

COLORADO SUPREME COURT
2 E. 14th Street
Denver, Colorado 80203

Appeal from District Court, Water Division No. 2,
Pueblo County
Honorable Larry C. Schwartz, Water Judge
Case No. 2015 CW 3006

Concerning the Application for Water Rights of:
HCB Ventures, LLC, in El Paso, Elbert, Lincoln,
and Crowley Counties.

Applicant: HCB VENTURES, LLC

v.

Opposers-Appellees: HORSE CREEK WATER
USERS ASSOCIATION; DBORCUTT, LLC;
HIGH MESA, LLC; TWIN ACRES, LLC;
ROBERT PAYNE; BARBARA PAYNE deceased;
ROBERT THURSTON; ANN BLASINGAME, as
attorney in fact for KAREN ORCUTT; STATE
BOARD OF LAND COMMISSIONERS; BOX
SPRINGS CANAL & RESERVOIR COMPANY;
and DEAN and AUDRA GOSS

and

Appellee pursuant to C.A.R. 1(e):

Division Engineer, Water Division 2

and concerning

Attorney-Appellant: PETROCK & FENDEL, P.C.

▲ COURT USE ONLY ▲

Case No.

Attorneys for Attorney-Appellant: GORDON & REES LLP John R. Mann, #16088 555 17th Street, Suite 3400 Denver, Colorado 80202 (303) 534-5160 jmann@gordonrees.com	
NOTICE OF APPEAL	

Attorney-Appellant Petrock & Fendel, P.C., by counsel, Gordon & Rees LLP, submits the following Notice of Appeal pursuant to C.A.R. 1(e), 3, and 4:

I. TRIAL COURT INFORMATION

Trial Court: District Court, Water Division No. 2, Pueblo County.

Trial Court Judge: Honorable Larry C. Schwartz.

Parties Initiating the Appeal: Attorneys-Appellants Petrock & Fendel, P.C.

Trial Court Case No.: 2015 CW 3006

**II. DESCRIPTION OF NATURE OF CASE
AND DISPOSITION IN TRIAL COURT**

Nature of case: In this water case arising from the application of Applicant HCB Ventures, LLC (“HCB”) for amendment to plan for augmentation, Applicant’s attorneys, Petrock & Fendel, P.C., appeal from the two orders of the Water Court dated October 25, 2016, awarding attorney fees and costs to Opposers against Petrock & Fendel jointly and severally with HCB.

HCB is a member of the Horse Creek Water Users Association (HCWUA). HCB’s well is located in the Horse Creek Basin in El Paso County. HCB’s well is used for irrigation under the HCWUA Augmentation Plan decreed in 1998 in Case No. 97CW52, one of two augmentation plans in the Horse Creek Basin.

HCB filed its Application for Amendment to Plan for Augmentation in March 2015. In its Application, HCB sought to add HCB's well as an additional augmented structure to the 1998 "Preisser Decree" entered in Case No. 97CW106 so that it may be used for industrial use, including all uses associated with oil and gas drilling and production, directly and following storage, within the Horse Creek Basin and outside the basin in El Paso, Elbert and Lincoln counties. The Preisser Decree was a stipulated decree resulting from a settlement agreement dated May 4, 1998, to which HCWUA was a party. (Petrock & Fendel, P.C. was not a party to the May 4, 1998 settlement agreement). The settlement agreement provided in Section X.3 that "In the event of any litigation between the parties arising out of this Agreement, the prevailing party(ies) shall be entitled to the award of such attorney fees as the Court deems just."

HCB's application was opposed by HCWUA and other opposers. On July 1, 2016, the water court entered an order dismissing HCB's application for lack of subject matter jurisdiction, finding that it lacked subject matter jurisdiction over the relief requested in HCB's Application for Amendment to Plan for Augmentation of a previously decreed augmentation plan. As the court explained in its order, HCB's claim "is really a request either to re-open the plan for augmentation in case 97CW1006, or to amend the application for the plan for augmentation in case 97CW106, to add an additional augmented structure." The court determined that it lacked subject matter jurisdiction because the augmentation plan is not a "water right" that can be modified. The court concluded that the Preisser Augmentation Plan "was created and can only operate with wells included in the application at the time the Preisser Augmentation Plan" agreed to by all parties. The court further determined that, even if it had subject matter jurisdiction, it nevertheless agreed with Opposers that "contract principles prevent the relief requested because there was a stipulated decree limiting the augmented structures of the Preisser Augmentation Plan to the six Preisser Wells." The court concluded that HCB "is not prohibited from using the HCB well, as long as it meets the requirement for an augmentation plan and files an appropriate application. It cannot circumvent this requirement by attempting to add the HCB well to a previously decreed augmentation plan."

