

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Appeal from the District Court, Water Division No. 3 Case No. 13CW3002, Honorable Pattie P. Swift</p> <hr/> <p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE SANTA MARIA RESERVOIR COMPANY</p> <p>IN THE RIO GRANDE OR ITS TRIBUTARIES.</p>	
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<p>NOTICE OF APPEAL</p>	

Appellant James Warner (“Mr. Warner”), by and through his undersigned counsel, hereby sets forth the following Notice of Appeal pursuant to Colorado Appellate Rule 3(d):

I. BRIEF DESCRIPTION OF THE NATURE OF THE CASE.

A. General statement of the nature of the controversy.

This is an appeal of Findings of Fact, Conclusions of Law, Judgment and Decree issued on June 1, 2018, and Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees issued on August 9, 2018, by Water Judge Pattie P. Swift in Case No. 13CW3002, Division 3.

This matter concerns water rights diverting from and contributing return flows to surface streams, the unconfined aquifer, and the confined aquifer within the San Luis Valley, which have been found to be overappropriated, hydraulically connected tributary systems.

In Case No. 13CW3002, Division 3, Applicant Santa Maria Reservoir Company (“SMRC”) filed for approval of a plan for a change of water right that would authorize SMRC to change the type and place of use of certain water rights diverted from the Rio Grande River through the Rio Grande Canal (the “Subject Rights”), from the previously decreed use of irrigation of areas serviced by the Subject Rights, to add the new use of replacement of well depletions for wells located anywhere within Water Division 3.

Mr. Warner is an irrigator and owner of both surface water rights and underground water rights withdrawing from surface streams, the unconfined aquifer, and the confined aquifer (the “Warner Water Rights”). Return flows from irrigation use of the Subject Rights (the “Subject Right Return Flows”) had historically provided a source of supply for the Warner Water Rights and other vested water rights diverting from surface streams and from the confined and unconfined aquifers. Mr. Warner argued, *inter alia*, that judicial approval of SMRC’s application would injure Mr. Warner’s water rights and other vested water rights in Water Division 3 unless, consistent with fundamental principles of Colorado water law, SMRC were to prove the amount of, and include in any final decree appropriate terms and conditions limiting its future use of the Subject Rights to SMRC’s historic consumptive use of the Subject Water Rights. Mr. Warner argued such determination must necessarily calculate and such terms and conditions must necessarily require SMRC to replace in time, place, and amount the Subject Rights Return Flows.

SMRC refused to calculate its historic consumptive use, to include Mr. Warner’s requested terms and conditions, or to include other necessary terms and conditions addressing injury from its proposed change in use of the Subject Rights and discontinuance of the Subject Rights Return Flows. Rather, SMRC argued that the historic diversion of the Subject Rights out of the Rio Grande River into an area referred to as the “Closed Basin” meant that the Subject Rights should be considered “Imported Water,” such that SMRC now was entitled to change and fully consume the entire amount of water that historically had been and could in the future be diverted into the Closed Basin under the Subject Rights, without acknowledgement of the historic contributions of the Subject Rights and the Subject Return Flows to water supply of surface streams and the confined and unconfined aquifers, and without respect to impact on surface streams, the confined aquifer, the unconfined aquifer, and vested water rights of the discontinuance of this water supply.

The Findings of Fact, Conclusions of Law, Judgment and Decree (the “Trial Court Decree”) issued by the Division 3 Water Court (the “Trial Court”) on June 1, 2018 accepted SMRC’s arguments, and thus also failed to include terms and conditions to protect the Warner Water Rights or other vested water rights from a reduction in water supply caused by SMRC’s future discontinuance of the Subject Rights Return Flows and future consumption of the Subject Rights. Specifically, the Trial Court held that the Subject Water Rights were imported water, such that SMRC was entitled to change and fully consume all of the Subject Rights diverted into the Closed Basin without consideration of reduced water supply and resultant injury to surface streams and the confined and unconfined aquifers caused by such consumption or by the discontinuance of the Subject Rights Return Flows. In so holding, the Trial Court failed to appropriately consider the contributions of the Subject Right Return Flows to the water supply for the confined aquifer, the unconfined aquifer, and surface streams within the San Luis Valley, inside and outside of the Closed Basin.

Specifically, the Trial Court failed to consider the Division 3 Water Court’s prior holding, in a decision affirmed by the Colorado Supreme Court, that the confined aquifer, unconfined aquifer, and surface streams within the San Luis Valley constitute an overappropriated, hydraulically connected tributary system, such that withdrawal of water from the confined aquifer system will cause out-of-priority depletions to surface streams, materially injure existing water rights in the confined and unconfined aquifers, and interfere with Colorado’s ability to fulfill its obligations under the Rio Grande Compact. The Trial Court also held that Mr. Warner was not entitled to maintenance of return flows, for the asserted but erroneous reasons that the Warner Water Rights were senior to the Subject Rights; that the decrees for the Warner Water Rights permitted SMRC to discontinue seepage as a source of supply, and that a water user seeking to change its water rights is not required to maintain historic tail water and waste water flows.

Following issuance of the Trial Court Decree, Mr. Warner on June 15, 2018 filed a Motion to Amend Judgment, arguing that the Court’s determination that the Subject Rights were imported water was incorrect as a matter of law. By its Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees issued on August 9, 2018, the Trial Court denied Mr. Warner’s Motion to Amend, and granted SMRC an award of its attorney fees incurred in responding to Mr. Warner’s Motion to Amend.

B. The judgment appealed and statement of the basis for appellate jurisdiction.

Mr. Warner is appealing the Trial Court’s June 1, 2018 Findings of Fact, Conclusions of Law, Judgment and Decree and August 9, 2018 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees.

The Supreme Court has jurisdiction over this appeal pursuant to C.A.R. 1 (a)(2), 4 (a), and section 13-4-102(1)(d), 5 C.R.S. (2003).

C. Whether the judgment or order resolved all issues including attorneys' fees and costs.

The Trial Court's June 1, 2018 Findings of Fact, Conclusions of Law, Judgment and Decree and August 9, 2018 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees is final and have resolved all issues with respect to the merits of the claims made in the application pending before the Water Court.

The Trial Court has yet to determine the amount of costs and the fees to be awarded pursuant to the Trial Court's August 9, 2019 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees.

D. Whether the judgment was made final in accordance with C.R.C.P. 54(b).

The Trial Court's June 1, 2018 Findings of Fact, Conclusions of Law, Judgment and Decree and August 9, 2018 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees are final orders in accordance with C.R.C.P. 54(b). The Trial Court has yet to determine the amount of costs and the fees to be awarded pursuant to the Trial Court's August 9, 2019 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees. However, an award of attorney fees or costs is collateral to the Trial Court's decision on the merits; there is no need for a C.R.C.P. 54 (b) certification. *See Am. Numismatic Ass'n v. Cipoletti*, 254 P.3d 1169, 1175 (Colo. App. 2011) (an award of attorney fees or costs is collateral to the merits of a dispute).

E. Date the Judgment and Decree was entered and the date of mailing to counsel.

The Trial Court's June 1, 2018 Findings of Fact, Conclusions of Law, Judgment and Decree and August 9, 2018 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees were entered and served electronically on counsel on June 1, 2018 and August 9, 2018, respectively.

F. Whether there were any extensions granted to file any motions for post-trial relief.

No extensions to file motions for post-trial relief were requested.

G. The date any motion for post-trial relief was filed.

On June 15, 2018, Mr. Warner filed a Motion to Amend Judgment.

H. The date any motion for post-trial relief was denied or deemed denied.

On August 9, 2018, the Trial Court filed its Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees.

I. Whether there were any extensions granted to file any notice of appeal.

No extension to file the Notice of Appeal was requested.

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

The order on review was not issued by a magistrate where consent was necessary.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL.

- A. Whether the Trial Court erred as a matter of law and fact in holding that the Subject Rights constitute and remain after the change imported water, where it is undisputed that the Subject Rights Return Flows accrued to the confined and unconfined aquifers and to the Rio Grande River and other surface streams in the San Luis Valley, where it is undisputed and the Division 3 Water Court and Colorado Supreme Court have previously held that the confined aquifer, unconfined aquifer, and surface streams within the San Luis Valley all constitute a tributary, hydrologically connected system, and where it is undisputed and the Division 3 Water Court and Colorado Supreme Court have previously held that withdrawal of water from the confined aquifer system will cause out-of-priority depletions to surface streams, materially injure existing water rights in the confined and unconfined aquifers, and interfere with Colorado's ability to fulfill its obligations under the Rio Grande Compact.
- B. Whether the Court erred as a matter of law and fact in failing to require SMRC to prove the amount of SMRC's historic diversions and consumptive use of the Subject Water Rights, and include in any final decree appropriate terms and conditions limiting SMRC's future use of the Subject Rights to such historic diversions and use, including terms and conditions limiting and requiring SMRC to replace in time, place, and amount the Subject Rights Return Flows.
- C. Whether the Trial Court erred as a matter of law and fact in holding that Mr. Warner was not entitled to the continuation of return flows from the Subject Rights as a source of supply for the Warner Water Rights, for the asserted reason that the Warner Rights were senior to the Subject Rights.
- D. Whether the Trial Court erred as a matter of law and fact in holding that Mr. Warner was not entitled to the continuation of return flows from the Subject Rights as a source of supply for the Warner Water Rights, for the asserted reason

that the decrees for the Warner Rights recognized that the Warner Rights relied on seepage.

- E. Whether the Trial Court erred as a matter of law in holding that Mr. Warner was not entitled to the continuation of return flows from the Subject Rights as a source of supply for the Warner Water Rights, for the asserted reason that a water user in changing its water rights is not required to maintain historic tail water and waste water flows.
- F. Whether the Trial Court abused its discretion by awarding SMRC attorney fees for its response to the Motion to Amend Judgment.
- G. Any and all issues inherent in the “General statement of the nature of the controversy” set forth in paragraph I. A. above, as well as all issues which may become evident as a result of the review of the trial court’s record.

III. TRANSCRIPT INFORMATION.

A transcript of the evidence taken at trial is necessary for this Court to resolve the issues to be raised on appeal. Mr. Warner will request a transcript of any evidence taken during the trial proceedings before the District Court, Water Division No. 3, held in Alamosa, Colorado, 81101.

IV. WHETHER A PRE-ARGUMENT CONFERENCE IS REQUESTED

A pre-argument conference is not requested.

V. NAMES OF COUNSEL FOR THE PARTIES.

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3. William A. Paddock, Reg. No. 9478, Mason H. Brown, Reg. No. 44831, Carlson, Hammond & Paddock, L.L.C., 1900 Grant Street, Suite 1200, Denver, Colorado 80203-4312, (303) 861-9000, bpaddock@chp-law.com mbrown@chp-law.com, Attorneys for Applicant-Appellee, Santa Maria Reservoir Company.

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davidrobbins@hillandrobbins.com, peterampe@hillandrobbins.com, Attorneys for Opposer in Support Rio Grande Water Conservation District.

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6. Heather Annette Warren, Reg. No. 35952, Assistant Attorney General), 1300 Broadway, 7th Floor, Denver, Co. 80203, (720) 508-6266, heather.warren@coag.gov, Attorney for Colorado Division of Parks and Wildlife.

7. Jennifer Lyn Mele, Reg. No. 30720, Assistant Attorney General, 1300 Broadway, 7th Floor, Denver Co. 80203, (720) 508-6282), Jennifer.mele@coag.gov, Attorney for Colorado Water Conservation Board.

8. Richard John Mehren, Reg. No. 32231, Moses, Wittemyer, Harrison and Woodruff, PC., P.O. Box 1440, Boulder, Co. 80306-1440, (303) 443-8782, rmehren@mwhw.com, Attorney for Conejos Water Conservancy District.

9. Erich Schwiesow, Reg. No. 22385, Erich Schwiesow, P.C., P. O. Box 1270, Alamosa, Co. 81101, (719) 589-6626, erich@erichschwiesowpc.com, Attorney for Costilla Ditch Company.

VI. APPENDICES.

Appendices containing copies of the Trial Court's June 1, 2018 Findings of Fact, Conclusions of Law, Judgment and Decree and August 9, 2018 Order Denying Motion to Amend Judgment and Granting Request for Attorney Fees and Mr. Warner's Motion to Amend Judgment are attached hereto.

Dated this 28th day of September 2018.

CONFLUENCE WATER LAW LLC

/s/ John J. Cyran

John J. Cyran
Attorneys for Opposer-Appellant, James Warner

Pursuant to Rule 121, a printed or printable copy of this document bearing the original, electronic, or scanned signature is on file in the office of Confluence Water Law

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2018, I served the foregoing **NOTICE OF APPEAL**, via e-service upon each party or each party's counsel, upon all parties of record as indicated in the electronic record.

/s/ John Cyran _____

<p>District Court, Water Division No. 3, Colorado Alamosa County Courthouse 702 Fourth Street, Alamosa, Colorado 81101 (719) 589-4996</p> <hr/> <p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE SANTA MARIA RESERVOIR COMPANY</p> <p>IN THE RIO GRANDE OR ITS TRIBUTARIES</p>	<p>DATE FILED: September 28, 2018 10:37 AM CASE NUMBER: 2013CW3002</p> <p>▲ COURT USE ONLY ▲</p> <p>Case Number: 13CW3002</p> <p>Division: 1 Courtroom:</p>
<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE</p>	

This matter came before the court for trial on April 6 and 7, 2017, and May 2, 2017. The court, having considered the evidence presented, having read the briefs, and being fully advised concerning the Application, enters the following Findings of Fact, Conclusions of Law, Judgment and Decree. The court notes that the Applicant reached stipulations with numerous Opposers which included the Opposers' agreement not to protest or appeal the decree the court ultimately entered so long as the terms of the decree were no less protective of the Opposers and no less restrictive on the Applicant than those contained in the proposed decree. Although the court is issuing a decree in a somewhat different form than the proposed decree, the court approves the Applicant's application on the same terms as included in the proposed decree.

Table of Contents

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW	4
I. Background and Procedural History	4
II. Water Rights to be Changed and Description of the Change Requested.....	6
A. Santa Maria Reservoir	6
B. Continental Reservoir.....	7
III. Parties.....	9
IV. Applicant’s First Request: The Court Recognizes the Historical Irrigation Use of the SMRC Water Rights on Lands Served by the Monte Vista Canal and the Rio Grande Canal.....	11
A. Deliveries to Land Served by the Monte Vista Canal	11
B. Deliveries to Lands Served by the Rio Grande Canal	12
C. The Court Recognizes the Applicants’ Historic Place of Use of the SMRC Water.....	14
V. Applicant’s Second Request: The Court Recognizes the Historical Irrigation Practice of Recharging the Unconfined Aquifer of the Closed Basin with SMRC Water Rights and Later Withdrawing a Corresponding Volume of Water by Means of Wells for Irrigation of Crops.....	14
VI. Applicant’s Third Request: The Court Recognizes the Right to Fully Consume, By First Use, Reuse, and Successive Use, All Net Depletions to the Rio Grande from the Historical Delivery into the Closed Basin, of Water Derived from the SMRC Water Rights	20
A. The Hydraulic Divide	20
B. The Fact that the RGDSS Calculates Accretions to the Rio Grande as a Result of the SMRC Water Being Used for Irrigation in the Service Area of the Rio Grande Canal Does Not Mean that Water Imported into the Closed Basin Returns to the Rio Grande.....	23
C. Prior Decrees of This Court Do Not Estop the Applicant from Claiming that the Water It Delivers into the Closed Basin is Imported Water	26
D. Because SMRC Water is Imported into the Closed Basin, SMRC Water Users Under the Rio Grande Canal May Use Their Water to Extinction	33
VII. Applicant’s Fourth Request: Change the Type of Use of the SMRC Water Rights for use to Replace Depletions to Surface Streams caused by the Operation of Wells in Water Division No. 3.....	35
A. The Rio Grande Compact	36
B. Historical Water Storage and Release.....	38

C. Calculation of Historical Consumptive Use and Determination of Necessary Replacement of Water to Prevent Injury to Other Water Rights	41
1. Change of SMRC Water Rights Used on Land Served by the Monte Vista Canal	42
2. Change of SMRC Water Rights Used on Land Served by the Rio Grande Canal.....	45
3. Administration and Accounting	48
VIII. Mr. Warner’s Claim of Injury	49
JUDGMENT AND DECREE.....	51

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND AND PROCEDURAL HISTORY

1. Name, mailing address, and telephone number of Applicant:

Santa Maria Reservoir Company
147 Washington Street
P.O. Box 288
Monte Vista, CO 81144
(719) 852-3556

2. The Santa Maria Reservoir Company (“Company”, “Applicant” or “SMRC”) filed this *Application for Change of Water Right* (the “Application”) on January 31, 2013. The Application was published in the January 2013 Resume for Water Division No. 3 and in newspapers in general circulation in the areas affected by the Application. Proper and adequate notice of the filing and contents of the Application was given in the manner required by law. The court has jurisdiction over the subject matter of the Application pursuant to §§ 37-92-303(1) and 37-92-304(3), C.R.S. (2017) and over all persons who have standing to appear as parties whether they have appeared or not. None of the land or water rights involved in the Application is located within a designated groundwater basin.

