreed that it would not reuse or successively use water imported from the western slope after Denver's initial municipal use. This agreement was reached to ensure that Denver replaced water lost through evaporation and seepage from three of

its in-stream reservoirs located along the South Platte River. The claim in this case, which was bifurcated from a more comprehensive water use plan filed by Denver in 2004CW121,[3] relates to Denver's use of Blue River System[4] water imported from Colorado's western slope and, more particularly, whether water derived through Denver's Blue River System exchange is limited to a single use by Denver under the 1940 agreement.

In 1991, this court ruled that the 1940 agreement only prohibits Denver's reuse or successive use of imported western slope water from sources appropriated prior to May 1, 1940, including imported water from the Fraser and Williams Fork rivers. The court further ruled that Denver may reuse or successively use western slope water appropriated by Denver on or after May 1, 1940. *See Amended Ruling & Order re: In the Matter of the Application for Water Rights of the City & Cnty. of Denver in the South Platte River & its Tributaries*, Case No. 1981CW405, p. 16 (Water Div. 1, Nov. 12, 1991).

Denver and Consolidated Ditches filed pre-trial motions in the present action seeking a determination by the court as to whether Denver's western slope exchange plan, which involves out-of-priority diversions by Denver from the Blue River System that are replaced with water originating from the Fraser and Williams Fork rivers, renders water imported from the Blue River System exchange unavailable for re-use or successive use by Denver under the 1940 agreement. Relying on the Colorado Supreme Court's decision in *Centennial Water and Sanitation District v. City and County of Broomfield*, Consolidated Ditches argued that the "character" of the Blue River System exchange is defined by the priority date of the water Denver uses as replacement water in the exchange, which, when Denver uses replacement water

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[3] In 2004CW121, Denver sought quantification of the amount of water it is entitled to re-use and successively use from its lawn irrigation return flows (LIRF) as sources of replacement water in Denver's augmentation plans and in its substitution and exchange plans.

[4] The Blue River System includes water Denver diverts from the Snake River, Blue River, and Ten Mile Creek, all of which are tributaries of the Colorado River on the western slope.

diverted from the Fraser or Williams Fork rivers and stored in the Williams Fork Reservoir, would be July 4, 1921. 256 P.3d 677, 684 (Colo. 2011) ("The diversions at the upstream point take on the character of the water right used as a source of downstream substitute supply."). This court was not persuaded by Consolidated Ditches' argument and instead ruled that the administrative appropriation date of Denver's Blue River System water is 1946, as previously determined and decreed by the United States District Court for Colorado, and not the 1921 priority date of the Williams Fork Reservoir water used as a replacement source in Denver's western slope exchange. As a result, the court concluded that the 1940 agreement does not restrict Denver's right to reuse or successively use imported Blue River System water. Most assuredly, that ruling will be fodder for continued debate by the parties upon appeal.

Understanding that trial dates for this case loomed on the horizon, the court convened the attorneys for the parties for a status conference on July 14, 2016, at which time the attorneys for Denver and Consolidated Ditches indicated that the court's ruling on their pretrial motions resolved the issues that were to be contested at trial. The attorneys for those two parties, however, had not yet decided whether they would request that the order determining the question of law be entered as a final judgment of the court, under C.R.C.P. 54(b), thus enabling the parties to seek an immediate appeal of that ruling to the Colorado Supreme Court. As an alternative manner of concluding the trial court proceedings, Denver indicated that it may attempt to reach agreements with the remaining opposing parties regarding the language of the decree, with an understanding that those parties would retain their right to appeal the court's pretrial ruling. Denver selected the latter option and submitted a motion for entry of a final decree, along with a proposed decree prepared by Denver.

Although Denver indicated during the July 14 status conference that it would attempt to reach agreements with all opposing parties regarding the form of the final decree, Denver and Central were unable to reach accord. In its objection to Denver's proposed decree, Central argues that the decree does not conform to certain parts of

the court's order on the determination of question of law and it misstates Denver's rights. To cure the purported discrepancies between the court's order and the decree language, Central proposes that provisions be added to the decree requiring Denver to adhere to its historical practices regarding the amount of water Denver imports from the Williams Fork and Fraser rivers, which would include a minimum amount of non-reusable water Denver must import each year. Central also requests that the decree contain language specifying that Denver must provide accurate accounting of its diversions from the Blue River System in a manner consistent with current reservoir administrative guidelines. According to Central, these conditions would prevent Denver from reducing the amount of water it has historically imported from sources that cannot be reused or successively used under the 1940 agreement after Denver begins reusing water originating from the Blue River System. Central is concerned that any reduction in the amount of non-reusable water Denver has historically imported may result in Denver falling short of its obligation to replace out-of-priority reservoir depletions under the 1940 agreement, thus causing injury to Central's water rights.