In a subsequent order entered August 30, 2016, the water court determined that it did have subject matter jurisdiction over HCB's application, and amended its July 1, 2016 order: "The Court finds that the water court has exclusive subject matter jurisdiction over the relief requested in the Application for Amendment to

Plan for Augmentation. All other judgments in the July 1, 2016 order remain in effect, including dismissal of the Application for Amendment to Plan for Augmentation because the contractual provisions of the Settlement Agreement prevent adding the HCB well to the Preisser Augmentation Plan.” The court again denied HCB’s application on the ground that “Under the facts and decreed augmentation plan in this particular case, Applicant’s request to change the decreed augmentation plan is simply not permitted by the decree or settlement agreement.” The water court further granted Opposers leave to request attorney fees and costs based on the fee-shifting provision of the May 4, 1998 settlement agreement.

Following submissions of attorney fee affidavits and bills of costs by Opposers, the water court, in two orders dated October 25, 2016, awarded attorney fees and costs to Opposers and against HCB and Petrock & Fendel jointly and severally. To Opposer Box Springs Canal & Reservoir Company, the court awarded \$17,650 in fees pursuant to the May 4, 1998 settlement agreement, and \$2,957.11 in costs pursuant to § 13-16-113, C.R.S., plus interest. The court’s order also determined that responsibility for the award of fees and costs is joint and several as between HCB and Petrock & Fendel.

To Opposers Horse Creek Water Users Association, DBOrcutt, LLC, High Mesa Farms, LLC, Twin Acres, LLC, Robert Payne, Barbara Payne deceased, Robert Thurston, Ann Blasingame, as attorney in fact for Karen Orcutt, the State Board of Land Commissioners, and Dean and Audra Goss, the court awarded attorney fees pursuant to the May 4, 1998 settlement agreement and costs pursuant to § 13-16-113 in the total amount of \$98,745.65, plus interest. The court also found “that an award of attorneys’ fees is proper against Applicant (and its attorneys jointly and severally) pursuant to C.R.S. § 13-17-102. In light of the facts of this litigation, the relief requested by Applicant lacked substantial justification.” The court also awarded these Opposers costs against Petrock & Fendel jointly and severally with HCB.

Although the water court made no finding that HCB’s or Petrock & Fendel’s opposition to the Opposers’ motions for attorney fees was itself groundless, frivolous, or otherwise lacking in substantial justification under § 13-17-102, its October 25, 2016 orders nevertheless awarded all Opposers “additional fees and costs incurred for the prosecution of the motion for fees,” *i.e.*, “fees on fees” and “costs on costs.” Opposers’ requests for “fees on fees” and “costs on costs” are currently

pending.

Judgment and orders being appealed and appellate court jurisdiction: The two orders of judgment dated October 25, 2016 in this case are being appealed. Jurisdiction is with this Court pursuant to Colo. Const. art. VI, § 2(2) and § 13-4-102(1)(d), C.R.S.

Whether the judgment or order resolved all issues before the trial court including attorney fees and costs: The final orders entering judgment resolved all issues pending before the trial court except for the amount of “fees on fees” and “costs on costs” to be awarded to Opposers.

Whether judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b): No.

Date judgment or order was entered: The judgment being appealed was entered on October 25, 2016 and was transmitted to counsel electronically on that date.

Whether extension was granted to file motion for post-judgment relief: No.

Date any motion for post-judgment relief was filed: On November 8, 2016, Opposer Silhouette Ranches, LLC filed a Motion for Clarification of the Court’s October 25, 2016 Orders Awarding Attorneys’ Fees and Costs pursuant to C.R.C.P. 59(a)(4). Opposer Silhouette Ranches, LLC is not a party to this appeal, and its motion does not seek relief that would affect the October 25, 2016 judgments against Petrock & Fendel: “Silhouette requests this Court amend the final sentence of the HCWUA Order and Box Springs Order to clarify that it found Silhouette liable pursuant to the Settlement Agreement only, and that Silhouette is not responsible for costs in this matter.”

Date any motion for post-judgment relief was denied: Not applicable.

Whether any extension was granted to file notice of appeal: No extension of time in which to file the notice of appeal has been sought and none has been granted.

III. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

1. Did the water court err in awarding attorney fees to Opposer Box Springs Canal & Reservoir Company and against Petrock & Fendel jointly and severally with HCB Ventures pursuant to the fee-shifting provision of a contract to which Petrock & Fendel was not a party?

2. Did the water court err in awarding costs to Opposer Box Springs Canal & Reservoir Company and against Petrock & Fendel jointly and severally with HCB Ventures pursuant to the fee-shifting provision of a contract which does not authorize an award of costs to the prevailing party?

3. Did the water court err in awarding costs to Opposers and against Petrock & Fendel jointly and severally with HCB Ventures, when no statute or rule authorizes an award of costs against the attorney for an unsuccessful party?