3. Timely and adequate notice of the Application in this matter was given as required by law, the court has jurisdiction of the subject matter of this proceeding and over all persons and water rights affected thereby, whether they have appeared or not. §§ 37-92-203 and 302, C.R.S.

4. Timely statements of opposition to the Application were filed by the Colorado Division of Parks and Wildlife and the Parks and Wildlife Commission; the Colorado Water Conservation Board (“CWCB”); the Conejos Water Conservancy District; the Costilla Ditch Company; Richard H. Ramstetter; the Rio Grande Water Conservation District (statement in support); the San Antonio, Los Pinos and Conejos River Acequia Preservation Association; V. W. Ellithorpe; and James Warner, *pro se*. The time for filing of statements of opposition has expired.

- (a) V. W. Ellithorpe withdrew his *Statement of Opposition* on November 1, 2013.
- (b) The San Antonio, Los Pinos and Conejos River Acequia Preservation Association withdrew its *Statement of Opposition* on February 13, 2014.
- (c) The Applicant and Opposers, Colorado Division of Parks and Wildlife and the Parks and Wildlife Commission, entered into a stipulation for entry of a decree in this case and the court approved that stipulation on January 20, 2015.

- (d) The Applicant and Opposer, Richard Ramstetter, entered into a stipulation for entry of a decree in this case and the court approved that stipulation on May 12, 2015.
- (e) The Applicant and Opposer, CWCB, entered into a stipulation for entry of a decree in this case and the court approved that stipulation on June 15, 2015.
- (f) The Applicant and Opposer, Costilla Ditch Company, entered into a stipulation for entry of a decree in this case and the court approved that stipulation on September 1, 2015.
- (g) The Applicant and Opposer, Conejos Water Conservancy District, entered into a stipulation for entry of a decree in this case and the court approved that stipulation on February 22, 2016.
- (h) James Warner continues his opposition to the application with respect to water rights used on lands under the Rio Grande Canal.

5. The Water Judge referred this Application to the Water Referee for Water Division 3, in accordance with §§ 37-92-101, C.R.S. *et seq.*

6. On May 10, 2013, the Division Engineer filed a written report containing his comments and recommendations after consulting with the Water Referee. The court has considered the comments and recommendations of the Division Engineer in entering this decree.

7. By order dated April 26, 2016, the Water Referee referred the case back to the Water Judge. At that time the Company had reached a settlement with all active opposers except Mr. Warner, *pro se*. The court subsequently held a trial setting conference on August 8, 2016, and set this matter for trial on December 5, 2016, which date was later continued to January 5, 2017, and then continued to April 6, 2017. On March 8, 2017, Richard Arnett entered his appearance as counsel of record for Mr. Warner.

8. At the trial in this case the Applicant was represented by William A. Paddock of Carlson, Hammond & Paddock, LLC. The Rio Grande Water Conservation District (“District”), an opposer in support of the application, was represented by Peter Ampe of Hill & Robbins, P.C. The Opposer, James Warner, was represented by Mr. Arnett.

9. During its case-in-chief the Applicant presented testimony from Keith Holland, president of the Santa Maria Reservoir Company; Jay Yeager, superintendent of both the Santa Maria Reservoir Company and the Rio Grande Canal Water Users Association, and Thomas A. Williamsen, P.E. of Helton and Williamsen, P.C. Mr. Williamsen was qualified as an expert in water resources engineering and gave expert opinion testimony. The Rio Grande Water Conservation District called no witnesses and did not present any evidence. The Opposer, James Warner, called as witnesses James Heath, Assistant Division Engineer, who provided testimony pursuant to § 37-92-304(3), C.R.S (2017); James Swanson, a former ditch rider on part of the

Rio Grande Canal and currently a water commissioner in former water districts 26 and 27; William Hofner, a local farmer; and James Warner. The Applicant presented rebuttal testimony from Jay Yeager. First Assistant Attorney General Paul Bennington was present to represent James Heath and James Swanson during their testimony at the trial.

10. On April 28, 2017, Opposer Warner filed a *Motion to Dismiss for Want of Jurisdiction*. The Applicant filed its written response on May 12, 2017. On August 15, 2017, the court entered its order denying the motion.

11. On May 25, 2017, the Applicant and the Opposer each filed a proposed *Findings of Fact, Conclusions of Law, Judgment and Decree*. On June 20, 2017, the parties each filed a response to the other parties' initial submissions.

II. WATER RIGHTS TO BE CHANGED AND DESCRIPTION OF THE CHANGE REQUESTED.

12. The water rights to be changed ("SMRC Water Rights") are:

A. Santa Maria Reservoir

(1) Date of original and all relevant subsequent decrees: September 13, 1916, Costilla County District Court; decree upon remittitur from the Supreme Court dated June 28, 1924, *nunc pro tunc* to November 26, 1920, Alamosa County District Court; Findings and Decree dated June 28, 1924, Alamosa County District Court; Findings and Decree dated December 27, 1984, Case No. W-3979, District Court, Water Division No. 3; Findings and Decree dated November 25, 1995, Case No. 90CW42, District Court, Water Division No. 3.

(2) Decreed legal description of structure: located in Sections 16, 21, 22, and 27 of Township 41 North, Range 2 West of the N.M.P.M., Mineral County, Colorado. The reservoir collects water diverted from North Clear Creek, Bennett Creek, and Boulder Creek by means of a supply ditch, the headgate of which is located on North Clear Creek approximately 5,398.1 feet from the east quarter-corner of Section 12, Township 41 North, Range 3 West, N.M.P.M.

(3) Decreed source of water: North Clear Creek, Bennett Creek, Boulder Creek.

(4) Appropriation Date: August 11, 1896, as to the first 15,871.21 acre-feet; and September 22, 1902, as to the remaining 21,652.79 acre-feet.

(5) Total amount decreed to structure: 37,524 acre feet, absolute.

(6) Decreed use: Irrigation.

(7) Amount of water that Applicant intends to change: 37,524 acre feet.

B. Continental Reservoir

(1) Date of original and all relevant subsequent decrees: December 15, 1934, Alamosa County District Court (Palmer Decree); Findings and Decree dated November 30, 1978, Case No. W-3, District Court, Water Division No. 3; Findings and Decree dated December 27, 1984, Case No. W-3979, District Court, Water Division No. 3; Findings and Decree dated November 25, 1995, Case No. 90CW42, District Court, Water Division No. 3.

(2) Decreed legal description of structure: located in Sections 21, 28, and 29 of Township 42 North, Range 3 West of the N.M.P.M., Hinsdale County, Colorado. The reservoir impounds the natural flow of North Clear Creek.

(3) Decreed source of water: North Clear Creek.

(4) Appropriation Date: June 1, 1901 as to the first 8,832 acre-feet; May 4, 1907 as to the next 17,884 acre-feet.

(5) Total amount decreed to structure: 26,716 acre-feet absolute.

(6) Decreed use: Irrigation.

(7) Amount of water that Applicant intends to change: 26,716 acre-feet.

13. Santa Maria Reservoir is an off-channel reservoir that was constructed by placing an embankment on a natural lake and by diverting additional water from North Clear Creek, Bennett Creek and Boulder Creek to supply the reservoir. Exhibit A-24. The water rights for Santa Maria Reservoir were adjudicated in the second supplemental adjudication of water rights in Water District No. 20 by decree entered in 1916 and modified on remittitur in 1924. Exhibit A-9. In that adjudication the reservoir was decreed water storage rights in the amount of 15,871.21 acre-feet with an appropriation date of August 11, 1896 (Appropriation Priority 1916-81A; Reservoir Priority 1916-2), and 27,954.85 acre-feet with an appropriation date of September 22, 1902 (Appropriation Priority 1916-81A; Reservoir Priority 1916-2A). Of this amount, 9,600 acre-feet was an absolute water right and the remainder was a conditional water right. The reservoir began storing water in 1912 and the first beneficial use of the stored water occurred in 1912. The reservoir was completed in 1913. Santa Maria reservoir has a capacity of some 43,500 acre-feet, but the Company failed to make 6,302.06 acre-feet of the conditional water right absolute. As a consequence, the water storage rights for Santa Maria Reservoir are currently entitled to store 15,871.21 acre-feet with an appropriation date of August 11, 1896, and 21,652.79 acre-feet with an appropriation date of September 22, 1902.

14. Continental Reservoir is an on-channel reservoir located near the headwaters of North Clear Creek. Exhibit A-25. The water rights for Continental Reservoir were adjudicated in the third supplemental adjudication of water rights in Water District No. 20 by decree entered in 1934. Exhibit A-10. In that adjudication, the reservoir was decreed water storage rights in the amount of 8,832 acre-feet with an appropriation date of June 1, 1901, absolute (Reservoir Priority 1934-1), and 21,918 acre-feet with an appropriation date of May 4, 1907, of which 2,557 acre-feet was absolute (Appropriation and Reservoir Priority 1934-3) and of which 19,361 acre-feet was conditional (Appropriation and Reservoir Priority 1934-4). The reservoir began storing water in 1925 and the first beneficial use of the stored water occurred in 1926. The reservoir was completed in 1928. Exhibit A-10. The conditional water right was made absolute in the amount of 15,327 acre-feet and the remaining 4,034 acre-feet was cancelled by this court's decree entered on November 30, 1978, in Case No. W-3. *Id.* As a consequence, Continental Reservoir is now entitled to store 8,832 acre-feet with an appropriation date of June 1, 1901, and 17,884 acre-feet with an appropriation date of May 4, 1907.

15. The Company also owns an appropriative right of exchange that was decreed on November 8, 1995, in this court's Case No. 90CW42. Exhibit A-3. That decree allows the Company to exchange water stored in Santa Maria Reservoir into storage in Continental Reservoir, to exchange water stored in Continental Reservoir into storage in Santa Maria Reservoir, allows the water from both reservoirs to be stored by exchange in Rio Grande Reservoir, and allows water stored in Rio Grande Reservoir to be stored by exchange in Santa Maria or Continental Reservoirs. The exercise of this appropriative right of exchange has resulted in SMRC water rights being stored by exchange in and released from Rio Grande Reservoir.

16. The Application seeks judicial recognition of: (1) the historical use of the water storage rights described in paragraphs 12A and 12B above to irrigate crops on lands served by the Monte Vista Canal and the Rio Grande Canal; (2) the historical irrigation practice of using the SMRC Water Rights by means of aquifer recharge and withdrawal of a corresponding volume of water by means of wells, all for the ultimate purpose of irrigation of crops; and (3) the right to fully consume, by first use, reuse, and successive use, all net depletions to the Rio Grande from the historical delivery into the Closed Basin, of water derived from the SMRC Water Rights. In addition, the Application also seeks (4) to change the type of use of the SMRC Water Rights by adding to the decreed beneficial use of irrigation, the right to replace depletions to surface streams caused by the operation of wells in Water Division No. 3, State of Colorado with the water historically depleted from the Rio Grande and its tributaries (which do not include the Closed Basin) by the exercise of the SMRC Water Rights. To effectuate this change of the SMRC Water Rights, the Applicant will replicate return flows or other accretions that accrued to the Rio Grande and its tributaries (which do not include the Closed Basin) from the exercise of the SMRC Water Rights in the amount, and at the times when they historically occurred so as to prevent injury to the vested water rights of others. The Company anticipates that augmentation/replacement use may be accomplished in accordance with its bylaws by any lawful means, including leasing shares to entities responsible for replacing stream depletions, such as Special Improvement District No. 1 of the Rio Grande Water Conservation District.

17. Mr. Warner does not oppose the court granting the Company's request (1), but he does oppose the court granting requests (2), (3) and the portion of (4) that requests changes in the manner of use of the water attributable to shares in the Santa Maria Reservoir Company historically diverted into and used on lands served by the Rio Grande Canal. Mr. Warner does not oppose the proposed change in use of Santa Maria Reservoir Company shares historically used under the Monte Vista Canal, but does not agree that the terms and conditions for the change of the Company's water rights delivered to its shareholders underlying the Monte Vista Canal are applicable to or sufficient for the proposed change of the Company's water rights delivered to Company shareholders underlying the Rio Grande Canal, or as applied to Mr. Warner's water rights.

18. The court first describes the parties to this case and then takes up the Applicant's requests in order.

III. PARTIES

19. The Applicant, the SMRC, is a mutual reservoir company that was incorporated in 1931, which owns and operates, for the benefit of its shareholders, the Santa Maria Reservoir, the Continental Reservoir, and the appropriative right of exchange decreed in Case No. 90CW42. According to its current president, Keith Holland, the SMRC has 5400 shares of stock with two hundred or so shareholders.

20. All shareholders in the SMRC have their reservoir water delivered either through the Monte Vista Canal or the Rio Grande Canal and the Company's bylaws allocate 10% of the shares to shareholders whose lands are served by the Monte Vista Canal and 90% of the shares in the company to shareholders whose lands are served by the Rio Grande Canal. Shareholders in the SMRC must own stock in either the Rio Grande Canal Water Users Association ("RGCWUA") or the Monte Vista Canal Users Association, or both, so their shares of reservoir water can be delivered to their land as served by each canal. In addition, the Company's bylaws require that each SMRC shareholder own "irrigated lands under the canal to which the reservoir stock is allocated commensurate to the number of shares owned in the Company." Exhibit A-15, By Laws of the Santa Maria Reservoir Company, Article VIII "Certificates of Stock," Section 1, second paragraph.

21. The Company's bylaws allow the transfer of SMRC shares allocated to the Monte Vista Canal only to other shareholders in the Monte Vista Canal Users Association and the transfer of SMRC shares allocated to the Rio Grande Canal only to other shareholders in the RGCWUA. The bylaws prohibit the transfer of shares between the Rio Grande Canal and Monte Vista Canal or to others outside the service areas of these canals.

22. The original *Articles of Incorporation* for the SMRC limited the use of the Company's water to irrigation, including aquifer recharge.

23. In 2011, the Company amended its *Articles of Incorporation* to provide that this water could be stored and released “for such other beneficial uses in Water Division No. 3 as are authorized . . . by the bylaws of the company, including replacement of depletions to surface streams caused by the operation of wells” in Water Division No. 3. Exhibit A-14. According to Keith Holland, the president of the SMRC, the purpose of this change was to allow SMRC stockholders to lease their annual share of the SMRC water to Subdistrict No. 1 for replacement of injurious depletions to the Rio Grande caused by pumping Subdistrict wells. Mr. Holland and the other members of the SMRC Board of Directors and shareholders made this change because they were concerned that the Subdistrict would fail if it did not have sufficient replacement water and, if the Subdistrict failed, farmers who owned wells north of the Rio Grande would have to stop pumping and would likely go bankrupt, causing serious economic harm to the entire San Luis Valley.

24. The parties stipulated that the Company is a member of the Rio Grande Water Users Association and has been a member of that Association since 1985.

25. The Opposer, James Warner, is a rancher, not a farmer, who owns two parcels of non-contiguous land in Saguache County, Colorado, together with both surface and groundwater rights. Mr. Warner’s properties are shown in red cross-hatching on Exhibit A-39. The northern parcel consists of the north half of Sections 5 and 6, T42N, R8E, and the NW¼ and S½ of Section 32, T43N, R8E, N.M.P.M. During trial this parcel was referred to as the “Road N” property. Mr. Warner acquired this property in 1995 and 1997. The southern parcel consists of the E½ of Section 25 and all of Section 36, T42N, R7E, N.M.P.M. During trial this parcel was referred to as the “Road G” property. Mr. Warner acquired this property in 2005.

26. For purposes of this case the Applicant, the District and Mr. Warner stipulated that for the Road N property Mr. Warner owns the water rights decreed to:

- (a) the Crow Drainage and Seepage Ditch adjudicated in this court’s Case No. W-3976 for 2.5 c.f.s. with an appropriation date of June 1, 1923, and adjudicated on an application filed in 1978; Exhibit O-2B;
- (b) the Crow Drainage and Seepage Ditch for 10.0 c.f.s. conditional decreed on February 26, 1998, in Case No. 96CW41 (this conditional water right made absolute in the amount of 6.77 c.f.s. in this court’s Case No. 04CW03, and the most recent finding of reasonable diligence in the development of the remaining conditional water right was entered on February 24, 2012, in this court’s Case No. 11CW08. Exhibit O-2D and O-2F); and
- (c) the irrigation and stock wells from the confined aquifer adjudicated in this court’s Case No. W-363, including Well No. 2 for 2.23 c.f.s. Exhibit O-2I through 2-K.