Denver argues that Central does not have standing to request additional terms and conditions to the decree because Central was not a party to the 1940 agreement. Denver further contends that Central's ownership of shares in several of the ditch companies that are members of Consolidated Ditches does not confer any authority to Central to direct the actions of either Consolidated Ditches or its individual member ditches regarding enforcement of the 1940 agreement.

Central counters that the 1940 agreement was designed to protect the rights of all South Platte River water users from injurious evaporation depletions from Denver's reservoirs, not just Consolidated Ditches and its member ditch companies. Therefore, Central believes that any water user that may be adversely impacted by a potential breach of the 1940 agreement by Denver has standing to enforce the terms of that contract. Central further argues that it has standing as an opposing party in this action to protect its water rights from potential injury from Denver's augmentation plan, irrespective of whether Central has standing under the 1940 agreement.

II. ANALYSIS

As previously noted, the purpose of the 1940 agreement between Denver and Consolidated Ditches was to ensure that Denver fully replaced all out-of-priority evaporation depletions from its in-stream reservoirs. This agreement was deemed necessary by Consolidated Ditches in 1940, and agreed to by Denver, in large part because the State Engineer did not have the authority at that time to require Denver to replace reservoir evaporation depletions. That changed in 1965, when the General Assembly amended C.R.S. § 148-7-17, thereby providing the State Engineer with express authority to order the release of water from reservoirs to replace evaporation depletions. The State Engineer's statutory authority to order reservoir releases is now found at C.R.S. § 37-84-117(5). Citing to the recently enacted statute, the Division One Engineer notified Denver by letter in August of 1966 that Denver had to release 4,688 acre feet of water to the South Platte to account for evaporation losses from Denver's three in-stream reservoirs. Denver contested the State Engineer's request and countered that the amount of water it returned to the South Platte River, after its first use of imported water, was more than adequate to replace evaporation from Denver's reservoirs. The Division Engineer was satisfied that Denver was meeting its reservoir evaporation replacement obligations through return flows from imported water and thus did not utilize his statutory power to require Denver to release additional water from its reservoirs.

After receiving the Division Engineer's August 1966 letter, Denver entered into an agreement with the Adolph Coors Company (Coors) in 1969, which would have allowed Coors to divert water upstream in exchange for downstream releases by Denver of treated effluent from the Metro wastewater treatment plant. This led to the filing of competing complaints for declaratory relief by Denver on one side and Fulton

Irrigating Ditch Company (Fulton) and Cache la Poudre Water Users Association[5] (Cache) on the other, with each side requesting a determination from the court on the validity of the 1940 agreement. Denver argued that the 1940 agreement was terminated by the Division Engineer's letter in 1966 requesting that Denver release water from its reservoirs to replace depletions. The trial court ruled that the 1940 agreement was not terminated, in part because the State and Division Engineers were satisfied that Denver was meeting its reservoir evaporation depletions through return flows from imported water, as contemplated under the 1940 agreement. This finding was affirmed by the Colorado Supreme Court. *City & Cnty. of Denver v. Fulton Irrigating Ditch Co.,* 506 P.2d 144, 153 (Colo. 1972). Notably, neither the trial court nor the Colorado Supreme Court were called upon to decide whether Denver's return flows from imported water sources fully replaced its reservoir depletions; rather, the issue presented was limited to whether the Division Engineer's letter to Denver in 1966 terminated the 1940 agreement. Because the 1940 agreement remained intact after the *Fulton* decision, Denver continued its historical practice of replacing reservoir evaporation depletions with imported water return flows, a practice apparently acquiesced to by the State and Division Engineers. A fear raised by Fulton and Cache in *Fulton* was that Denver would primarily use and recapture imported water during the irrigation season, thereby shorting the river of return flows Denver was contractually obligated to provide. The Supreme Court acknowledged, albeit in dictum, that water users would be afforded much better protection from injury to their water rights by the State Engineer, acting pursuant to authority that had yet to be created by the legislature, as opposed to through a judicial pronouncement. *Id.* at 149. The concerns presently raised by Central to support its request for additional decree terms bear striking similarity to those presented by Fulton and Cache in the *Fulton* case.

[5] Fulton Irrigating Ditch Company is a member of Consolidated Ditches and was a signatory to the 1940 agreement, but Cache la Poudre Water Users Association was neither a member of Consolidated Ditches nor signatory to the 1940 agreement.