4. Did the water court err or abuse its discretion in awarding attorney fees to Opposers and against Petrock & Fendel pursuant to § 13-17-102, C.R.S., because HCB Ventures, LLC's application did not lack substantial justification?

5. Did the water court err or abuse its discretion in awarding attorney fees to Opposers and against Petrock & Fendel pursuant to § 13-17-102, C.R.S., without making the findings required by § 13-17-103, C.R.S., and without making any findings as to the basis for its award sufficient to permit meaningful appellate review?

6. Did the water court err or abuse its discretion in awarding "fees on fees" to Opposers and against Petrock & Fendel pursuant to § 13-17-102, C.R.S., without making any finding that Petrock & Fendel's opposition to the Opposers' motions for attorney fees lacked substantial justification under § 13-17-102?

7. Did the water court err or abuse its discretion in awarding "costs on costs" to Opposers and against Petrock & Fendel when no statute or rule authorizes an award of costs against the attorney for an unsuccessful party?

IV. TRANSCRIPT INFORMATION

Whether a transcript of evidence is necessary: No.

V. MAGISTRATE INFORMATION

Whether the order on review was issued by a magistrate where consent was necessary: No.

VI. ATTORNEY INFORMATION

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VII. APPENDIX TO THIS NOTICE OF APPEAL

The Appendix contains the orders in the case dated July 1, 2016, August 30, 2016, and October 25, 2016. No motion for leave to proceed *in forma pauperis* was filed.

Respectfully submitted this 13th day of December, 2016,

GORDON & REES LLP

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Petrock & Fendel, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2016, a true and correct copy of the foregoing **NOTICE OF APPEAL**, was electronically filed and served via ICCES or U.S. Mail, first class postage prepaid, to the following:

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s/John R. Mann

DISTRICT COURT, WATER DIVISION NO. 2, COLORADO 501 North Elizabeth Street, Suite 116 Pueblo, CO 81003	DATE FILED: July 1, 2016 3:58 PM CASE NUMBER: 2015CW3006 <p style="text-align: center;">• COURT USE ONLY •</p>
Concerning the Application for Water Rights of: HCB Ventures, LLC, in El Paso, Elbert, Lincoln, and Crowley Counties.	
	Case No.: 15CW3006
ORDER REGARDING SUBJECT MATTER JURISDICTION	

This matter is before the Court on HCB Venture’s Application for Amendment to Plan for Augmentation filed on March 31, 2015. The Court, having reviewed the entire case file, including the pleadings and exhibits filed in this matter, enters the following FINDINGS AND CONCLUSIONS:

FACTS AND PROCEDURAL HISTORY

1. Applicant HCB Ventures, LLC filed an Application for Amendment to Plan for Augmentation on March 31, 2015. Opposers filed timely Statements of Opposition on May 28, 2015 and May 29, 2015. HCB Ventures is the successor in interest to the Preisser Wells and Preisser Augmentation Plan. The Preisser Augmentation Plan was approved by Water Division 2 via Decree in Colorado Water Court case 97CW106. The 97CW106 case was settled via

Stipulated Decree, and the Settlement Agreement was attached to the 97CW106 Decree as Appendix C. The Settlement Agreement expressly states that the Preisser Augmentation Plan relates to the Pressier Wells. The Preisser Wells, in turn, are defined as six wells owned by Preisser and located in the Horse Creek Basin. The HCB well is also located in the Horse Creek Basin.

ISSUE PRESENTED

2. Applicant seeks to amend the Preisser Augmentation Plan decreed in 97CW106 to add the HCB well as a 7th augmented structure. The original Application for a Plan for Augmentation in 97CW106 included six augmented structures. Applicant does not cite any legal authority, whether statutory or case law, for the proposition that a decreed augmentation plan can be amended after the period of reserved jurisdiction has expired.

SUBJECT MATTER JURISDICTION

3. A court must have jurisdiction over the subject matter raised in a matter before the court, otherwise any rulings and orders issued are unenforceable and void. Lack of subject matter jurisdiction is a jurisdictional defect that goes to the heart of the court's power to issue enforceable judgments; the defense is not waived by a party's failure to raise it in the trial court and may be raised at any stage of a proceeding. Further, a court may sua sponte consider the court's lack of subject matter jurisdiction notwithstanding the parties' failure to raise the issue. *Sullivan v. Board of County Commissioners*, 692 P.2d 1106 (Colo.1985); *In re Marriage of Dureno*, 854 P.2d 1352 (Colo. App. 1992); *In re Support of E.K.*, 2013 COA 99, ¶7, 2013 WL 3440077 (Colo. App. 2013).

Parties cannot confer subject matter jurisdiction on a Court. Only personal jurisdiction can be waived by the parties.