27. For purposes of this case the Applicant, the District and Mr. Warner stipulated that for the Road G property Mr. Warner owns 10 shares in the Rio Grande Canal Water Users Association, the contract interest of James C. Schmittle to divert water from the Rocky Hill Seepage and Overflow Ditch to irrigate the Road G property, as that interest is defined in Exhibit

A-43; and the groundwater rights from the confined aquifer adjudicated in this court's Case No. W-626. Exhibits O-1A, E, and F.

28. Mr. Warner's property is located generally east and north of land that receives irrigation water from the SMRC delivered through the Rio Grande Canal.

29. Mr. Warner grows hay on up to 578 acres to feed his livestock. He uses the balance of his land for pasture and other purposes. Mr. Warner uses only flood irrigation to irrigate his hay crop and he depends on groundwater levels beneath his lands being maintained at a shallow enough depth to reduce ditch losses and make his flood irrigation water carry further across his crop land.

IV. APPLICANT'S FIRST REQUEST: THE COURT RECOGNIZES THE HISTORICAL IRRIGATION USE OF THE SMRC WATER RIGHTS ON LANDS SERVED BY THE MONTE VISTA CANAL AND THE RIO GRANDE CANAL

30. Historically the water stored in Santa Maria Reservoir has been delivered to lands served by the Monte Vista Canal and the Rio Grande Canal. Although between 1940 and 1946, the water stored in Continental Reservoir was delivered to the Del Norte Irrigation District Canal and several smaller ditches as well as to the Rio Grande Canal and the Monte Vista Canal, since 1947, the water stored under the Company's water rights for Continental Reservoir has only been delivered to the Company's shareholders under the Monte Vista and Rio Grande Canals. That water has been allocated *pro rata* to the Company's shareholders under the Monte Vista Canal (10%) and the Rio Grande Canal (90%).

31. The water allocated to Company shareholders under the Monte Vista Canal is delivered to the Monte Vista Canal headgate, and the water allocated to Company shareholders under the Rio Grande Canal is typically delivered to the headgate of the Rio Grande Canal. Prior to 1979, however, some of the water allocated to Company shareholders under the Rio Grande Canal was delivered through other ditches to the shareholders' lands served by the Rio Grande Canal.

32. The SMRC bylaws entitle the Company's shareholders to draw their *pro rata* share of the water stored in the Company's reservoirs. Any shareholder's water not used in any one water year is carried over in storage and, traditionally, has been combined with the water stored in the following water year, which is then allocated *pro rata* among all shareholders.

A. Deliveries to Land Served by the Monte Vista Canal

33. The Monte Vista Canal diverts water from the south side of the Rio Grande west of Monte Vista in the SE $\frac{1}{4}$ of Section 8, T39N, R7E of the NMPM. Exhibit A-27. From there it runs generally southeast a distance of 28 miles, ending deliveries in Section 25, T36N, R8E, NMPM. *Id.* The lands served by the Monte Vista Canal lie generally south of Highway 160 and are bounded on the east by the Rio Grande and Piedra Valley Ditch and the Empire Canal. *Id.*

The Monte Vista Canal has decreed water rights totaling 340.77 c.f.s., with its two most senior priorities being priority no. 224 for 132.2 c.f.s. and priority no. 358 for 125.3 c.f.s. Exhibit A-22, Table 3. The Monte Vista Canal experiences a great deal of ditch loss due to its length and the character of the soils that it crosses.

34. There are approximately 24,367 acres of irrigated lands underlying the Monte Vista Canal, of which approximately 7,323 acres have historically received water from the Company. The majority of those lands are located in the southern portion of the Monte Vista Canal's service area. As of 2010, 82.9% of the 7,323 acres were irrigated by center pivot sprinkler systems and the remaining lands were gravity irrigated, typically by flood or row irrigation.

35. There is an extensive system of buried drain pipes and open drainage ditches located on the lands served by the Monte Vista Canal including, among others, the Carmel Drain and the Bowen Drain. These drains can intercept surface run-off and deep percolation from irrigation in the areas served by these drainage facilities.

36. The Company usually delivers reservoir water to the Monte Vista Canal after the peak run-off when the Rio Grande's flow is declining, just before the Monte Vista Canal goes out of priority. The reservoir water is some of the last water delivered through the canal each year; the timing and duration of these deliveries vary annually based upon climatic and hydrologic conditions, and the amount of water available for release from storage.

37. The deliveries of the SMRC Water Rights to the headgate of the Monte Vista Canal during the period 1968 through 2010 averaged 1,297 acre-feet annually, and ranged from no deliveries in 2002 to a high of 3,149 acre-feet in 1987. These quantities reflect the transit loss the Division Engineer assesses to reservoir releases, which is typically 10%. The Monte Vista Canal Company assesses an additional 10% canal and lateral delivery loss on all reservoir water carried in the Monte Vista Canal. Thus, the amount of water delivered to the farms of SMRC shareholders is typically only 81% of the amount released from the reservoirs for delivery to the Monte Vista Canal.

B. Deliveries to Lands Served by the Rio Grande Canal

38. The Rio Grande Canal is the largest irrigation canal in the San Luis Valley with decreed water rights totaling 1,699.4 c.f.s.¹ Exhibit A-22, Table 3. The Rio Grande Canal diverts from the north side of the Rio Grande just west of Del Norte, Colorado, in the NW¼ of Section 30, T40N, R6E, of the NMPM. Exhibit A-26. From there the canal runs generally northeast a distance of approximately 29 miles to near Saguache, Colorado. There are a number of large delivery laterals from the Rio Grande Canal that deliver water to the irrigated lands lying east of the main canal. The Rio Grande Canal can serve approximately 120,000 acres of land lying

¹ 7.9 c.f.s. is contract water not allocated *pro rata* among RGCWUA shareholders.

north of the Rio Grande, and the lands served by the Rio Grande Canal are largely located in the Closed Basin.

39. For delivery purposes the Rio Grande Canal is divided into seven divisions as shown on Exhibit A-26. The three northerly divisions are divisions 4, 5 and 6. As farmers increased their use of center pivot sprinklers and before they had built sufficient recharge facilities, they found they could not take delivery of as much surface water as they previously used for surface irrigation. During the 1990s the Rio Grande Canal had a sustained period of high flows. During that time, the shareholders in Rio Grande Canal divisions 1, 2, 3, and 7 did not have sufficient recharge capacity to enable them to take their full *pro rata* share of the available water. When that occurred, more water than a *pro rata* share was temporarily delivered to shareholders in Rio Grande Canal divisions 4, 5, and 6. By the early 2000s, however, the farms in Rio Grande Canal divisions 1, 2, 3, and 7 had installed sufficient recharge capacity to enable them to take their full *pro rata* share of water diverted by the Rio Grande Canal in periods of sustained high flows. As a result, the temporary delivery of more than a *pro rata* share to shareholders in Rio Grande Canal divisions 4, 5, and 6 stopped.

40. Approximately 46,594 acres of irrigated lands underlying the Rio Grande Canal have historically received water from the SMRC Water Rights. Exhibit A-22, 26. All of those lands are within the Closed Basin. The majority are located in the central portion of the Rio Grande Canal's service area, and also receive water from the Rio Grande Canal. In 2010, 98% of these lands were irrigated by center pivot sprinkler systems and the remaining lands were irrigated by gravity methods.

41. During the irrigation season, the SMRC delivers water to its shareholders' land in "separate" weekly runs, depending upon the demands of the individual shareholders. When the Rio Grande Canal is diverting more than 280 c.f.s., there is typically sufficient flow in the canal to deliver SMRC water to the lands of all SMRC shareholders under the Rio Grande Canal if they request such deliveries. But, when the Rio Grande Canal is diverting 280 c.f.s or less, it is not typically possible to deliver SMRC water to every headgate of every SMRC shareholder under the Rio Grande Canal. When the Rio Grande Canal is diverting 280 c.f.s. or less, the Company will deliver SMRC Water Rights to its shareholders only if (1) the Rio Grande Canal is diverting water under its priority no. 216A, because diversions under any lower priorities would involve too little water to reach the SMRC owners' headgates; (2) Rio Grande Canal water diverted under priority no. 216A is being delivered, in accordance with the Rio Grande Canal's normal operating procedures, to or past the SMRC shareholder's delivery headgate on the Rio Grande Canal or its laterals; and (3) the SMRC shareholder has requested delivery of water from storage.

42. The deliveries of the SMRC Water Rights to the lands served by the Rio Grande Canal during the period 1968 through 2010 averaged 8,756 acre-feet annually, and ranged from no deliveries in 2002 to a high of 19,656 acre-feet in 1973. These quantities reflect the transit loss the Division Engineer assessed to reservoir releases, which is typically 10%. The RGCWUA assesses an additional 10% canal and lateral delivery loss on all reservoir water carried in the Rio

Grande Canal. Thus, the amount of water delivered to the farms of Company shareholders is typically only 81% of the amount released from the reservoirs for delivery to the lands the Rio Grande Canal serves.

C. The Court Recognizes the Applicants' Historic Place of Use of the SMRC Water

43. The SMRC Water Rights have historically been used to irrigate lands served by the Rio Grande Canal and the Monte Vista Canal, and those lands are the lawful place of use for these water rights.

V. APPLICANT'S SECOND REQUEST: THE COURT RECOGNIZES THE HISTORICAL IRRIGATION PRACTICE OF RECHARGING THE UNCONFINED AQUIFER OF THE CLOSED BASIN WITH SMRC WATER RIGHTS AND LATER WITHDRAWING A CORRESPONDING VOLUME OF WATER BY MEANS OF WELLS FOR IRRIGATION OF CROPS

44. In numerous prior opinions, this court has described the unique practice of conjunctive use of surface and groundwater in the area served by the Rio Grande Canal including the Closed Basin. Division 3 Water Court Case No. W-3979 (Rio Grande Canal), Case No. W-3980 (San Luis Valley Irrigation District), Case No. 96CW45 (Prairie Ditch Company), Case No. 96CW46 (San Luis Valley Canal Company), Case No. 04CW24 (Confined Aquifer New Use Rules), and Cases No. 06CV64 and 07CW52 (Amended Plan of Water Management for Subdistrict No. 1). The Applicant has asked the court to take judicial notice of these prior decrees and the Applicant gave notice that it would be relying, at least in part, on these decrees in its proposed *Findings of Fact, Conclusions of Law, Judgment and Decree* filed on February 17, 2017. Opposer presented no evidence to show that there is any reason for the court to find that the historical facts the court previously found in these decrees are no longer true or were not true historically. Although some of these decrees were stipulated, both 04CW24 and 06CV64/07CW52, which found the same facts as the earlier stipulated decrees, were the result of litigation.

45. The Applicant's expert witness, engineer Thomas Williamsen, relied in part on some of these decrees in reaching his expert opinions in this case. Exhibit A-22, *Final Report of Helton & Williamsen, P.C.*, September 8, 2016, at 36. Mr. Williamsen also relied on Exhibits A-37 ("Soil Conditions and Drainage in San Luis Valley, Colorado," by R.J. Tipton, Irrigation Engineer, September, 1924)("Tipton Report 1924"), A-38 ("Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-37," National Resources Committee, February 1938)("Rio Grande Joint Investigation"), and A-49a ("Ground-Water Resources of the San Luis Valley, Colorado" by William J. Powell, 1958). Based on the court's previous decrees and their determinations of historical facts, Mr. Williamsen's uncontested expert testimony and the admitted exhibits upon which he relied, the court makes the following factual findings.

46. The San Luis Valley is approximately 90 miles from north to south and 50 miles from east to west. The Rio Grande enters the valley on the west side near the Town of Del Norte,

“continues southeasterly through Monte Vista to Alamosa, at which point it takes a southerly course for nearly 40 miles and, passing through a break in the San Luis Hills, enters New Mexico.” Exhibit A-38, Rio Grande Joint Investigation at 19.

47. Because the timing of the flow of the Rio Grande did not match the water needs of crops, early irrigators in the San Luis Valley sought to construct reservoirs in the headwaters of the streams tributary to the Rio Grande to store excess water early in the season and then release it as needed for growing crops. The federal government, however, placed several embargoes on the construction of reservoirs on federal lands in the San Luis Valley which hindered the development of such reservoirs.

48. When San Luis Valley water users could not build sufficient reservoirs to store water from high flows early in the irrigation season, they began the practice of subirrigation which essentially turned the unconfined aquifer into a storage reservoir. Irrigators would apply water to the land to build up the water table to within 1 to 3 feet of the surface and then “water [was] then allowed to run slowly through small ditches spaced about 8 rods apart. Water from these ditches [seeped] outward, supplying moisture to the plants.” Exhibit A-38, Rio Grande Joint Investigation at 67. This method of irrigation caused “the moisture necessary for plant growth [to be] then supplied to the soil by capillarity from the underground reservoir.” Exhibit A-37, Tipton Report 1924 at 30. Although this method of subirrigation allowed irrigators to store some of the water from the early season high flows to use later in the season, and, thus, adjusted the water supply to the irrigation demand, it did result in “unduly high water tables, and in excessive evaporation and transpiration losses.” Exhibit A-38, Rio Grande Joint Investigation at 67.

49. Such “[s]ubirrigation by flooding was once very common in many parts of the Valley, particularly in the Closed Basin area north of the Rio Grande.” Exhibit A-5, 04CW24 Decree at ¶74. This practice created an “artificial” aquifer in the Closed Basin. *Id.* at 75

50. The Closed Basin is the area of the San Luis Valley located north of the Rio Grande that is separated from the Rio Grande by both a topographic and a hydraulic divide. The topographic divide was “formed across the valley by the alluvial fan of [the] Rio Grande on the west and the alluvial material from the Sangre de Cristo Mountains on the east.” Exhibit A-38, Rio Grande Joint Investigation at 19. This low topographic divide extends from the vicinity of Del Norte “to a point a few miles north of Alamosa and thence easterly to the eastern rim of the Valley.” *Id.*

51. The result of the topographic divide is that surface streams entering the Closed Basin do not flow into the Rio Grande. Rather, they flow toward the “sump” which is the topographic low point of the Closed Basin located in the vicinity of the San Luis Lakes. The hydraulic divide has the same effect: groundwater in the unconfined aquifer of the Closed Basin flows to the sump as well, not to the Rio Grande.

52. By 1984, when this court issued its decrees in W-3979 and W-3980, subirrigation was no longer widely used in the San Luis Valley. This was because “[a]n extended period of low

water years, the attendant imposition of curtailments on diversions from the Rio Grande in aid of assuring compliance with the Rio Grande Compact, and the development of pumps to extract huge quantities of ground water” had all contributed to lower “the ground water table in the Closed Basin area. Such a lowered water table in turn eliminates the possibility for subirrigation.” Exhibit A-2, Finding of Fact, Conclusions of Law, Judgment and Decree, Case W-3980, ¶ 19.

53. The W-3980 court further explained:

The increased use of wells drilled into the underground aquifers became an important part of the economy of the Closed Basin. While subirrigation was still feasible, the essentially artificial aquifer created by that irrigation practice in which the water table level was quite near to the ground surface assured that irrigation water could be pumped from that shallow aquifer quite economically. This pumping itself, however, worked at cross purposes with the method of subirrigation because subbing depends on holding the water table near the ground surface and pumping from the shallow aquifers tends to lower the water table. . . .

Id. at ¶ 20.

54. Beginning in the early 1970s, and possibly a few years earlier, irrigators began installing center pivot sprinklers in the Closed Basin as well as other areas of the San Luis Valley. “The advent of center pivot sprinklers once again changed the irrigation practices in the Closed Basin. Sprinkler irrigation has increased the yield of crops and represents a more efficient use of water with reduced waste.” *Id.* at ¶ 22.

55. By importing their surface water rights into the Closed Basin and recharging the water into the ground and then pumping that water to serve their center pivot sprinklers, irrigators were again using the underground aquifer in the Closed Basin as a storage facility. In W-3979 and W-3980, the court found:

Water for the sprinklers is most efficiently supplied from wells in the underground aquifers but, because these aquifers are not maintained by natural recharge, continuation of (3979 – sprinkler irrigation) pumping is necessarily dependent upon artificial recharge. See Powell at pages 51-52. Just as they have in the past Rio Grande Canal shareholders have imported water into the Closed Basin from the Rio Grande and used it to recharge the underground aquifers, in effect using these aquifers as storage facilities. The stored water is then extracted from the aquifers by means of (3979-the) wells which supply the sprinklers.

Finding of Fact, Conclusions of Law, Judgment and Decree, Case W-3979 at ¶ 22; *see also* Findings of Fact, Conclusions of Law, Judgment and Decree, Case W-3980 at ¶ 22 which is identical but concerns the San Luis Valley Irrigation District’s water rights.

56. In Case No. 04CW24 this court made the same finding:

And, as established both by the evidence in this case and by the prior decrees of this Court in Cases No. W-3979, W-3980, 1995 CW 45, and 1995 CW 46 (judicially noticed in this case), there long has been a practice of using surface water to recharge or replenish the unconfined aquifer to provide a water supply for wells dependent upon that aquifer. The testimony of Ray Wright detailed his varied use of water over time including all the practices described above. *Transcript (Wright) Vol VII page 1270-74.* These practices of conjunctive use of surface water and groundwater are common in much of the San Luis Valley, with groundwater recharge being practiced most extensively in the Closed Basin area north of the Rio Grande.