Fast forward now to 1981, when Denver filed an application in 1981CW405, seeking court approval to reuse and successively use Blue River System water as a replacement source for wells removing tributary ground water, a claim ardently contested by Consolidated Ditches. It was through that action that this court first ruled that the 1940 agreement only limits Denver to a single use of imported water from sources decreed prior to May 1, 1940, and that Denver may reuse and successively use imported water from sources decreed after May 1, 1940. Integral to the court's ultimate decision was its determination that Denver had fully replaced its in-stream reservoir evaporation depletions through return flows from imported water sources decreed prior to May 1, 1940. In fact, the court concluded that Denver had historically exceeded its replacement obligations by several thousand acre feet per year through return flows from pre-May 1, 1940 water sources.

Central focuses on the court's previous analysis of the historical amounts of water imported by Denver from pre-May 1, 1940 sources as a foundation for its argument that Denver must continue to import approximately 59,891 acre feet of non-reusable water per year. Central alleges that this is the amount of water Denver imported, on average, from pre-May 1, 1940 sources between 1959 and 1990. However, as this court found in 1981CW405, Denver imported only 31,304 acre feet in 1939, 38,672 acre feet in 1940, and 45,326 acre feet in 1941. Using the amount of water imported in 1940 (38,672 acre feet) in its assay, the court determined that Denver's return flows totaled 12,506 acre feet that year, while evaporation losses from Denver's reservoirs were estimated to be 10,142 acre feet. Thus, Denver relinquished 2,364 acre feet of water to the South Platte River in 1940 after fully meeting its replacement requirements. Yet, Central presses for a decree condition to require Denver to import 59,891 acre feet per year from non-reusable imported water sources, which is 65% more water than Denver imported in 1940. The obvious result, if such a condition is levied against Denver, will be an even larger windfall of foreign water deposited into the South Platte River for use by Central and other downstream water users. Central may not wield the 1940 agreement against Denver in an attempt to garner additional surplus return flows for its own use.

Recall again that the purpose of the 1940 agreement was for Denver to replace evaporation depletions from its in-stream reservoirs, and thus the agreement offers a shield of protection to other water users that Denver's reservoirs do not pilfer through evaporation that which belongs to the river, should Denver continue to rely on imported water return flows to meet its replacement obligations. However, unlike the circumstances existing in 1940, the State Engineer now has not only the authority, but also the duty, to order Denver to release water from its reservoirs if Denver's importation of non-reusable water proves insufficient to meet its reservoir evaporation replacement obligation. C.R.S. § 37-84-117(5). Therefore, although Central has the right, under C.R.S. § 37-92-305(3)(a), to propose decree terms and conditions to prevent injury, the court finds that requiring Denver to import a minimum of 59,891 acre feet of non-reusable water each year is not necessary to prevent injury to Central's water rights. As Judge Behrman aptly observed in 1991 when issuing the amended order in Case No. 1981CW405, water users are entitled to avail themselves of statutory protections through the State Engineer, "should Denver attempt to juggle its use of Colorado River Basin water to the detriment of Consolidated Ditches." 1981CW 405 Order, p. 16. That observation remains true today.

The court is also not persuaded by Central's argument that the decree should include a directive that Denver must operate its Blue River System exchange in compliance with the General Administrative Guidelines for Reservoirs (Reservoir Guidelines). These guidelines were prepared as "a basic practical guide for the staff of [DWR], including division engineers, water commissioners and others charged with administering the state's many reservoirs." COLO. DIV. WATER RES., GENERAL ADMINISTRATION GUIDELINES FOR RESERVOIRS, p. 2 (rev. Feb. 2016). By design, these guidelines merely provide DWR staff with basic concepts pertaining to the storage of water, and staff is advised that they should not rely on the Reservoir Guidelines as administrative or legal authority because the guidelines are not intended to "function as rules or regulations governing storage of water." *Id.* Central has not provided any persuasive reason for this court to require Denver to abide by guidelines that are not even considered to be rules and regulations by the DWR. In addition, and more

importantly, Central is asking this court to impose terms and conditions in this case that may directly impact how Denver operates its western slope Blue River System exchange. The Blue River System exchange was decreed by the United States District Court, and even if this court had concluded that imposing such a condition was necessary to protect Central's rights, this court has no authority to modify Denver's rights and obligations as set forth in the Blue River System decree.

III. ORDER

Based on the foregoing, the court finds that Central's proposed sections 24, 25, and 26 are not necessary to prevent injury to Central's water rights.

Because Denver did not object to the proposed revisions to sections 6, 7.9, 7.10, and 8 of Central's version of the decree, Denver shall include those revisions in the final decree.

The court grants Denver's motion to enter a final decree, which shall be revised by Denver consistent with this order, and submitted by September 30, 2016. The trial scheduled to begin on October 17, 2016, is hereby vacated.

Dated: September 25, 2016

BY THE COURT

James Hartmann

James F. Hartmann
Water Judge, Water Division One