ANALYSIS

4. This Court lacks subject matter jurisdiction over the relief requested in the Application for Amendment to Plan for Augmentation of a previously decreed augmentation plan. C.R.C.P. 12(b) (1).

5. There is no legal authority to support the proposition that a decreed augmentation plan can be amended after the period of reserved jurisdiction has expired. C.R.S. § 37-92-101 *et seq.*; *Farmer's Reservoir and Irrigation Co. v. Consolidated Mut. Water Co. Supreme Court of Colorado*, 33 P.3d 799 (Colo. 2001)(En Banc).

6. Applicant's claim is really a request either to re-open the plan for augmentation in case 97CW1006, or to amend the application for the plan for augmentation in case 97CW106, to add an additional augmented structure. Neither claim can prevail.

8. The Court in 97CW106 retained jurisdiction for two years to re-consider injury to senior water right holders. See provisions 12 and 24 of Decree. The period of reserved jurisdiction has long passed, and the Court no longer has jurisdiction to re-consider injury to senior water right holders based on the decreed Preisser Plan for Augmentation. Applicant in this case admits that an injury analysis would have to occur to approve its request to amend the decreed plan for augmentation.

9. Pursuant to C.R.S. § 37-92-305(3)(a) “A ...plan for augmentation...shall be approved if such change, contract, or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” An injury analysis must occur to add a 7th augmented structure (HCB Well) to the Preisser Augmentation Plan, and the time period to re-consider injury to senior water right holders has passed, thereby divesting this Court of subject matter jurisdiction. See also C.R.S. 37-92-304(6); *In re Concerning Application for Plan for Augmentation of City and County of Denver*, 44 P.3d 1019 (Colo. 2002)(“in the interest of preserving the finality of water appropriations, the water court’s ability to revisit injury determinations is limited to the period of retained jurisdiction, or its extension by the court.”). In fact, invoking the Court’s reserved jurisdiction would have to occur in case 97CW106, and not in a new case.

10. Further, the application for a plan for augmentation in 97CW106 cannot be amended to refer back to the original application, and especially not after a decree has entered approving a Plan for Augmentation. *U.S. v. Bell*, 724 P.2d 631 (Colo. 1986)(an amendment to a water rights application cannot relate back to date original application was filed because a reasonably prudent person would not be on notice, based on the application and resume, of the new issue raised in the amended application.)

11. The purpose of an augmentation plan is to permit ground water to be pumped out of priority upon the provision of adequate substitute or replacement water in time, location, amount, and quality, to satisfy senior water

rights. The augmentation plan is specific to the augmentation structures listed in the original application. Although water rights may be modified, a plan for augmentation is not a "water right." Instead, ground water rights are operated as part of a plan for augmentation. The plan for augmentation, therefore, is specific and limited to the water rights being operated. The court cannot modify the water rights being operated under a plan for augmentation that has already been decreed. The request to amend a decreed plan for augmentation after the court's retained jurisdiction has lapsed would be inconsistent with the purpose and intent of an augmentation plan as set forth in the Water Right Determination and Administration Act at C.R.S. § 37-92-101 *et seq.*

12. The Court therefore finds and concludes that the Preisser Augmentation Plan was created and can only operate with wells included in the application at the time the Preisser Augmentation Plan was thoughtfully crafted, and agreed to by all parties.

13. Assuming, *arguendo* that the Court has subject matter jurisdiction, the Court agrees with Opposers' position in its Motion for Summary Judgment that contract principles prevent the relief requested because there was a stipulated decree limiting the augmented structures of the Preisser Augmentation Plan to the six Preisser Wells. *USI Properties East v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). The Settlement Agreement, provision 3, states in part, "References in this Agreement to 'Preisser's plan for augmentation' refer to such a plan for the Preisser Wells." The Preisser Wells, in turn, are *limited* to six wells based on the plain and unambiguous language of the Settlement Agreement and

Decree. See Provision 4A of Settlement Agreement “The total number of Preisser Wells is limited to six.”

14. The Applicant has not pointed to any specific language in the Settlement Agreement for its proposition that there was a meeting of minds that Preisser could add another well or augmentation structure to the Preisser Augmentation Plan as long as the addition of the new structure did not exceed the total volume of water used by the existing six wells.

15. Applicant is not prohibited from using the HCB well, as long as it meets the requirement for an augmentation plan and files an appropriate application. It cannot circumvent this requirement by attempting to add the HCB well to a previously decreed augmentation plan.

CONCLUSION

16. The Court concludes that it lacks subject matter jurisdiction to amend a previously decreed plan for augmentation after the period of reserved jurisdiction has expired. Applicant must file a new Plan for Augmentation and cannot amend the Preisser Augmentation Plan approved by decree in case 97CW106 to add an additional augmentation structure.