Exhibit A-5, Findings of Fact, Conclusions of Law, Judgment and Decree, Case No. 04CW24 at ¶78.

57. And this court made the same finding in the Subdistrict case:

The essential role of early season diversions of surface water for underground storage in both the historical subirrigation practice and the current sprinkler irrigation practice was also explained by the Supporters' expert witness Mr. James Slattery. He described subirrigation in the San Luis Valley as an ingenious way of solving the practical problem that surface water supplies did not parallel crop demands. The solution was to use the aquifer as a reservoir to store the large spring run-off for later use. *See Testimony of James Slattery* (Oct. 4, 2009). Mr. Slattery explained that the use of aquifer storage for sprinkler irrigation is just an extension of farmers' use of water for subirrigation. The surface water is diverted, as it was historically, and then is directly recharged into the aquifer for subsequent withdrawal by wells. *Id.* Mr. Slattery stated that the water diverted by wells for sprinkler irrigation was, in effect, the withdrawal of the surface water that the farmers had recharged and stored in the aquifer. Mr. Slattery explained that historically this extensive recharge practice was unique to the San Luis Valley and is unlike the historical use of groundwater in other parts of the state. As an example, Mr. Slattery explained that in the Arkansas River Basin groundwater historically was used to meet crop demands after surface water supplies were gone, while in the San Luis Valley, including Subdistrict No. 1, surface water is recharged into the aquifers and then withdrawn by wells for irrigation. *Id.*

Exhibit A-7, Findings of Fact, Conclusions of Law, Judgment and Decree in 06CV64 and 07CW52 at ¶112.

58. Beyond the testimony of Applicant's expert witness, Mr. Williamsen, the testimony of two lay witnesses establishes the same thing. Keith Holland testified that he was involved in irrigation on his parents' farm in the Closed Basin from an early age. During his youth, his

family generally used flood and row irrigation. However, in the mid-1960s they raised some crops using subirrigation because the water table was high enough to support that method of irrigation.

59. Mr. Holland and his family have switched to using center pivot sprinklers because they are more efficient and they have also found it more efficient to use water pumped from wells to supply those center pivot sprinklers. Mr. Holland and other irrigators under the Rio Grande Canal typically use their Santa Maria Reservoir water (as well as other surface water rights they own) to recharge the aquifer and, thus, store it underground for later withdrawal through their irrigation wells.

60. Jay Yeager has worked for the RGCWUA since 1988 when he was a ditch-rider. In 2007 he became the superintendent for the RGCWUA and in 2008 he became the superintendent for the SMRC. During the thirty years that he has worked with irrigation water delivered under the Rio Grande Canal, he has observed that more farmers have installed center pivot sprinklers and that there is less surface irrigation. As farmers have switched to center pivot sprinklers they have changed the way they use their surface water rights, including their SMRC water rights, under the Rio Grande Canal. Although some farmers divert their surface water into ponds from which they pump the water into their center pivot sprinklers, most divert the water into recharge pits and then, later, pump the water out of the aquifer through their irrigation wells.

61. The undisputed testimony of Mr. Williamsen, Mr. Holland and Mr. Yeager shows that the SMRC Water Rights delivered to lands served by the Rio Grande Canal are part of the water supply imported into the Closed Basin that has helped fill the aquifer system and created the artificial aquifer described in paragraph 49 above that has sustained the production the wells used to irrigate the shareholders' lands. *See Exhibits A-37, 38 and 49a.*

62. Mr. Warner contends that the evidence in this case does not show that the SMRC Water Rights were historically used for aquifer recharge. In fact, however, as explained above, the uncontested evidence in this case indicates that the SMRC Water Rights diverted through the Rio Grande Canal were historically used in the same way as all other water rights diverted through that canal. As this court has repeatedly determined, those water rights were historically used to recharge the aquifer and create an underground reservoir which originally served the purpose of subirrigation but later, and currently, serves as a supply for the surface water rights owners' groundwater diversions.

63. Applicant seeks confirmation of the Company's shareholders' irrigation practice of recharging the aquifers underlying their land with SMRC Water Rights delivered through the Rio Grande Canal for irrigation purposes. The original decrees for the SMRC Water Rights did not include the use of "recharge" because, at the time the rights were originally decreed, "recharge" was not a recognized use of water. *See Mills' Annotated Statutes, Ch. 69, §§ 2399-2439.*

64. Colorado law provides that an underground aquifer may be considered a reservoir for the storage of water if the aquifer is filled "by other than natural means with water to which the

person filling such aquifer has a conditional or decreed right.” §§ 37-87-101(2); 37-92-103(10.8), C.R.S. (definition of “storage” as applied to water in underground aquifers); § 37-92-305(9)(c), C.R.S. (requirements for a decree recognizing a right to store water).

65. The Colorado General Assembly “has authorized the issuance of decrees for artificial recharge and storage of water in an aquifer when the decree holder lawfully captures, possesses, and controls water and then places it into the aquifer for subsequent beneficial use.” *Board of County Comm’rs of Park County v. Park County Sportsmen’s Ranch, LLP*, 45 P.3d 693, 705 (Colo. 2002).

66. Here, the evidence showed that the SMRC Water Rights are naturally tributary to the Rio Grande. Water from the Rio Grande, however, does not naturally reach the Closed Basin. Thus, when the SMRC Water Rights are diverted through the Rio Grande Canal and delivered to lands in the Closed Basin and then recharged into the underground aquifer, the underground aquifer is being filled by “other than natural means.” In addition, the evidence showed that the water the SMRC shareholders use to recharge the unconfined aquifer in the Closed Basin is water they own by virtue of their ownership of shares in the SMRC and that they historically maintained control of it after recharging it into the aquifer, because they used it, historically, for subirrigation, and currently, they maintain control of it after recharging it into the aquifer by withdrawing it through their wells.

67. Therefore, the SMRC shareholders are entitled to a decree confirming their irrigation practice of recharging the aquifers underlying their land with SMRC Water Rights delivered through the Rio Grande Canal for irrigation purposes and then withdrawing that water through their wells.

68. At the time of entry of this decree the State Engineer has promulgated rules and regulations governing the use of groundwater in Water Division No. 3 which have been challenged by some opposers. This court held a trial on the rules in January and February of 2018 but has not yet issued a decision. Because the nature of future regulation and administration of individual groundwater rights in Water Division No. 3 is not known, this decree makes no determination of what accounting, measuring and administration may be required in the event that it becomes necessary for the Company’s shareholders to rely upon the SMRC Water Rights and the recharge therefrom as a lawful source of supply for continued diversions from their wells. The resolution of that question will be addressed in the context of the plan of water management, plan for augmentation or other legal proceeding intended to allocate the water to specific wells or replace injurious depletions.

VI. APPLICANT’S THIRD REQUEST: THE COURT RECOGNIZES THE RIGHT TO FULLY CONSUME, BY FIRST USE, REUSE, AND SUCCESSIVE USE, ALL NET DEPLETIONS TO THE RIO GRANDE FROM THE HISTORICAL DELIVERY INTO THE CLOSED BASIN, OF WATER DERIVED FROM THE SMRC WATER RIGHTS

69. The uncontroverted evidence in this case establishes that when water derived from the SMRC Water Rights on the Rio Grande is delivered into the Closed Basin, the water is imported water because it does not naturally flow into the Closed Basin, and once it is there, it does not naturally return to the Rio Grande. Therefore, the Applicant is entitled to fully consume this water.

A. The Hydraulic Divide

70. As noted above, the Closed Basin is north of the Rio Grande and was formed by a low topographic as well as a hydraulic divide. As a result of these divides, surface and groundwater entering the Closed Basin does not flow to the Rio Grande but, rather, flows to the sump.

71. Both surface and ground water reaching the sump was historically lost to naturally occurring evaporation and transpiration. The Closed Basin Project now “salvages” a portion of that water. *See e.g. Closed Basin Landowners Ass’n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 629 (Colo. 1987) (describing Closed Basin Project); *Concerning the State Engineer’s Approval of the Plan of Water Management for Special Improvement Dist. No. 1*, 351 P.3d 1112-1123 (Colo. 2015).

72. The Closed Basin is a watershed that is distinct from the Rio Grande and its tributaries. The Rio Grande Compact defines the “Closed Basin” as “that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.” Rio Grande Compact, Art. I(d), P.L. No. 96, 53 Stat.785 (1939); § 37-66-101, C.R.S. (2016). Furthermore, the statutory definition of Water Division No. 3 found in § 37-92-201(1)(c), C.R.S., describes the Closed Basin drainage area as distinct from the drainage area of the Rio Grande and its tributaries.

73. Before 1850, prior to the advent of irrigation in the Closed Basin, the unconfined aquifer in the Closed Basin received natural drainage from streams tributary to the Closed Basin. This natural drainage did not cause the groundwater levels in the Closed Basin to rise to the ground surface, except in the trough or sump of the Closed Basin. Exhibit A-37, Tipton Report 1924 at 4, Exhibit A-7, 06CV74 & 07CW53 Decree at ¶109. In fact, prior to the development of numerous large irrigation canals--the Rio Grande Canal, the Farmers Union Canal, the Prairie Ditch, and the San Luis Valley Canal--as well as smaller ditches that bring water into the Closed Basin, groundwater levels in the unconfined aquifer of the Closed Basin could be anywhere from seventy to one hundred feet below the surface of the land.

74. Water from the Rio Grande does not naturally flow into the Closed Basin. Once early irrigators began importing water from the Rio Grande into the Closed Basin, however, the water levels in the Closed Basin rose “appreciably.” *Id.* at ¶109.

In 1886-1896, the water table on the west side of the Valley on the alluvial slope under the Rio Grande Canal was reported to be at depths of 40 to 100 feet, and it had risen to depths of 7 to 16 feet by 1924. Likewise, the depth to water between the Gunbarrel Road (U.S. Highway 285) and Mosca, Colorado, was reported to be about 40 feet in 1884, and had risen to about 12 feet in 1900, and to between 0-3 feet in 1924.

Id. (citing Tipton Report 1924 at 9); *see also* Rio Grande Joint Investigation at 67.

75. It was this large-scale importation of water into the Closed Basin that created the hydraulic divide, which is a mound or high point in the groundwater level in the unconfined aquifer. The hydraulic divide roughly parallels the topographic divide, but its location varies in response to climatic conditions and irrigation practices. Exhibit A-49a, Powell, at 60-61, *see* Exhibit A-29b, Plate 1, Water Resources Circular 18, (showing hydraulic divide in 1970); Exhibit A-30a (showing hydraulic divide in 2012); Exhibit A-12b, Appendix K (showing hydraulic divide in 2015). As seen on these exhibits, water engineers determine the location of the hydraulic divide by plotting groundwater contours using the height of the water level in numerous wells in the area. Groundwater flows perpendicular to these contours. Groundwater in the unconfined aquifer north of the hydraulic divide flows to the sump area and groundwater in the unconfined aquifer south of the hydraulic divide flows to the Rio Grande.

76. During wetter years, when there is more water available in the Rio Grande and, therefore, more water imported into the Closed Basin, the hydraulic divide moves farther north from the Rio Grande. In contrast, during drier periods, when less water is imported into the Closed Basin, the hydraulic divide is very close to the river.

77. As of 2015, the hydraulic divide was located close to the Rio Grande west of Monte Vista. Exhibit A-12b, 2016 Annual Replacement Plan of Special Improvement District No. 1 of the Rio Grande Water Conservation District, at 32 and Appendix K. This is an area in which the hydraulic divide has historically been close to the Rio Grande. The Rio Grande in the area from Del Norte to Seven Mile Plaza, west of Monte Vista, is considered to be “perched,” which means that it is not in contact with the unconfined aquifer because it is underlain by low permeability materials that restrict the amount of water that can seep out of the stream channel into the underlying aquifer. Even when the hydraulic divide is poorly defined or very close to the Rio Grande, however, water flowing north into the Closed Basin does not return to the Rio Grande.

78. The Opposer, however, asserts that the evidence in this case did not prove the existence of the hydraulic divide and that the hydraulic divide is a construct of old or disproven science. The Opposer did not present expert testimony to establish this alleged fact but, instead, relied upon the discussion of the hydraulic divide in the 2016 Annual Report of Special

Improvement District No. 1 of the Rio Grande Water Conservation District. Exhibit O-7 at 34. That report discusses the hydraulic divide as follows:

The hydraulic divide (divide) is a shallow groundwater divide, that when present, separates the closed basin in the San Luis Valley from the remainder of the Rio Grande Basin. The divide has been historically mapped generally paralleling and lying northerly of the Rio Grande $\pm \frac{1}{2}$ to ± 2 miles through the reach from near Del Norte to Alamosa. The divide extends northwest of Del Norte to the Continental Divide and from Alamosa northeast to the basin divide along the Sangre de Cristo Mountains. Recent water level measurements in wells along the north side of the Rio Grande indicate that the divide has retreated south to the Rio Grande or very near the river. A goal of the Plan of Water Management is to recover and re-establish the divide northerly of the river which is likely to reduce depletions to the Rio Grande from well pumping within Subdistrict #1.

Appendix C contains maps showing the results of groundwater measurements collected during spring 2016. These maps include interpreted groundwater elevation contours and vectors showing direction of groundwater flow. If a well-defined divide lying northerly of the Rio Grande exists, groundwater flow vectors would indicate a groundwater flow from the divide along the southerly side toward the river and on the northerly side toward the Closed Basin. The groundwater flow vectors do not provide evidence of a well-defined divide with the possible exception of an area between Monte Vista and Alamosa where there is some evidence for a few miles. The interpreted location of the divide is shown on the maps prepared from the 2016 groundwater measurements. The approximate divide location in the area between Del Norte and the 7-Mile Plaza is uncertain due to the perched river condition, so it is shown as a dotted line on the maps included in Appendix C.

Although this discussion of the hydraulic divide indicates that the divide has retreated to very near the Rio Grande and that the divide is not well-defined, it does not indicate that the divide does not exist.

79. Furthermore, the Applicant's expert, Thomas Williamsen, as well as the Assistant Division Engineer, James Heath, both gave credible, uncontroverted testimony that the hydraulic divide exists and that because of the topographic and hydraulic divides, the surface streams and groundwater in the unconfined aquifer of the Closed Basin do not flow to the Rio Grande. The Opposer did not provide the court with any evidence from which the court could make a different factual finding.

B. The Fact that the RGDSS Calculates Accretions to the Rio Grande as a Result of the SMRC Water Being Used for Irrigation in the Service Area of the Rio Grande Canal Does Not Mean that Water Imported into the Closed Basin Returns to the Rio Grande

80. The Opposer claims that water diverted from the Rio Grande into the Closed Basin is tributary to the Rio Grande and not imported water because the 2012 Response Functions of the Rio Grande Decision Support System (“RGDSS”) indicate that removing SMRC water from irrigation under the Rio Grande Canal will result in a reduction in accretions to the Rio Grande. Opposer bases this claim on the fact that the Company has used the 2012 Response Functions for Subdistrict No. 1 from the RGDSS to calculate an amount of lost accretions to the Rio Grande which will result if the court grants the Company’s request to allow it to change the use of the SMRC water rights historically used under the Rio Grande Canal. The evidence, however, does not support the Opposer’s claim.

81. If the court grants the change request, SMRC water rights owners will be allowed to lease shares of SMRC water to the Subdistricts or other entities to replace depletions to the Rio Grande caused by groundwater pumping. The practical effect of this change will be that the leased water will be released from the reservoirs and sent down the Rio Grande and will not be diverted for irrigation in the service area of the Rio Grande Canal, *i.e.* in the Closed Basin.

82. At trial, the Company’s expert witness, Thomas Williamsen, testified that he used the 2012 Response Functions developed from the RGDSS to calculate the accretions to the Rio Grande that would be lost when owners of SMRC water rights that were historically used to irrigate land under the Rio Grande Canal, instead, leased their water to replace depletions to the Rio Grande.

83. The RGDSS groundwater model is a complex groundwater modelling computer program that the Colorado Division of Water Resources and other Division 3 Water organizations have worked to develop over the course of many years and through numerous iterations. The RGDSS has shed new light on the interaction between the stream systems and aquifer systems in the San Luis Valley. As this court observed in its decision in Case No. 04CW24, “[t]he RGDSS Study provides less than a complete picture of the hydrogeology of the San Luis Valley but it provides this court with immensely more information and a better understanding of the interplay of the aquifers and surface streams than available to anyone in the past.” Exhibit A-5, Case No. 04CW24, November 9, 2006, Finding of Fact, Conclusions of Law, Judgment and Decree, at 55-56. The RGDSS and the RGDSS groundwater model have been refined since the court made that statement and they are currently the best science available for purposes of determining stream depletions caused by well pumping in Water Division 3.