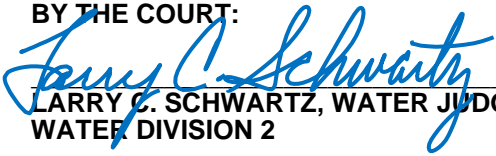
ORDER

IT IS THEREFORE ORDERED that Applicant’s Application for Amendment to Plan for Augmentation is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the Trial Readiness Conference scheduled July 21, 2016, at 2:00 p.m. and the Court trial scheduled August 29 through September 2, 2016, are hereby vacated.

Dated this 1st day of July, 2016.

BY THE COURT:


LARRY C. SCHWARTZ, WATER JUDGE
WATER DIVISION 2

matter jurisdiction over the relief requested in the Application for Amendment to Plan for Augmentation.

2. Water courts have exclusive jurisdiction over what the General Assembly refers to as “water matters.” C.R.S. § 37-92-203(1). Water matters may include matters that fall beyond the special statutory proceedings for determination of water rights pursuant to the Water Rights Act.
3. The Colorado Supreme Court has established categories of proceedings that are outside the scope of traditional “water matters” but are nonetheless within the water court's jurisdiction. They include, *inter alia*, matters that affect the use of water, that are related to the administration of water, or that require reliance upon the expertise of the water judge. See, e.g., *Kuiper v. Well Owners Conservation Association*, 490 P.2d 268, 274 (1971)(the Water Rights Act need not mention a specific type of action to confer the water court's jurisdiction over it); *State Eng'r v. Smith Cattle, Inc.* 780 p2d 546 (Colo. 1989); *Groundwater Appropriators of South Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 27 (Colo. 2003).
4. The Water Rights Act expressly provides for the approval of plans for augmentation and changes to existing water rights. C.R.S. § 37-92-305. The Act provides that various aspects of a water right may be changed, including the manner of use and place of use. However, the Water Rights Act is silent on the issue of changes to a plan for augmentation.

5. The Court does not have to rule on the issue of whether a request to change a decreed plan for augmentation falls squarely within the scope of a “water matter” set forth in the statutory proceedings of the Water Rights Act. Even if the request is not a “water matter” expressly provided for in the Water Rights Act, the Court hereby finds that the Water Court has exclusive subject matter jurisdiction over a request to change a decreed plan for augmentation because the request affects the use of water, is related to the administration of water, and requires reliance upon the expertise of the water judge. *City of Sterling v. Sterling Irr. Co.*, 42 P.3d 72 (Colo. App. 2002) (adjudication of right to use water is water matter within exclusive jurisdiction of water court; substance of relief sought, rather than form of pleading, determines whether particular action is water matter); See also *Crystal Lakes Water and Sewer Ass'n v. Backlund*, 908 P.2d 534, 539 (Colo. 1996); *Humphrey v. Southwestern Development Co.*, 734 P.2d 637, 640 (Colo. 1987).
6. The Court hereby finds that the water court has subject jurisdiction over the relief requested in the Application for Amendment to Plan for Augmentation and, therefore, provisions 3 through 11, and 16, of the July 1, 2016 order, are hereby set aside and vacated.

SUMMARY JUDGMENT LEGAL STANDARD

7. Summary judgment pursuant to C.R.C.P. 56 is a drastic remedy appropriate only when the pleadings and supporting documents show that no genuine issue as to any material fact exists and the moving party is

entitled to summary judgment as a matter of law. C.R.C.P. 56; *West Elk Ranch, LLC v. United States*, 65 P.3d 479, 481 (Colo.2002). The nonmoving party is entitled all favorable inferences reasonably drawn from the undisputed facts. *In re Tonko*, 154 P.3d 397, 402 (Colo. 2007). Interpretation of a contract is a question of law that is appropriate to resolve on a motion for summary judgment. *Anderson v. Denver Publ. Sch. Emps. Pension & Benefit Ass'n*, 935 P.2d 31, 33 (Colo. App. 1996).

ANALYSIS

Opposers' Motion for Summary Judgment

8. The Preisser Augmentation Plan was created and can only operate with wells included in the application at the time the Preisser Augmentation Plan was thoughtfully crafted, and agreed to by all parties.
9. The Court is persuaded by Opposers' that contract principles prevent the relief requested by Applicant because there was a stipulated decree limiting the augmented structures of the Preisser Augmentation Plan to the six Preisser Wells. *USI Properties East v. Simpson*, 938 P.2d 168, 173 (Colo. 1997). The Settlement Agreement, provision 3, states in part, "References in this Agreement to 'Preisser's plan for augmentation' refer to such a plan for the Preisser Wells." The Preisser Wells, in turn, are *limited* to six wells based on the plain and unambiguous language of the Settlement Agreement and Decree. See Provision 4A of Settlement Agreement "The total number of Preisser Wells is limited to six."

10. Applicant has not pointed to any specific language in the Settlement Agreement for its assertion that there was a meeting of minds that Preisser could add another well or augmentation structure to the Preisser Augmentation Plan as long as the addition of the new structure did not exceed the total volume of water used by the existing six wells.
11. Applicant is not prohibited from using the HCB well, as long as it meets the requirement for a *new* augmentation plan and files an appropriate application. It cannot circumvent the express provisions of the existing decreed augmentation plan.
12. The contractual provisions of the May 4, 1998 Settlement Agreement prohibits the addition of the HCB well to the decreed Preisser Augmentation Plan. The Court does not rule on Opposers' request for declaratory judgment, which is moot, given the Court's granting the Opposers' Motion for Summary Judgment. The Court hereby supplements its July 1, 2016 order with the following findings and conclusions.
13. The Court finds that the May 4, 1998 Settlement Agreement was incorporated by reference into the 97CW106 Decreed Augmentation Plan, which was attached as Appendix C. Therefore, contract principles apply to interpretation of the 97CW106 stipulated and decreed Preisser Augmentation Plan. *USI Properties East v. Simpson*, 938 P.2d 168, 173 (Colo. 1997); *City of Aurora v. ACJ P'ship*, 209 P.3d 1076 (Colo. 2009); *Cherokee Metro. Dist. v. Simpson*, 148 P.3d 142 (Colo. 2006); *City and*

County of Denver v. City of Englewood, 826 P.2d 1266, 1271 (Colo. 1992).

14. The Court finds the following contractual language contained in the Settlement Agreement applicable to Opposers' Motion for Summary Judgment:

- a. "Reference in this Agreement to 'Preisser's plan for augmentation' refer to such a plan for the Preisser Wells." Page 3, ¶ 3.
- b. "The total number of Preisser Wells is limited to six. The relocated wells must remain within the current property boundaries of Preisser's land." Page 3, ¶ 4A.
- c. "Preisser may replace any of the six wells, only so long as each replacement well is within 200 feet of the replaced well, the replacement well penetrates only the Nussbaum Formation, and does not exceed the diameter of the replaced well." Page 4, ¶ 4.D
- d. "Preisser agrees not to seek supplemental wells for any of the Preisser Wells or their replacements." Page 4, ¶ 4.E.
- e. "Preissser may not seek alternate points of diversion for any points in addition to the six wells." Page 4, ¶ 4.F.
- f. "This Agreement may not be amended nor any rights hereunder waived except by an instrument in writing signed by all parties..." Page 15, provision 7.

15. The Court finds that the above contractual terms are plain and unambiguous. There are no provisions in the Settlement Agreement or decreed augmentation plan that allow additional augmentation structures to be added to the decreed plan.
16. Clearly, C.R.S. 37-92-305(8)(c) allows additional sources of water to be added to an augmentation plan, ***if the plan provides for procedures to add additional or alternate sources of replacement water.*** (emphasis added)
17. A “Replacement well” is a “new well which replaces an existing well and which shall be limited to the yield of the original well and shall take the date of priority of the original well, which shall be abandoned upon completion of the new well.” C.R.S. § 37-90-103(13). Pursuant to C.R.S. § 37-90-103(17) a “Supplemental well” means “any well drilled and used, in addition to an original well or other diversion, for the purpose of obtaining the quantity of the original appropriation of the original well.” HCB is proposing to use the HCB well in place of Preisser well 15, see page 7 and 8 of Opposers’ engineering report, which raises questions as to whether the HCB well is, in fact, a replacement or supplemental well. Even if the HCB well was a replacement well under the definition of C.R.S. § 37-90-103(13), the HCB well does not qualify as a replacement well under the terms of the Settlement Agreement because it is not located within 200 feet of the Preisser well being replaced and may not meet the other criteria in the plan. The Settlement Agreement expressly states that

supplemental wells may not be sought. The Court finds that the express language of the Settlement Agreement limits the augmentation structures to the six Preisser Wells and, therefore, ruling on the issue of whether the HCB well is, in fact, a supplemental well, is not necessary to the court's order granting Opposers' Motion for Summary Judgment.

18. The Court rejects HCB's argument that the Settlement Agreement is silent on the issue of whether additional wells can be added to the Preisser Augmentation Plan. Instead, the Court finds that the plain and unambiguous language of the Settlement Agreement, including the terms set forth above, limit the Preisser Augmentation Plan to the six Preisser Wells or replacement wells that remain within the property boundaries of Preisser's land, as set forth in the Settlement Agreement. Adding the HCB well to the decreed Preisser Augmentation Plan is in violation to the express contractual language of the May 4, 1998 Settlement Agreement.