84. Because the RGDSS is a complex, basin-scale model that requires powerful computers and a substantial investment of time and resources to operate, and because its results are most reliable when used to simulate extended time periods, this court has previously approved the use of response functions as “a simplified form of the output from the RGDSS groundwater model” to calculate “monthly stream depletions from the net consumptive use of

groundwater by Subdistrict wells.” Exhibit A-7, Findings of Fact, Conclusions of Law, Judgment and Decree in Case No.’s 2006CV64 & 2007CW52, at 47 (May 27, 2010).

85. Furthermore, because Subdistrict No. 1, containing some 174,000 acres of irrigated farm land north of the Rio Grande, includes nearly all the lands served by the Rio Grande Canal on which the SMRC Water Rights have been historically used,² it was appropriate for Mr. Williamsen to calculate the lost accretions to the Rio Grande using the 2012 Response Functions for Subdistrict No. 1. This is a reasonably reliable means of estimating the impact on affected surface streams for the proposed change of water rights and for preventing injury to the vested water rights of others.

86. Of course, that begs the question of why calculate lost accretions to the Rio Grande from water that the Company claims is imported to the Closed Basin and does not return to the Rio Grande. In his expert report, Mr. Williamsen explained that

SMRC does not concede that it has any legal obligation to replace accretions to the Rio Grande that may result from losses to the aquifer system, but has agreed to do so as a part of its settlement with other Opposers. SMRC contends it is entitled to fully consume the full quantity of water delivered into the Closed Basin and that it has no replacement obligation to the Rio Grande.

Exhibit A-22, Final Report Case No. 13CW3002, September 8, 2016, at 18, fn. 8.

87. Nevertheless, it is appropriate for the Applicant to replace lost accretions to the Rio Grande caused by the proposed change of water rights in this case because this court has previously determined that groundwater consumption by irrigation wells in Subdistrict No. 1 depletes the flows of the Rio Grande. Exhibit A-7, Finding of Fact, Conclusions of Law, Judgment and Decree in Cases No. 2006CV64 and 2007CW52, dated May 27, 2010 . This depletion is the result of the complex and non-linear interactions between the unconfined and confined aquifer systems and the surface streams. The result of the net groundwater consumption has been to reduce accretions or gains to the Rio Grande. The reduction in accretions or gains to the Rio Grande, however, is only a comparatively small percentage of the amount of groundwater used in Subdistrict No. 1. *See generally Id.* at 46-57.

88. Mr. Williamsen used the 2012 Response Functions to calculate whether removing the SMRC water from irrigation in the area underlying the Rio Grande Canal would have any effect on the Rio Grande. As explained in more detail at ¶¶ 157 – 170 below, Mr. Williamsen was estimating the impact of removing the deep percolation from the first use of the SMRC Water Rights from the aquifer system. The results of his calculations were that “3.3 percent of the water diverted by the Rio Grande Canal, Santa Maria water, would be accretions to the Rio Grande”

² The Rio Grande Canal’s service area and lands provided water by the Company include lands at the north end of the Rio Grande Canal Service area in Townships 43 and 44 North near Saguache, Colorado. See Exhibit A-26.

from the application of that water on the land served by the Rio Grande Canal. Vol. I, p. 64, ll. 10-11. Mr. Williamsen and the Company propose to replace this 3.3% to the Rio Grande to ensure that the change of water rights they are requesting in this case will not result in injury to other water users.

89. Because the groundwater contour maps he consulted indicated that SMRC water delivered to lands in the service area of the Rio Grande Canal would not return to the Rio Grande, Mr. Williamsen questioned why the 2012 Response Functions showed any effect on the Rio Grande from removing the SMRC water from irrigation use in the service area of the Rio Grande Canal, *i.e.* the Closed Basin. Mr. Williamsen consulted with others involved in creating the RGDSS groundwater model and through those consultations and his review of the evidence determined the 2012 Response Functions were “identifying that amount of recharge that’s affecting the river that’s between the hydraulic divide and the Rio Grande. And so that’s a pretty small portion of Rio Grande Canal service area.” Trial Transcript, Vol. I, p.64, ll. 4-6.

90. The uncontroverted testimony from both Mr. Williamsen and Mr. Heath showed that the loss of accretions calculated using the 2012 Response Functions for Subdistrict No. 1 reflected the loss of return flow to the Rio Grande from the SMRC water that has historically been applied to irrigate lands in the Rio Grande Canal service area that are located south of the hydraulic divide and north of the Rio Grande. In addition, the evidence showed that the loss of accretions to the Rio Grande was also the result of the Response Functions taking into account changes in the location of the hydraulic divide over time including the changes that would result from the change in use of the SMRC water. If less SMRC water is diverted for irrigation of land overlying the Closed Basin, there will be less water in the artificial aquifer of the Closed Basin which will result in the hydraulic divide moving closer to the Rio Grande which will result in less return groundwater flow to the river because there will be less irrigated acreage located south of the hydraulic divide and north of the river. As Mr. Heath said in response to the Opposer’s attorney’s question about whether the estimated accretions meant that water was returned to the river: “It’s a change in what the river did. So there were more flows if it—if the change scenario added water to the system, there would be more flows in the Rio Grande, not necessarily a molecule of water moving towards the Rio Grande, there’s other aspects. . . .” Trial Transcript, Vol. 4, p. 35, ll 6-10.

91. Opposer asks the court to find that the fact that the 2012 Response Functions estimate that removal of SMRC water from irrigation of lands underlying the Rio Grande Canal would result in a reduction of 3.3% in accretions to the Rio Grande means that the SMRC water applied to land in the Closed Basin is tributary to the Rio Grande and not imported water. The Opposer, however, provided no expert or other evidence to support this claim. Accordingly, the court cannot make this finding and must rely on the uncontroverted testimony of Mr. Heath and Mr. Williamsen that the results of applying the 2012 Response Functions to quantify the change in historical stream flows that would result from the Applicant’s proposed change of water rights are not proof that water is moving from the Closed Basin to the Rio Grande.

C. Prior Decrees of This Court Do Not Estop the Applicant from Claiming that the Water It Delivers into the Closed Basin is Imported Water

92. Mr. Warner claims that issue preclusion bars the Company's claim that the water it delivers into the Closed Basin is imported to that drainage basin. Mr. Warner argues that the court's decrees in 86CW46, the Application of American Water Development, Inc. ("AWDI Decree"), Exhibit O-20, and in 04CW24, in the Matter of the Confined Aquifer New Use Rules for Division 3, Exhibit A-5, contain specific findings that establish that the SMRC water rights, after they are delivered into the Closed Basin, are tributary to the Rio Grande, which means the SMRC water rights are not imported to the Closed Basin and that these determinations are binding on Applicant in this case. The court agrees with the Applicant that neither of those decrees made a determination on the issues before this court and, therefore, those decrees do not bar the Applicant's claim that the SMRC water delivered into the Closed Basin is imported.

93. Issue preclusion, otherwise known as collateral estoppel, is a judicially created, equitable doctrine that bars re-litigation of an issue that has been litigated and decided in a prior proceeding. *Reynolds v. Cotten*, 274 P.3d 540, 543 (Colo. 2012). Issue preclusion bars re-litigation of an issue when: (1) the issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) the party against whom estoppel is sought was a party to or was in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *Id.* at 543; *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 667 (Colo. 2006); *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). The party seeking issue preclusion has the burden to prove each of these elements. *See, e.g., Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84-85 (Colo. 1999).

94. Mr. Warner asserts that the AWDI Decree bars the Company's claim to imported water. In his Response to Applicant's Proposed Findings of Fact, Conclusions of Law, Judgment and Decree, Mr. Warner argues that his real claim is that various factual findings the AWDI court made are binding on Applicant—specifically, he argues that since the AWDI court determined that groundwater in the unconfined aquifer, including in the Closed Basin, is tributary groundwater or "water of a natural stream," that this means the court found that the water in the unconfined aquifer in the Closed Basin is tributary to the Rio Grande. *See also* Opposer's Proposed Findings of Fact, Conclusions of Law, Judgment and Decree at 18-20; Opposer's Trial Brief at 5-6.

95. The court agrees with the Applicant that:

In so arguing the Opposer conflates the question of whether the water in these aquifers is tributary for purposes of Colo. Const. Art. XVI §§ 5 and 6 with the question of whether that water flows into the Rio Grande. . . . [T]he fact that a water source is "tributary" does not mean that it is part of any particular surface stream; rather it means that it is water of the natural stream subject to the doctrine

of prior appropriation under the Colorado Constitution, as opposed to non-tributary groundwater allocated based on land ownership or designated groundwater allocated based on a modified doctrine of appropriation. Therefore, a determination that water in the confined and unconfined aquifers is tributary for purposes of the constitutional doctrine of prior appropriation, does not establish that it flows into the Rio Grande and is a tributary of the Rio Grande.

Applicant's Response to Opposer James Warner's Proposed Decree at 2.

96. Although the AWDI case dealt with the question of whether water in the unconfined aquifer of the Closed Basin was tributary groundwater, it did not decide that water imported into the Closed Basin return flowed to the Rio Grande. The AWDI case was tried in this court in October and November 1991. The sole issue remaining at the time of trial was AWDI's claim for 200,000 acre-feet annually of non-tributary groundwater to be diverted through 117 wells located on the Baca Grant No. 4 and land adjacent thereto, and 15 wells located near Villa Grove. The wells were to be 2,500 feet deep and withdraw groundwater from between 200 and 2,500 feet below ground, which is below the blue clay that separates the deeper confined from the shallow unconfined aquifer. So, AWDI was seeking the right to withdraw what it argued was unappropriated water from the confined aquifer and it was arguing that this water was non-tributary groundwater and therefore, that AWDI's withdrawal of this water would not injure other water users in Division 3.

97. The Company was not a party to the AWDI case, but stipulated that it was a member of the Rio Grande Water Users Association, which was a party to the case. Mr. Warner offered no evidence of what type of legal entity the Rio Grande Water Users Association was at the time of the AWDI Decree. If the Rio Grande Water Users Association was an unincorporated nonprofit association, under the Colorado Uniform Unincorporated Nonprofit Association Act, § 7-30-108, C.R.S., a judgment or order against such an association is not, by itself, a judgment or order against a member of the association. Thus, Mr. Warner has not established the privity required for his estoppel claim.

98. Even assuming Mr. Warner had established the requisite privity, his estoppel claim still fails. The AWDI court described the matters at issue in the nontributary claim in paragraphs 40-44 of the Decree. Essentially, the question was whether the water that AWDI proposed to pump from the confined aquifer met the statutory definition of nontributary groundwater in effect at the time of the trial, which provided:

'Nontributary groundwater' means that groundwater, located outside the boundaries of any designated groundwater basins in existence on January 1, 1985, the withdrawal of which will not, within 100 years, deplete the flow of a natural stream, including a natural stream as defined in §§ 37-82-101(2) and 37-92-102(1)(b) at an annual rate greater than 1/10th of 1% of the annual rate of withdrawal. The determination of whether groundwater is nontributary shall be based upon aquifer conditions existing at the time of permit application...

§ 37-92-103(10.5) C.R.S. (1991). This statute required AWDI to prove that its pumping would not deplete the flow of natural streams by more than this amount. As described in paragraph 41 of the AWDI Decree, AWDI contended that the unconfined aquifer in the San Luis Valley was not a natural stream or part of a natural stream and claimed that the court should not consider the effects of pumping on the unconfined aquifer in determining whether the groundwater AWDI sought to withdraw was non-tributary. Thus, the AWDI court was required to determine, among other things, whether the water in the unconfined aquifer was water of a natural stream, that is, tributary water subject to appropriation under Colo. Const. Art. XVI §§ 5 and 6. If so, then the court was required to determine the extent to which AWDI's proposed pumping would deplete the unconfined aquifer as part of its determination of the proposed pumping's impact on the flow of natural streams. The court found that the groundwater in the unconfined aquifer is water of the natural stream, i.e., tributary water subject to appropriation.

99. To resolve AWDI's non-tributary claim, however, the court did not need to determine whether water delivered into the Closed Basin from the Rio Grande flowed back to the Rio Grande. Moreover, to the extent the AWDI Decree addresses the issue, the court's determinations in that case are consistent with the Company's claims in this case. The AWDI decision contains extensive findings of fact on the geologic and hydrologic system of the San Luis Valley as it was then understood. Paragraph 82 on page 40 of the AWDI Decree discusses the Closed Basin area, finding:

82. The third principal drainage is north of the Rio Grande in an area known as the Closed Basin. The Closed Basin is distinguished from the remainder of the Valley by a low topographic divide and a ground water or "hydraulic" divide. The approximate boundaries of the Closed Basin are shown on Plate 1 of Water Resources Circular 18, Applicant's Exhibit 29. *The effect of both the topographic divide and the ground water divide is that water entering the Closed Basin does not flow, either on the surface or in the unconfined aquifer, to the Rio Grande.* The Closed Basin is the natural drainage for a portion of the San Juan Mountains on the west and north and the Sangre de Cristo Mountains on the east. Numerous streams come off these mountains and supply water to the Closed Basin and to the unconfined and confined aquifers. The two principal drainages located within the Closed Basin area are Saguache Creek and San Luis Creek. *The Closed Basin also receives a substantial supply of water imported by ditches and canals from the Rio Grande.* Also located within the Closed Basin area is the U.S. Bureau of Reclamation's Closed Basin Project, the Great Sand Dunes National Monument, and the Blanca Wildlife Habitat Area.

(Emphasis added). This finding of fact is consistent with the Company's claim that the Closed Basin is a separate drainage basin from the Rio Grande and its tributaries and that water entering the Closed Basin does not flow to or return to the Rio Grande. Thus, for all these reasons, the AWDI Decree does not bar the Company's imported water claim in this case.

100. Mr. Warner also asserts that the Company's claim to imported water is estopped by argument in the Objectors' Trial Brief filed in the AWDI case on September 26, 1991. Exhibit O-23. In particular, Mr. Warner points to the arguments on pages 28-30 regarding the requirements for a change of water rights. At the time this brief was filed AWDI had not dismissed its augmentation or replacement plan. Claim V and this portion of the AWDI Objectors' Trial Brief addressed legal standards governing plans for changes of water rights to be used in AWDI's augmentation or replacement plan. Exhibit O-23 at 25. The AWDI Objectors' arguments at pages 28-30 simply state the then applicable law for changes of water rights. Nothing in that brief suggests that imported water was being changed or that the Objectors' Trial Brief argued that the standards it cited applied to imported water. Thus, the Court finds no basis for any claim of estoppel arising out of the Objectors' Trial Brief in AWDI.

101. Mr. Warner also points to pages 11 and 12 of the Supplement to the Objectors' Trial Brief in AWDI. Exhibit O-24. There the AWDI Objectors argued that "[w]ater rights in the unconfined aquifer are appropriative water rights created by appropriation pursuant to the Constitution, and are not nontributary rights." This statement is simply an acknowledgement that groundwater in the unconfined aquifer is water of the natural stream subject to appropriation under Colo. Const. Art. XVI §§ 5 and 6. It is not an assertion that water in the unconfined aquifer in the Closed Basin returns to the Rio Grande or that the Closed Basin is tributary to the Rio Grande. This statement provides no basis for any claim of estoppel against the Company in this case.

102. Mr. Warner also argues that the Company's claim to imported water is estopped by the Decree entered in Case No. 04CW24, in the Matter of the Confined Aquifer New Use Rules for Division 3. As support he cites to various provisions of the court's extensive findings in the Decree in that case discussing the hydrology of the San Luis Valley. At issue in Case No. 04CW24 were that State Engineer's proposed "Confined Aquifer New Use Rules for Division 3" promulgated under the standards of § 37-92-501(4), C.R.S. Those Rules addressed the standards that apply to persons seeking new withdrawals of groundwater from the confined aquifer system, and do not apply to existing groundwater uses. The issues in that case did not require the court to determine whether water diverted from the Rio Grande into the Closed Basin was imported water or returned to the Rio Grande. Furthermore, in paragraphs 56 and 57 of that decree, the court generally described the Closed Basin consistent with the Company's claims in this proceeding. Finally, because the issue of whether water diverted into the Closed Basin from the Rio Grande is imported water was not actually litigated or necessary to the decision in Case No. 04CW24, the decree in that case does not bar any of the Company's claims in this proceeding.

103. In addition, Mr. Warner has identified three Division 3 water rights decrees (00CW19, 99CW9, and 99CW25) involving shares in the Company that he asks the court to use as evidence of the actual history of the use of SMRC water. In his Response to the Applicant's Proposed Findings of Fact, Conclusions of Law, Judgment and Decree, Mr. Warner indicates that he is not asking the court to find that these decrees made any determinations that would preclude the Applicant from pursuing its claims in this case. Instead he states these "decrees were offered into evidence to show, as a matter of fact, the actual history of the use of that

water.” Opposer’s Response to Applicant’s Proposed Findings of Fact, Conclusions of Law, Judgment and Decree at 14, fn. 6.