Applicant's Motion for Partial Summary Judgment

19. HCB's Motion for Partial Summary Judgment requesting dismissal of claim 2.b. of the statement of opposition filed by Box Springs Canal and Reservoir Company is DENIED. Provision 2.b. of the Statement of Opposition relates to interpretation of the Settlement Agreement, which is addressed above. For the above reasons, the Court finds that adding the HCB well to the Preisser Augmentation Plan, as proposed in the Application for Amendment to Plan for Augmentation, is in violation of the Settlement Agreement incorporated into the 97CW106 Decree.

Applicant's request that the Court dismiss the claim identified in Paragraph 2.b of the statement of opposition filed by Box Springs is denied as moot given the dismissal of the Application in this matter.

Adding Wells to a Decreed Augmentation Plan

20. Applicant's requested relief, is not allowed by and is specifically precluded by the terms of the 97CW106 Decree and the Settlement Agreement that is part of the 97CW106 Decree. To hold otherwise would require this Court to unilaterally amend the Settlement Agreement in contravention of section X.7, page 15 of the Settlement Agreement that states that it may not be amended nor any rights thereunder waived except in writing signed by all parties. Further, the terms of the 97CW106 Decree and the Settlement Agreement only allow for replacement wells to replace the decreed augmented structures, and explicitly prohibit the addition of new augmented structures e.g. supplemental wells or alternate points of diversion other than the Preisser Wells. Exhibit B and Exhibit C
21. Although the Water Rights Act is silent on the issue of changes to a decreed Augmentation Plan, Water Court Rule 3(b)(2) states "Persons alone or in concert may file applications for approval of plans for augmentation, including water exchange projects, and *subsequent changes thereto.*"
22. While some changes to decreed augmentation plans may be permitted those changes within a previously decreed plan must be based on the specific facts of a case, such as changes necessary to implement the

original decreed augmentation plan, changing the source of replacement water, or technical changes to the original wells to implement the decreed augmentation plan, the Court agrees that changing a decreed augmentation plan to add an additional augmentation structure generally is not permitted, unless a decreed plan for augmentation expressly permits the addition of augmentation structures or by the filing of an entirely new application for an entirely new augmentation plan.

23. Under the facts and decreed augmentation plan in this particular case, Applicant's request to change the decreed augmentation plan is simply not permitted by the decree or settlement agreement.

24. HCB has to find new replacement water and cannot use the water that has already been decreed under the Preisser augmentation plan to be necessary to prevent injury to senior water right holders based on diversions from the six Preisser Wells.

ORDER

25. The Court hereby vacates and sets aside the July 1, 2016 order. The Court finds that the water court has exclusive subject matter jurisdiction over the relief requested in the Application for Amendment to Plan for Augmentation. All other judgments in the July 1, 2016 order remain in effect, including dismissal of the Application for Amendment to Plan for Augmentation because the contractual provisions of the Settlement Agreement prevent adding the HCB well to the Preisser Augmentation

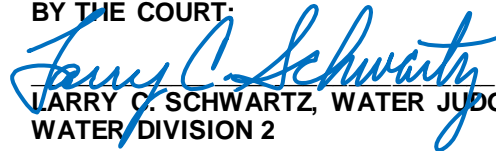
Plan. Applicant's Application for Amendment to Plan for Augmentation filed on March 31, 2015, is dismissed.

26. HCB's Motion for Partial Summary Judgment is DENIED.

27. Opposers' Motion for Summary Judgment is GRANTED. Opposers' leave to request attorney fees and costs is granted based on the plain language of Page 14, paragraph 3, of the Settlement Agreement and decreed augmentation plan.

Dated this 30th day of August, 2016.

BY THE COURT:


LARRY C. SCHWARTZ, WATER JUDGE
WATER DIVISION 2

DISTRICT COURT, WATER DIVISION NO. 2, COLORADO 501 North Elizabeth Street, Suite 116 Pueblo, CO 81003	DATE FILED: October 25, 2016 10:51 AM CASE NUMBER: 2015CW3006
Concerning the Application for Water Rights of: HCB Ventures, LLC, in El Paso, Elbert, Lincoln, and Crowley Counties.	• COURT USE ONLY •
	Case No.: 15CW3006
ORDER AWARDING ATTORNEYS' FEES AND COSTS TO BOX SPRINGS	

The Court, having considered the Joint Motion for Award of Attorneys' Fees filed by Opposer, Box Springs Canal and Reservoir Company ("Box Springs")¹ and Box Springs' Bill of Costs, and being advised of the same, states:

1. The Decree entered in Case No. 97CW106 incorporating the Settlement Agreement provides for an award of attorneys' fees to a prevailing party in litigation between the parties arising out of the Settlement Agreement. Applicant HCB Ventures, LLC ("HCB"), Silhouette Ranches, LLC, and Box Springs are parties to or successors in interest to parties to the 97CW106 Decree and Settlement Agreement.

2. In its Response to Joint Motion for Award of Attorneys' Fees, HCB stated unequivocally on pages 2 and 14 of its Response that it does not contest Box Springs' contract-based claim for fees. The basis for that concession is explained in detail by HCB in its said Response. Accordingly, there is no remaining issue as to the award of attorneys' fees in favor of Box Springs and against HCB. The Court agrees with HCB's explanations for its concession in regard to attorney fees for Box Springs. Silhouette is also a party to or successor in interest to parties to the 97CW106 Decree and Settlement Agreement. Therefore, the Court applies the same analysis of liability for attorney fees to Box Springs as explained by HCB, to the liability of Silhouette for attorney fees to Box Springs under the Settlement Agreement.

3. The current case constitutes litigation between these parties arising out of the 97CW106 Decree and Settlement Agreement, and Box Springs is the prevailing party as a result of the

¹ Box Springs was joined in its motion by other opposers, for whom a separate Order has been entered.

Motion for Partial Summary Judgment resulting in dismissal of the Application with prejudice. The Court finds, therefore, that an award of attorneys' fees is proper against Applicant and Silhouette Ranches, LLC jointly and severally and in favor of Box Springs pursuant to the Settlement Agreement and 97W106 Decree.

4. The Court finds that Box Spring is entitled to judgment for its costs pursuant to C.R.S. § 13-16-113.

Box Springs is hereby awarded its attorneys' fees in the amount of \$17,650.00, together with interest at the statutory rate from the date of this Order.

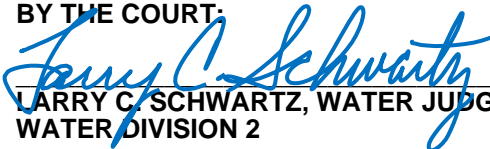
Box Springs is hereby awarded costs in the amount of \$2,957.11, together with interest at the statutory rate from the date of this Order.

The amount of this award shall be increased by additional fees and costs incurred for the prosecution of the motion for fees upon submission by Box Springs of evidence of such within seven days of the entry of this order.

The Court determines that responsibility for this award of fees and costs is joint and several as between Applicant and Silhouette Ranches, LLC, and is joint and several as between Applicant and its counsel of record.

Dated this 25th day of October 2016

BY THE COURT:


LARRY C. SCHWARTZ, WATER JUDGE
WATER DIVISION 2

Agreement are intended third party beneficiaries of the 97CW106 Decree and Settlement Agreement.

2. The current case constitutes litigation between these parties arising out of the 97CW106 Decree and Settlement Agreement, and Movants are the prevailing parties as a result of their Motion for Partial Summary Judgment resulting in dismissal of the Application with prejudice. The Court finds, therefore, that an award of attorneys' fees is proper against Applicant and Silhouette Ranches, LLC jointly and severally and in favor of Movants pursuant to the Settlement Agreement and 97W106 Decree.

3. In addition, the Court finds that an award of attorneys' fees is proper against Applicant (and its attorneys jointly and severally) pursuant to C.R.S. § 13-17-102. In light of the facts of this litigation, the relief requested by Applicant lacked substantial justification.

4. The Court finds that Opposers are entitled to judgment for their costs pursuant to C.R.S. § 13-16-113.

Movants are hereby awarded the attorneys' fees and costs in the following amounts, together with interest at the statutory rate from the date of this Order:

-for the HCWUA and Horse Creek Opposers: \$ 31,427.12 (payment of this part of the award may be made to the HCWUA and Horse Creek Opposers' counsel who may then disburse the fees to those parties accordingly);

-HCWUA and Horse Creek Opposers are additionally awarded costs in the amount of \$11,296.77 plus interest at the statutory rate from the date of this order;

-for State Board of Land Commissioners: \$20,203.75;

-for Dean and Audra Goss: \$ 35,592.50; and

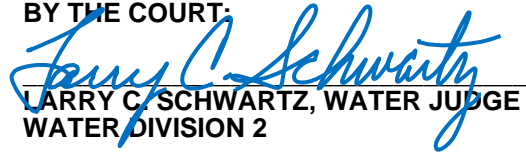
- Dean and Audra Goss are additionally awarded costs in the amount of \$225.50 plus interest at the statutory rate from the date of this order.

The amounts of this award shall be increased by additional fees and costs incurred for the prosecution of the motion for fees upon submission by Movants of evidence of such within seven days of the entry of this order.

The Court determines that responsibility for this award for fees and costs is joint and several as between Applicant and Silhouette Ranches, LLC, and is joint and several as between Applicant and its counsel of record.

Dated: October 25, 2016

BY THE COURT:


LARRY C. SCHWARTZ, WATER JUDGE
WATER DIVISION 2