104. In these cases, SMRC water rights owners obtained decrees to permit them to use their SMRC surface water rights to recharge the aquifer and then to pump the water from their wells for irrigation. The applicants did not claim the SMRC water rights were imported to the Closed Basin and the decrees did not grant the applicants the right to successively use their water to extinction. Mr. Warner argues that the court should find that these decrees show that the SMRC water rights owners did not believe their water was imported to the Closed Basin because they did not seek decrees allowing them to use the water to extinction. In fact, however, all these decrees were entered by stipulation of the parties which precludes the court from relying on these decrees to make the factual findings Mr. Warner is requesting.

105. A prior judgment, generally will not have preclusive effect if it is the result of a stipulation or consent decree because it will not meet the first requirement for issue preclusion—that the issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding. For an issue “to be actually litigated” and necessarily adjudicated, “the issue must [have been] submitted for determination and then *actually determined by the adjudicatory body.*” *Nichols v. Board of County Com’rs of La Plata County*, 506 F.3d 962, 968 (10th Cir. 2007) abrogated on different grounds by *Onyx Properties, LLC v. Board of County Com’rs of Elbert County*, 838 F.3d 1039, 1043 n.2 (10th Cir. 2016)(quoting *Bebo Constr.*, 990 P.2d at 85) (emphasis in original). “Mere prior litigation without a decision does not justify preclusion when the same issue arises under a different claim or cause of action.” *Reynolds*, 274 P.3d at 544 (quoting 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4420 (2nd ed. 2011)).

106. The Restatement (Second) Judgments § 27, cmt. e explains the rationale for the requirement that the identical issue be actually litigated and necessarily decided in the prior proceeding:

A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation

...

In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.

107. Accordingly, consent decrees are not a judicial determination of a litigated right, rather “[the] judgment results not from adjudication but from a basically contractual arrangement of the parties. It can be entered only if the parties have in fact agreed to entry, it is to be enforced in accord with the intent of the parties” 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443 (2nd ed. 2011) (footnotes omitted). “Stipulation of individual issues is treated much as a consent judgment. A stipulation or admission may be binding in later stages of a continuing proceeding. But issue preclusion ordinarily does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation.” *Id.* Thus, “[t]he basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties. There is no preclusion at all if the parties do not intend to preclude later litigation” *Id.*

108. Colorado has adopted this approach to the interpretation of consent decrees in water cases. *Minturn v. Tucker*, 293 P.3d 581, 590 (Colo. 2013). Courts construe stipulated water decrees as they would a contract. *Id.* Consistent with the principles of contract construction, the court’s primary goal when construing a stipulation is to give effect to the intent of the parties. *Id.*

109. Case No. 99CW09, the Application of Off Ranches, Exhibits O-18, involved a change of water rights and plan for augmentation. The Company was not a party to that case and the applicant, Off Ranches, and the opposer, the Rio Grande Canal Water Users Association, stipulated to the Report and Ruling of the Referee. The express terms of the Report and Ruling of the Referee state:

29. Applicant’s claims in this case rely solely upon recharge with the water attributable to its shares in the RGCWUA and the Santa Maria Reservoir Company on the SW¼ of Section 30, T40N, R7E, NMPM. Accordingly, *nothing in this Ruling shall be construed to preclude the RGCWUA or the Santa Maria Reservoir Company from litigating, in any different case involving the same or similar issues, any matter determined in this case.* The facts of this case are unique and therefore this Ruling is not intended to be, and shall not be, construed as a binding precedent in other cases involving shares in the RGCWUA and Santa Maria Reservoir Company now pending or hereafter filed in the District Court for Water Division No. 3. The Applicants, the RGCWUA, and the State and Division Engineers have agreed that this Ruling shall not be cited or relied upon by them as binding precedent in any other lawsuit or administrative proceeding involving water rights in Water Division No. 3.

(Emphasis added). This language makes clear the parties’ intention that this decree would not preclude the Company from litigating any issue addressed in this case in any other proceeding.

Accordingly, the decree entered in this case confirming the Report and Ruling of the Referee does not bar any of the Company's claims now before the court.

110. Case No. 99CW25, the Application of James E. Bradley, Exhibit O-19, also concerned a change of water rights and plan for augmentation involving shares in the Company. The applicant, James Bradley, and the opposers, the State and Division Engineers and the Rio Grande Water Users Association, stipulated to the Report and Ruling of the Referee. Paragraph 17 of the Report and Ruling of the Referee states:

17. The Applicant's claims in this plan for augmentation rely solely upon recharge with the water attributable to his shares in the RGCWUA and the Santa Maria Reservoir Company on the NW $\frac{1}{4}$ of Section 31, T40N, R7E, NMPM. Accordingly, *nothing in this Ruling shall be construed to preclude the RGCWUA or the Santa Maria Reservoir Company from litigating, in any different case involving the same or similar issues, any matter determined in this case.* The facts of this case are unique and therefore this Ruling is not intended to be, and shall not be, construed as a binding precedent in other cases involving shares in the RGCWUA and Santa Maria Reservoir Company now pending or hereafter filed in the District Court for Water Division No. 3.

(Emphasis added). Again, this is a clear and unambiguous statement of the parties' intent that the decree in this case would not bar the Company from litigating in any other case the issue determined in this case. Therefore, the decree in Case No. 99CW25 does not bar any of the Company's claims now before the court.

111. In addition, in Case No. 00CW19, the Application of Roger Ensz and Julia Ensz, Exhibits O-16 and 17, the applicants requested a change of water rights and plan for augmentation involving SMRC Water Rights. The applicants, the Enszs, and the opposers, the Rio Grande Canal Water Users Association and the Rio Grande Water Users Association, stipulated to the Ruling of the Referee. Paragraph 35 of the Ruling of the Referee states:

35. This Ruling is the product of compromise and settlement negotiations among the parties and the issues were not litigated. The facts of this case are unique and therefore *this Ruling is not intended to be, nor shall it be, construed as binding precedent in other cases now pending or hereafter filed in the District Court for Water Division No. 3.* Each of the parties stipulates and agrees that this Ruling shall not be cited nor relied upon by them as binding precedent in any other lawsuit or administrative proceeding involving water rights in Water Division No. 3.

(Emphasis added). Once again, this plain and unambiguous language demonstrates the intent of the parties that this decree will not preclude any party from litigating in any other proceeding any issue resolved by the Ruling of the Referee. Accordingly, the decree in Case No. 00CW19 does not bar any of the Company's claims now before the court.

112. Opposer also appears to argue that the fact that the applicants in two other Division 3 water court cases, 96CW46, Application of San Luis Valley Canal Co., and 96CW45, Application of Prairie Ditch Co., withdrew their claims that the irrigation water they brought into the Closed Basin was “foreign, imported or developed water with respect to the Closed Basin” supports the court finding, in this case, that the Company’s SMRC water brought into the Closed Basin is not imported water. Exhibit O-12, 96CW46 Decree at ¶ 5; Exhibit O-13, 96CW45 Decree at ¶ 5 and Opposer’s Proposed Findings of Fact, Conclusions of Law, Judgment and Decree at ¶ 40. Notably, however, both decrees also contain the following language: “[f]or purposes of this decree, all parties have stipulated and agreed that, to the extent that future diversions by the Company recharge the unconfined aquifer of the Closed Basin, the Company’s shareholders are entitled to use and to fully consume by first use and, if necessary, by repeated reuse, all water recharged to the unconfined aquifer . . .” 96CW46 Decree at ¶21 and 96CW45 Decree at ¶21.

113. In addition, both 96CW46 and 96CW45 were stipulated decrees and contained the following language:

49. This Judgment and Decree is the product of compromise and settlement negotiations between the parties hereto and the issues were not actually litigated. Accordingly, nothing in this Judgment and Decree shall be construed to preclude any party from litigating, in any different case involving the same or similar issues, any matter determined in this Judgment and Decree. The facts of this case are unique and therefore this Judgment and Decree is not intended to be, and shall not be construed as a binding precedent in other cases now pending or hereafter filed in the District Court for Water Division No. 3.

Id. at ¶49. Thus, the court can draw no conclusions from the fact that the applicants in 96CW46 and 96CW45 withdrew their claims that the water they brought into the Closed Basin was foreign or imported water.

D. Because SMRC Water is Imported into the Closed Basin, SMRC Water Users Under the Rio Grande Canal May Use Their Water to Extinction

114. The SMRC Water Rights diverted into the Closed Basin from the Rio Grande do not return as surface flow to the Rio Grande. In addition, the direction of groundwater flow in the unconfined aquifer of the Closed Basin is to the northeast, away from the Rio Grande, so that the return flows from the SMRC Water Rights used for irrigation do not return to the Rio Grande. Thus, the water from SMRC Water Rights delivered by the Rio Grande Canal into the Closed Basin is new water to the Closed Basin that would not be there absent its diversion by the Rio Grande Canal into the Closed Basin. The SMRC Water Rights are foreign to the Closed Basin in the sense that but for the diversion of that water through the Rio Grande Canal that water would not reach the Closed Basin and would not be available for diversion or use in the Closed Basin.

115. As the court has previously found, the importation of water from the Rio Grande into the Closed Basin has created an artificial aquifer. Moreover, the SMRC Water Rights divert water into a different watershed or drainage area because none of the streams that flow into the Closed Basin naturally flow back into the Rio Grande. Thus, while the Closed Basin is within Water Division No. 3, it is an unconnected stream system within the meaning of § 37-82-106, C.R.S. (2016), for purposes of water diverted from the Rio Grande into the Closed Basin.

116. Because the SMRC Water Rights carried into the Closed Basin are imported water, the right to reuse automatically attaches to those water rights and the Company has the right to make successive use of that water to extinction. *Denver v. Englewood*, 304 P.3d 1160, 1164 (Colo. 2013) (citing *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 68, 70 (Colo. 1996), *Pub. Serv. Co. of Colo. v. Willows Water District*, 856 P.2d 829, 833 n. 8 (Colo. 1993)), *City of Florence v. Board of Water Works of Pueblo*, 793 P.2d 148, 154 (Colo. 1990).

117. Opposer argues, however, that this court should not recognize Applicant's claim to reuse the SMRC water it imports into the Closed Basin because Applicant did not make this claim at the time of the original adjudication of the water storage right and has not taken any action in the subsequent one hundred years to exercise the right of reuse. See Opposer's Proposed Findings of Fact, Conclusions of Law, Judgment and Decree at 23. In fact, however, one who imports water into a new basin "need not have an intent to reuse this water at the time of the original appropriation and importation to maintain the subsequent right of reuse." *City of Thornton*, 926 P.2d at 70. Furthermore, "the right to reuse foreign water is not subject to abandonment for non-use." *City of Thornton*, 926 P.2d at 71-72. So, the fact that neither the Company nor its shareholders indicated an intent to reuse the SMRC water rights to extinction at the time of adjudication of the water storage right or at the time they first imported the water to the Closed Basin does not defeat the Applicant's claim to a right of reuse. Similarly, the fact that the Company's shareholders may not have historically re-captured and reused this imported water to extinction³ does not defeat the Applicant's claim that it and its shareholders have the right to use and reuse this water to extinction.

118. Finally, the Colorado Supreme Court's decision in *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improv. Co.*, 191 P. 129 (Colo. 1920,) does not change this result, and, in fact, has no bearing on the issues in this case. Opposer appears to have cited this case for the proposition that since the Colorado Supreme Court rejected the Rio Grande Reservoir's claim that water seeping from its reservoir was developed or added water that this court should reject the Company's claim that water diverted from the reservoir into the Closed Basin is imported water. Since *Rio Grande Reservoir & Ditch Co.* involved water seeping out of the base of a hill

³ As this court has found, however, the Applicants' shareholders did re-capture and reuse this water since they historically placed the water in the unconfined aquifer for use in subirrigation practices and since they currently place the water in the unconfined aquifer to store it for use in center pivot sprinklers to irrigate later in the growing season when it can be profitably withdrawn from groundwater wells and applied to crops. See ¶¶ 44-68 *supra*.

adjacent to the Santa Maria Reservoir—located far from the Closed Basin--and did not involve water being imported into the Closed Basin, the decision in that case does not apply to the questions before this court.

119. Subject to the further terms and conditions of this decree, to the extent that SMRC water is delivered to the Company's shareholders served by the Rio Grande Canal, the Company's shareholders are entitled to use and to fully consume by first use and, if necessary, by successive use, the water recharging the aquifers to provide a water supply for the irrigation of the shareholders' lands within the Rio Grande Canal's Service Area. This entitlement or recharge credit will be allocated to the Company's shareholders served by the Rio Grande Canal, based upon each shareholder's use of its reservoir water delivered through the Rio Grande Canal, and subject to any further limitations as described in paragraph 68 above. Extraction of water from the aquifers by means of the wells of the Company's shareholders, however, is not limited by this decree to the amount of water applied to recharge. The owners of these wells may also be entitled to withdraw water from their wells by other lawful entitlements.

VII. APPLICANT'S FOURTH REQUEST: CHANGE THE TYPE OF USE OF THE SMRC WATER RIGHTS FOR USE TO REPLACE DEPLETIONS TO SURFACE STREAMS CAUSED BY THE OPERATION OF WELLS IN WATER DIVISION NO. 3

120. The court may only approve the Company's request to change the allowable uses of the SMRC Water Rights to add the use of replacing depletions to surface streams as the result of well-pumping in Division 3 if the court finds that the Company's plan for making this change will not result in injury to other water users. Under Colorado law, the court can only grant a change of water right when no injury to others will result from the change. § 37-92-305(3)(a), C.R.S. (2016); *Burlington Ditch*, 256 P.2d at 661-62. "Injury involves diminution of the available water supply that a water right holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority." *Id.* The applicant bears the burden of showing that the proposed change will not cause injury. § 37-92-304(3), C.R.S. (2016); *Burlington Ditch*, 256 P.3d at 662. If the applicant meets this burden, then the objector has the burden of going forward with evidence of injury to other adjudicated water rights. *Id.* (citing *City of Thornton*, 926 P.2d 1, 88 (Colo. 1996)).

121. To determine whether injury to other water users will result from the Applicant's proposed change with respect to water stored in the Santa Maria, Continental and Rio Grande Reservoirs, all built prior to the Rio Grande Compact ("Compact"), the court must consider how the Division Engineer administers the Compact and how that administration affects the operation of these reservoirs. The court must also determine the amount of water that was historically stored and released from these reservoirs. In addition, the court must determine the amount of the water historically applied for irrigation use under both the Monte Vista Canal and the Rio Grande Canal that can be changed without injuring other water users. The court will consider each of these issues in turn.

A. The Rio Grande Compact

122. “Since before the turn of the century, valley water users have had to contend with out-of-state demands for Rio Grande water. In 1896, complaints and claims for damages from the Republic of Mexico led the United States Department of Interior to deny permission for the utilization of federal land in the construction of most reservoirs planned for the valley.”

Alamosa-La Jara v. Gould, 674 P.2d 914, 918 (Colo. 1983). Although the U.S. resolved the dispute with Mexico by way of treaty, the following year the United States Supreme Court recognized the doctrine of equitable apportionment, *Kansas v. Colorado*, 206 U.S. 46, 27 S. Ct. 655, 51 L.Ed. 956 (1907), which meant that New Mexico and Texas could claim rights to Rio Grande water. In response, in 1923 the States of Colorado, New Mexico, and Texas began negotiating the apportionment of the water of the Rio Grande which ultimately led the negotiators to sign the Rio Grande Compact in 1938. The legislature of each state ratified the Compact and the U.S. Congress approved it in 1939. 53 Stat. 785 (1939); § 37-66-101 C.R.S..

123. The Colorado Supreme Court explained that:

the compact obligates Colorado to deliver water in the Rio Grande at the New Mexico border based upon two schedules tying delivery obligations to levels of inflow, as measured at upstream gauges on the Rio Grande mainstem and the Conejos River, to which is added the flow of the Los Pinos and San Antonio rivers (tributaries of the Conejos) measured near Ortiz, New Mexico. The amount of required discharge varies according to natural supply. In low water years, small deliveries are required; in high water years, large deliveries are required. The compact fixes Colorado's overall obligation in the equitable interstate apportionment of the Rio Grande at a level intended to protect water use as it existed from 1928-1937 (the compact study period). In recognition that variations from predicted performance for each river would occur in the future because of the sequencing of wet and dry years, variable runoff patterns, and new depletions, the compact allows accumulated debits up to 100,000 acre-feet. *See* Article VI of the compact.

Alamosa-La Jara, 674 P.2d at 918-19 (Footnotes omitted).

124. Between 1952 and 1965, Colorado accrued accumulated debits of 939,900 acre-feet because Colorado water officials did not curtail surface appropriations in Colorado to meet Rio Grande Compact requirements. *Id.* As a result, Texas and New Mexico brought an original proceeding against Colorado in the United States Supreme Court. *Id.* To resolve the case, the three States negotiated a stipulation which required Colorado to use “all available administrative and legal powers, including curtailment of diversions, to assure annual compliance” with the Compact. *Id.* The stipulation required Colorado to meet its delivery obligation on an annual basis and did not allow the state to accumulate debits. *Id.*

125. To comply with this stipulation, the Colorado State Engineer substantially curtailed diversions of surface water on both the Rio Grande and the Conejos River. *Id.* These substantial

curtailments continued until 1985, when Elephant Butte Reservoir spilled and eliminated the remainder of Colorado’s accumulated debit—some 506,000 acre-feet. Findings of Fact, Conclusions of Law, Judgment and Decree, Concerning the Application for Water Rights of Tres Rios Ranch, 91CW29, ¶ 36, May 25, 1993 (“Decree, 91CW29, Tres Rios Ranch”).

126. Since 1985, the Division Engineer has continued to administer the Rio Grande and the Conejos River to meet the delivery requirements of Article III of the Rio Grande Compact. Exhibit A-22 at 4-5. The Division Engineer projects the annual runoff for each river and curtails surface water diversions as needed to meet the Compact’s delivery requirements. *Simpson v. Cotton Creek Circles*, 181 P.3d 252, 256 (Colo. 2008). During the irrigation season the curtailment is a percentage of the flow at the Del Norte gage. The Division Engineer typically calculates the curtailment percentage on both rivers every ten days during the irrigation season. Exhibit A-22 at 5. The curtailment amounts are not available to the ditches or reservoirs in Colorado and must be delivered to the state line to meet the Compact delivery requirements. *Id.* During the non-irrigation season the reservoirs are allowed to divert and store all available inflow. Exhibit A-22 at 4. When the curtailment of diversions for Compact purposes limits the water available for diversion in-priority by Santa Maria and Continental Reservoirs, the water so curtailed flows to the state line for Compact delivery. Exhibit A-22 at 4-5.

127. Under the Rio Grande Compact, the State of Colorado can accumulate both credits and debits. The credit water can be stored in reservoirs in New Mexico and “in effect, be exchanged back upstream for use in Colorado in subsequent years.” Exhibit A-4, Decree, 91CW29, Tres Rios Ranch at ¶ 39. In addition, Colorado can store water that it owes to a downstream state in the form of debits which are subject to the call of the downstream state. *Id.*

128. The Compact limits storage of water in reservoirs in Colorado constructed after 1929. Under Article VII neither Colorado nor New Mexico can increase the amount of water held in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre-feet of “Usable Water”⁴ in “Project Storage”⁵ unless either or both states relinquishes “accrued credits”⁶ and Texas accepts the same. § 37-66-101 C.R.S. Article VII. In that event the state relinquishing the credits may store an equivalent amount of water in reservoirs constructed after 1929. *Id.* Articles VI and VIII of the Compact also place limits on water storage in reservoirs constructed after 1929. § 37-66-101 C.R.S..

⁴ The Compact defines “Usable Water” as all water, except credit water, that is in project storage and is available for release in accordance with irrigation demand, including deliveries to Mexico.

⁵ The Compact defines “Project Storage” as the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet.

⁶ The Compact defines “Accrued Credits” as are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

129. Since both Santa Maria Reservoir and Continental Reservoir were constructed before 1929, this limitation does not apply to storage in those reservoirs. This makes them uniquely valuable to the State of Colorado's ability to maximize its ability to store water under the Rio Grande Compact. Exhibit A-22 at 2 and 11. These two reservoirs and Rio Grande Reservoir are the only "pre-compact" reservoirs on the Rio Grande and its tributaries upstream from Alamosa, Colorado, that have significant storage capacity. The Division Engineer often authorizes storage in these reservoirs while he determines whether the water is needed to meet the state-line obligations under the Compact and, if the water is not needed for that purpose, the Division Engineer authorizes its release to make it available to ditches in Water District 20. In this way, the State of Colorado can avoid over-delivering water to the state line and can avoid higher evaporation losses that occur when Colorado's over-deliveries are stored as credits in Elephant Butte Reservoir in New Mexico rather than in high mountain reservoirs such as Santa Maria or Continental Reservoirs in Colorado. Placing unnecessary restrictions on storage in pre-compact reservoirs would impair Colorado's ability to fully utilize the water apportioned to it by the Compact.

130. During the 1980s and 1990s, if the water held in Compact Storage was not needed for Compact delivery, the Division Engineer allowed the water to remain in Santa Maria and/or Continental Reservoirs until the following year and allocated one-half the water to the reservoirs, and released the remainder in three equal quantities during the irrigation season for the benefit of downstream water rights. In recent years, storage for Compact delivery has been held in the reservoirs until the following calendar year and then released at the commencement of the direct irrigation season for delivery to the state line to help reduce Compact curtailment in that year. Exhibit A-22 at 3. Either manner of operation has the effect of reducing over-deliveries under the Compact and thereby increasing the amount of water available for beneficial use in Colorado. The court finds these administrative practices are consistent with the Compact and they demonstrate the importance of the pre-compact reservoirs in facilitating the maximum use of the water available to Colorado under the Compact.

B. Historical Water Storage and Release

131. The Applicant presented evidence of the historical water storage and release from the Santa Maria and Continental Reservoirs for an over-all study period of 1940 through 2010. Mr. Williamsen chose this study period because 1940 was the first year after the Rio Grande Compact became effective and affected water administration in the San Luis Valley. And, 2010 was the last year before the State Engineer approved the SMRC substitute water supply plan that allowed SMRC shareholders to lease water rights to Subdistrict No. 1 to replace injurious stream depletions under Subdistrict No. 1's Plan of Water Management. This study period includes a broad range of hydrologic conditions and reflects the changes that have occurred in the way the Division Engineer administers water to meet the requirements of the Compact. This over-all study period is an appropriate and representative time period for analysis of the history of use of the SMRC Water Rights, the effects of Compact administration on the use of these water rights,

and the terms and conditions the court will need to impose to prevent injury if the court approves the Applicant's requested change of water rights.

132. The study period for the quantification of historical use of the water delivered from the reservoirs is limited to the period after the commencement of Compact administration, *i.e.* 1968 forward. The court finds that the period of 1968 through 2010 is the appropriate representative period for determining the historical use of the water delivered from the reservoirs for purposes of the change of water rights because it more accurately represents the (restricted) water supply available for use in the San Luis Valley when Colorado is administering water rights to meet its delivery obligations under the Compact.

133. Both Santa Maria Reservoir and Continental Reservoir have historically stored water during the non-irrigation season and have stored water when in priority during the irrigation season. Exhibit A-22. Since the commencement of Compact administration in 1968 the irrigation season has typically begun in late March or early April and ended by October 31 or in early November. On April 14, 2010, the State Engineer adopted Policy 2010-1 establishing the period of April 1 to October 31 as the presumptive irrigation season for both surface and groundwater rights in Water Division No. 3.

134. Both Continental and Santa Maria Reservoirs store the water physically available to the reservoirs during the non-irrigation season. Since these reservoirs are located high in the watershed of the Rio Grande, in most years the physical supply of water available during the non-irrigation season is not sufficient to fill, or even come close to filling the reservoirs. The reservoirs' inability to fill during the non-irrigation season is the result of the lack of a physical supply of water, not the demands by downstream water rights.

135. The records of storage in the reservoirs during the period 1940 through 2010 reflect the limited water supply during the non-irrigation season. During this period, the amount of water stored in Santa Maria Reservoir during November through March averaged 2,219 acre-feet, with a maximum of 7,614 acre-feet in 1945, and a net loss of 3,046 acre-feet in 1987. During this period the amount of water stored in Continental Reservoir during November through March averaged 3,115 acre-feet, with a maximum of 7,058 acre-feet in 1989, and a net loss of 2,145 acre-feet in 1985. Exhibit A-22, Table 2.

136. During the spring snowmelt run-off the water supply physically available for storage in the reservoirs is greater than during the non-irrigation season, and in some wet years the water supply available in-priority is sufficient to permit the reservoirs to fill completely.⁷ During the spring snowmelt run-off both the priority system and Compact administration limit the reservoirs' ability to divert and store the water physically available to them. Since the SMRC

⁷ According to Jay Yeager, while both reservoirs have been subject to storage restrictions due to dam safety concerns, that did not preclude storage of water available in priority.

Water Rights were not adjudicated until the second and third supplemental adjudications in Water District No. 20, Exhibits A-9, A-10, they are comparatively junior water rights. This means that during the irrigation season there must be a high flow at the Del Norte gage, after subtracting the Compact curtailment, for the SMRC Water Rights to be in priority to store water. Exhibit A-22, Figure 5. The SMRC Water Rights have historically diverted all the water legally and physically available to them.

137. The records of storage in the reservoirs during the period 1940 through 2010 reflect the limitations on storage resulting from the priority system and Compact administration. Exhibit A-22, Table 2. During this period the peak storage in Santa Maria Reservoir averaged 15,506 acre-feet, with a maximum of 42,067 acre-feet in 1942, and a minimum of 2,788 acre-feet in 1954. During this period the peak storage in Continental Reservoir averaged 10,189 acre-feet, with a maximum of 26,716 acre-feet in 1948, 1949, and 1958, and a minimum of 1,631 acre-feet in 1964.

138. The effect of Compact administration on the water supply legally available to the SMRC Water Rights can be seen by comparing storage that occurred during the period 1940 through 1967 to storage that occurred during the period 1968 through 2010. During the period 1940 through 1967 the annual peak storage in Santa Maria Reservoir averaged 17,288 acre-feet, and during the period 1968 through 2010 the annual peak storage in Santa Maria Reservoir averaged 14,347 acre-feet, an average decline of 2,941 acre-feet per year. A similar pattern occurred with Continental Reservoir. During the period 1940 through 1967 the annual peak storage in Continental Reservoir averaged 11,652 acre-feet, and during the period 1968 through 2010 annual peak storage in Continental Reservoir averaged 9,237 acre-feet, an average decline of 2,415 acre-feet per year. Exhibit A-22, Table 2. Compact curtailment during the irrigation season is the main reason for this reduction in average annual peak storage in the reservoirs because it causes the reservoirs to come into priority later and remain in priority for a shorter time than they would have absent Compact administration. Exhibit A-22, Figure 5. Furthermore, because Compact administration is the reason the reservoirs are storing less water, the extra water not stored is not available to downstream water rights in Colorado; rather, Colorado delivers the water curtailed from the reservoirs under Compact administration to the state line to help meet the Rio Grande's separate scheduled delivery under Article III of the Compact.

139. Before the court can grant the Company's request to change the use of stored water rights, the court must determine whether it should place a restriction on storage in the reservoirs to make sure the change in use of the stored water will not diminish the water supply historically available to other water users. *See* § 37-92-305 (3)(a), C.R.S., *Burlington Ditch Reservoir and Land Company v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661-62 and 668 (Colo. 2011). Generally, a decreed water storage right entitles the owner to one annual filling of the reservoir. *E.g. City of Westminster v. Church*, 167 Colo. 1, 13, 445 P.2d 52, 58 (Colo. 1968). "The 'one-fill rule' . . . serves to prevent injury to other appropriators by prohibiting a reservoir from making more than one fill annually based on its adjudicated priority." *Burlington Ditch*, 256 P.3d at 663 (citations omitted). However, when an applicant seeks to change a water storage right, the court must ensure that the change does not "unlawfully enlarge the water right to the

detriment of other appropriators,” *Burlington Ditch*, 256 P.3d at 664, and the court’s decree must prevent or compensate for any diminished return flows that result from the change in storage rights. *Southeastern Colorado Water Conservancy Dist. v. Fort Lyon Canal Co.*, 720 P.2d 133, 146-47 (Colo. 1986). The court must limit the changed use of the water right to the historical use of the water right to protect junior appropriators who have a vested right in the continuation of the stream conditions that existed at the time of their respective appropriations. *E.g. Williams v. Midway Ranches Property Owners Ass’s*, 938 P.2d 515, 523 (Colo. 1997); *Weibert*, 618 P.2d at 1371-72.

140. In addition, in a case involving the change of a water storage right the water court may examine storage and delivery issues involving an interstate compact “when particular facts and the interstate compact are at issue in the case.” *Id.* at Fn. 13. Thus, in determining what terms and conditions are necessary to prevent injury in this case, this court may consider the effect of the Rio Grande Compact on the SMRC Water Rights.

141. Under the facts of this case no historical use limitation, other than the one-fill rule, is necessary to prevent injury from the changed use of the SMRC Water Rights. Historically the owners of the SMRC Water Rights diverted all water legally and physically available to them in priority, which was typically not sufficient to fill the reservoirs and thus, no downstream junior appropriations are based upon water legally available to and not diverted by the SMRC Water Rights. Therefore, no limitations on diversions or releases by the SMRC Water Rights, other than the one-fill rule, are necessary to maintain stream conditions that existed at the time of subsequent appropriations.

142. The court further concludes that the operation of the Rio Grande Compact, particularly since Colorado began strict Compact administration in 1968, has reduced the supply of water available for diversion in priority by the SMRC Water Rights compared to the amount of water that was available at the time of the original appropriation. Strict Compact administration has shortened the time during the irrigation season when the SMRC Water Rights are entitled to divert in priority. The water that strict Compact administration has curtailed from diversion by the SMRC Water Rights has been delivered to the state line in aid of meeting the Rio Grande’s separate schedule of deliveries under the Compact. Accordingly, as a matter of law and fact this water has not been available for use by other water rights in Colorado. Because no other appropriations have been made in reliance on this water, volumetric limitations on the exercise of the SMRC Water Rights other than one annual filling are not necessary to prevent injury or enlarged use of the SMRC Water Rights.

C. Calculation of Historical Consumptive Use and Determination of Necessary Replacement of Water to Prevent Injury to Other Water Rights

143. Before the court can approve the Applicant’s request to change the use of the SMRC Water Rights, the Applicant must show that the proposed change will not cause injury to other water users. For the water rights used under the Monte Vista Canal, the Applicant has calculated the historic consumptive use of those rights and has a plan for replacing the return flow to the

Rio Grande that will be lost if the use of those rights is changed to allow them to be leased as a source of replacement water instead of being used for irrigation. For the water rights used under the Rio Grande Canal, the Applicant has calculated the loss of accretions to the Rio Grande that will result if those rights are used as a source of replacement water rather than for irrigation.

1. Change of SMRC Water Rights Used on Land Served by the Monte Vista Canal

144. Mr. Williamsen used the efficiency and resulting deep percolation factors from the RGDSS ground water model, which this court approved in Case No. 06CV64 and 07CW52, to calculate the consumptive use of the SMRC Water Rights delivered for irrigation on lands under the Monte Vista Canal. Exhibit A-22, 13-17. The efficiency factor is a measure of the amount of water delivered to the field that is stored in the soil for consumption by the crop. For gravity irrigation methods, such as furrows, corrugations, and graded and level borders, the maximum efficiency is 60 % of the amount of water applied to the field. The remaining 40 % of the water percolates through the root zone to the groundwater table. Center pivot sprinkler systems are generally more efficient than gravity irrigation methods, with 80 % of the water applied to a field through a center pivot sprinkler being available to the crop. Of the remaining 20 %, 3 % is lost to evaporation and wind drift and 17 % deep percolates through the soil to the groundwater table.

145. As discussed above, approximately 7,323 acres under the Monte Vista Canal have historically received SMRC water. As of 2010, 82.9% of the 7,323 acres were irrigated by center pivot sprinkler systems and the remainder, 17.1%, were gravity irrigated, typically by flood or row irrigation.

146. Applying the efficiency and deep percolation factors from the RGDSS to the lands under the Monte Vista Canal entitled to receive SMRC Water Rights results in a composite irrigation efficiency of 79.1% consumption and 20.9% deep percolation for all the SMRC lands under the irrigation methods in use as of 2010. This is calculated as follows: 82.9% of SMRC acreage is irrigated by center pivot sprinklers x 83% efficiency factor (% of the water applied that is consumed (80%) or lost (3%)) = 68.8% of the water applied by center pivot sprinklers is consumed plus 17.1% of SMRC acreage is irrigated by gravity methods x 60% efficiency factor (% of the water applied that is consumed) = 10.26% of the water applied by gravity irrigation methods is consumed. Add the 68.8% center pivot sprinkler irrigation efficiency plus 10.26% gravity irrigation consumed = 79.06 or rounded up to 79.1% composite irrigation efficiency or percentage of water applied that is consumed. Looked at in a different way, if all the Company shares allocated to the Monte Vista Canal were changed from irrigation use to replacement of well depletions, then using the 2010 irrigated acreage and irrigation methods for SMRC shareholders under the Monte Vista Canal, the unconsumed portion of the Company's irrigation delivery would be 20.9 % of the water applied for irrigation ((1,253 acres x 40% + 6,070 acres x 17%) / 7,323 acres = 20.9%). If the current methods of irrigation change in the future, the composite irrigation efficiency will change as well.

147. To determine the amount of deep percolation water (return flows) that must be replaced for any specific SMRC Water Rights whose use is changed, the Applicant will compute

the unconsumed portion (or the deep percolation amount) of the irrigation application on a per-share basis using the irrigation method used by the shareholder owning the shares being changed. The quantity of water per share will be the shares' *pro rata* entitlement which the Company determines annually. The total deep-percolation percentage for all leased shares will be computed as: $U = AG \times 40\% + AS \times 17\%$, where U = the unconsumed portion of the irrigation application in percent; AG = gravity irrigated acres as a percentage of the total acres irrigated by the leased shares; and AS = sprinkler irrigated acres as a percentage of the total acres irrigated by the shares.

148. To replace the amount of deep percolation (return flows) calculated according to the previous paragraph, the Company will deliver a portion of the water from the leased shares to the Monte Vista Canal and to selected recharge sites to replicate historical deep-percolation return flows from the historical use of these shares. The Company will accomplish this by dividing the water attributable to the leased shares into two accounts in the Company's reservoirs, the "consumable account" and the "return flow account."

149. The factors to be used in determining the amount of water in the "consumable account" and the "return flow account" are:

RS = replacement water storage in acre-feet,
 TL = charged transit loss (from Reservoirs to Canal) in percent,
 CL = charged canal and lateral loss in percent,
 U = unconsumed irrigation application in percent.

150. The replacement water in storage will be allocated as follows:

Consumable water = $RS \times (1 - TL) \times (1 - CL) \times (1 - U)$,
 Charged transit loss = $RS \times TL$,
 Charged canal and lateral loss = $RS \times (1 - TL) \times CL$,
 Unconsumed irrigation application = $RS \times (1 - TL) \times (1 - CL) \times U$.

According to Mr. Williamsen, the transit loss on water released from the reservoirs to the Monte Vista Canal is 10%. In addition, the Company charges 10% of the water for canal and lateral loss.

151. The consumable account will include the consumable water and a *pro rata* portion of the charged transit loss. The return-flow account will include the unconsumed irrigation application, the charged canal and lateral loss, and a portion of the charged transit loss. The operation of this allocation is shown by the following example using 100 acre-feet of replacement water in storage, a composite irrigation efficiency of 79.1%, stream-transit loss of 10% and canal and lateral delivery charge of 10%. In this example, the allocation of water in storage is:

Consumable water = $100 \times (1 - 0.1) \times (1 - 0.1) \times (1 - 0.209) = 64.07$ acre-feet

Unconsumed irrigation application = $100 \times (1 - 0.1) \times (1 - 0.1) \times 0.209 = 16.93$ acre-feet

Charged transit loss = $100 \times 0.1 = 10$ acre-feet

Charged canal loss = $100 \times (1 - 0.1) \times 0.1 = 9$ acre-feet

TL for the Consumable Water = $[64.07 \div (1 - 0.1)] - 64.07 = 7.12$ acre-feet

TL for the Return Flow Account = $10 - 7.12 = 2.88$ acre-feet

Total Water in Consumable Account, TCA = $64.07 + 7.12 = 71.19$ acre-feet

Total Water in Return Flow Account, TRA = $16.93 + 9.0 + 2.88 = 28.81$ acre-feet

In this example, the total water in the consumable account is 71.19 acre-feet. Transit losses will be charged to water released from the consumable account. If the lessee uses the consumable water downstream of the headgate of the Monte Vista Canal, the Division Engineer may charge additional transit loss to reach the point of use.

152. The water in the Return-flow Account will be delivered to the Monte Vista Canal for recharge. The volume delivered to the recharge site, "R," will be the total water in the return flow account, minus transit loss, minus charged canal and lateral loss. Using the example above:

$$R = 28.81 \times (1 - 0.1) \times (1 - 0.1) = 23.34 \text{ acre-feet}$$

153. The water needed to replace historical return flows will be delivered to the Monte Vista Canal after the peak run-off when the Monte Vista Canal is only diverting under its senior priority no. 224 for 132.2 c.f.s. The recharge water, less canal loss, calculated as described above, will be delivered to the recharge facilities shown on Figure 3 in Exhibit A-22. Delivery of this water to recharge at the locations shown on Figure 3, will replicate the historical location, time, and amount of return flow from the SMRC Water Rights and thereby prevent injury to any other water rights.

154. The quantity of water in the Consumable Account may be fully consumed by use, reuse, and successive use to extinction. Accordingly, the water in the Consumable Account may be used to replace injurious stream depletions caused by groundwater use in Water Division No. 3, in compliance with the Company's Articles of Incorporation and Bylaws. That use of this water will be governed by the terms and conditions of any decree, including a Plan of Water Management or Annual Replacement Plan, in which this water is used as a source to replace such injurious depletions. The use of this water to replace injurious well depletions will also be subject to the terms of any agreement between the Company and the person or entity using the water for this purpose.

155. If any SMRC shares currently allocated to the Monte Vista Canal are reallocated to the Rio Grande Canal (a practice the Company does not currently allow), then the return flow from such shares, as described above, must continue to be delivered to and recharged under the Monte Vista Canal, and such shares may only divert into the Rio Grande Canal the amount remaining available after the delivery of return flows to the Monte Vista Canal.

156. To prevent injury to other water rights, the company must maintain the historical return flows from the use of the SMRC Water Rights under the Monte Vista Canal. If Applicant complies with the terms and conditions of this decree, the historical return flows from the use of the SMRC Water Rights under the Monte Vista Canal will be maintained in a manner that will prevent injury to other water rights. The Company is entitled to fully consume the historical stream depletions of the SMRC Water Rights changed by this decree, and, when operated and administered in accordance with the terms and conditions set forth in this decree, the right to consume fully the historical stream depletions of the changed water rights is one contemplated by law.

2. Change of SMRC Water Rights Used on Land Served by the Rio Grande Canal

157. Mr. Williamsen determined that 3.3% of the amount of SMRC Water Rights that are applied to lands served by the Rio Grande Canal result in accretions to the Rio Grande. The Applicant will replace these lost accretions for any SMRC Water Rights that are leased for use as a source of replacement water. The following method of calculating the lost accretions takes into account all of the effects of this change of water rights, including any decrease in inflow to the confined aquifer.

158. To make this determination, Mr. Williamsen initially calculated the amount of deep percolation from the first use of the SMRC Water Rights on the lands on which the SMRC Water Rights are used under the Rio Grande Canal. According to the RGDSS, the unconsumed portion of the canal and lateral loss is 97 % of the amount of canal and lateral loss that the RGCWUA assesses against shareholders' water deliveries. The unconsumed portion of water that is applied using gravity irrigation methods is 40 % of the water delivered to the farm; and the unconsumed portion of water that is applied using sprinkler irrigation is 17 % of the water delivered to the farm. Again, the Division Engineer charges 10% of the water released as transit loss and the RGCWUA charges 10% of the remaining water as the canal and lateral loss.

159. The unconsumed portion of the first use of SMRC Water Rights under the Rio Grande Canal can therefore be calculated as:

$$UT = RS \times (1 - TL) \times [CL \times 0.97 + (1 - CL) \times (AG \times 0.4 + AS \times 0.17)] \text{ where:}$$

UT = the total unconsumed SMRC water in acre-feet,

RS = amount of replacement water storage of SMRC shareholders under the Rio Grande Canal,

TL = transit loss percentage charged by the Division Engineer,

CL = canal and lateral loss percentage charged by the RGCWUA,

AG = gravity irrigated acres as a percentage of the total irrigated acres receiving SMRC water,

AS = sprinkler irrigated acres as a percentage of the total irrigated acres receiving SMRC water.

For example, if RS = 1,000 acre-feet; TL = 10 %; CL = 10%; AG = 2%; and AS = 98%, then:

$$UT = 1000 \times (1 - 0.1) \times [0.1 \times 0.97 + (1 - 0.1) \times (0.02 \times 0.40 + 0.98 \times 0.17)]$$

UT = 229 acre-feet

160. This calculation uses the same values for the unconsumed canal loss, gravity irrigation application, and sprinkler irrigation application as are used in the RGDSS ground water model, thus, the manner of calculating the SMRC Water Rights not consumed by first use is consistent with the RGDSS as approved by this court.

161. Mr. Williamsen then used the response functions developed for Subdistrict No. 1's 2012 Annual Replacement Plan to estimate the effect on stream flows of not delivering the unconsumed portion of the first use of the SMRC Water Rights to the land. He calculated monthly accretion factors by multiplying the Average, Wet, and Dry Year response function's values⁸ by a scaling factor over 240 months for each of the three segments of the Rio Grande that the response functions predict this change would affect: Del Norte gage to Excelsior Ditch headgate (RG1), Excelsior Ditch headgate to Chicago Ditch headgate (RG2), and Chicago Ditch headgate to Lobatos (state line) gage (RG3). Exhibit A-22. The scaling factor is a calibration factor based on the type of year: dry years are those years when the net consumptive use caused by Subdistrict Wells exceeds 180,000 acre-feet; average years are those years when the net consumptive use caused by Subdistrict Wells ranges from 10,000 to 180,000 acre-feet; and wet years are those years when the net consumptive use caused by Subdistrict Wells is less than 10,000 acre-feet. The court approved these Response Functions for the 2012 Annual Replacement Plan for Subdistrict No. 1 and the court approved these administrative river segments as part of the Amended Plan of Water Management for Subdistrict No. 1.

162. Mr. Williamsen then multiplied the resulting monthly accretion factors by the "impulse", which is the unconsumed amount of the first-use of the water attributable to the leased SMRC shares on lands within the Rio Grande Canal service area. The unconsumed amount includes the seepage from the Rio Grande Canal and its laterals and the unconsumed portion of the first use of the water delivered to each farm. The amount not consumed by first use on the farm is dependent on whether the farm uses gravity or sprinkler irrigation or a combination of the two. The unconsumed amount is a "Year 1" annual value and the response functions distribute this annual value beginning in Year 1 over 240 months.

163. Because of the long delay or lag period for the response functions, the impact to the Rio Grande is relatively steady and does not vary materially from month to month or year to year. Using the example of a lease volume in storage of 1,000 acre-feet and 229 acre-feet of the water not consumed by its first use, and the average response for each of the three river segments, the total accretion from the unconsumed portion of the first use of the SMRC Water Rights used on land under the Rio Grande Canal in Subdistrict No. 1 is:

⁸ The values are contained in the Excel workbook prepared by James Slattery named "Stream Impacts for Sub District 1 – 2012e.xlsx" which is available at <http://www.primath.com/subdistrict1/012/index.html>.

Segment	Annual Amount
RG1	3% (30 a. f.)
RG2	0.2% (2 a.f.)
RG3	0.1% (1 a.f.)
Total	3.3% (33 a.f.)

164. In 2015 the State Engineer promulgated proposed “Rules Governing the Withdrawal of Groundwater in Water Division No. 3...” now pending review in this court’s Case No. 15CW3024. In connection with those proposed rules the State Engineer updated the response functions for the area that includes Subdistrict No. 1. Mr. Williamsen compared the results of the 2015 response functions to the 2012 response functions and found they were essentially the same, with the 2015 response functions predicting a slightly smaller impact than the 2012 response functions. Thus, the Company’s use of the 2012 response functions to quantify the amount of water to be delivered to the Rio Grande under this decree is conservative and reliable and will accurately calculate the replacement water to be delivered to the Rio Grande to prevent injury to other vested water rights.

165. SMRC will allocate a portion of the replacement water supply derived from SMRC shareholders under the Rio Grande Canal as the amount of accretion replacement to the Rio Grande resulting from the use of SMRC Water Rights in the Rio Grande Canal service area. The accretion amount will be equal to 3.3% of the water leased.

166. Unless the Division Engineer orders something different, SMRC will release the annual accretion replacement to the Rio Grande over a 12-month period in meaningful and usable release amounts. SMRC proposes to release 1/12th of the accretion account water each month from April through October (7 months), to release 2/12th at the end of the irrigation season to replace accretions that would have occurred in November through December (2 months), and to release 3/12th in late March or early April for delivery to the state line to replace accretions that would have occurred in January through March (3 months). SMRC will release from storage the monthly amounts for November and December at the end of the irrigation season to be delivered to the state line, unless the deliveries would result in an over-delivery under the Rio Grande’s separate delivery schedule under the Rio Grande Compact. In that event the Division Engineer can elect to treat this water as “Compact” water and hold it over for release and delivery to the state line at or before the beginning of the next irrigation season.

167. SMRC’s proposed method to calculate the accretion replacement to the Rio Grande and its proposed schedule for releasing the water from the reservoirs will adequately replicate historical accretions and will prevent injury to other water rights as a result of the proposed change in use of these water rights.

168. The SMRC shareholders served by the Rio Grande Canal or their lessees are entitled to fully consume all water attributable to the shares used to replace stream depletions after reduction for the accretion replacements described above. They may do so by use, reuse and successive use to extinction.

169. If, in the future, shares currently delivered to lands under the Monte Vista Canal are reallocated to lands under the Rio Grande Canal, then their use and return flows will be governed by paragraph 155 above and no accretions will be owed on such shares for their use under the Rio Grande Canal. If any SMRC shares currently allocated to the Rio Grande Canal are reallocated to the Monte Vista Canal (a practice the Company does not currently allow), then the accretions from such shares, as determined under this part, (VII)(C)(2), of this decree, must continue to be replaced in the time and amount provided herein, and such shares may only divert into the Monte Vista Canal the amount remaining available after the delivery of accretions from use under the Rio Grande Canal. To the extent that the use of such shares under the Monte Vista Canal results in additional return flows from water that is otherwise fully consumable, the SMRC may have the right to recapture and reuse such water to extinction. Exercise of the right to make such reuse, however, must be done pursuant to a new application, a future application for modification of this decree, or administrative approval as allowed by law.

170. In order to prevent injury to other water rights diverted from the Rio Grande, the Company must replicate the historical accretions to the Rio Grande that result from the water not consumed by first use of the SMRC Water Rights on lands served by the Rio Grande Canal. The terms and conditions of this decree, if properly implemented, will replicate those historical accretions and prevent injury to other water rights diverting from the Rio Grande.

171. Furthermore, the Company's shareholders are entitled to fully consume the historical stream depletions of the SMRC Water Rights changed by this decree, and, when operated and administered in accordance with the terms and conditions set forth in this decree, the right to consume fully the historical stream depletions of the changed water rights is one contemplated by law. For the SMRC Water Rights used under the Rio Grande Canal, this includes the right to recapture and reuse to extinction all water remaining after replacement of accretions to the Rio Grande.

3. Administration and Accounting

172. By way of compromise with the Opposer CWCB, the Company has agreed that if the SMRC Water Rights changed herein are used for the replacement of stream depletions from non-agricultural uses, then the quantity of the SMRC Water Rights to be used for such non-agricultural purposes will only be exchanged between Santa Maria, Continental, and/or Rio Grande Reservoirs under the November 29, 1995 decree in Case No. 90CW42, at times when the CWCB's instream flow water rights ("ISF") on: (1) North Clear Creek, decreed on April 27, 1984, in Case No. 83CW47; (2) Clear Creek, decreed on April 27, 1984, in Case No. 83CW51; or (3) the Rio Grande, decreed on April 27, 1984, in Case No. 83CW40, depending on which of

the exchanges are being operated, are met and operation of such exchanges will not result in a reduction of stream flows below the decreed ISF amounts. For purposes of this decree, agricultural purposes includes, but is not limited to, stock watering, incidental on-farm domestic use, aquifer recharge, and augmentation (replacement of injurious depletions) of such uses, and storage in connection with such uses. The Company will separately account for the quantity of SMRC Water Rights used for non-agricultural purposes. By agreeing to this term and condition, the Company did not waive the right to claim, in any future judicial, administrative, or other proceeding, that non-agricultural use of the SMRC Water Rights is subject to the subordination provided for in the March 10, 1983, Stipulation and Agreement between the CWCB and the Rio Grande Water Users Association, or any amendments to that Stipulation.

173. The accounting necessary to implement this decree will be based on the water year (a.k.a. irrigation year), which is the period November 1 through October 31. Accounting will be performed daily and reported monthly to the Division Engineer. The Company will take such measurements and report such information as the Division Engineer reasonably requires for the administration of this change of water rights. The Company has submitted to the court its proposed accounting forms, and the Division Engineer has approved those forms. While those forms are not decreed herein and may, due to operating experience and with the consent of the Division Engineer, require modifications, those forms are adequate to provide the information necessary to the Division Engineer to protect the rights of other water users.

174. Provided the Company furnishes the Division Engineer appropriate accounting records evidencing the operation of the change of water rights, this change of water rights is administrable.

VIII. MR. WARNER'S CLAIM OF INJURY

175. Mr. Warner asks the court to deny the Company's proposed change of water rights because he will be injured if there is a reduction in the historical return flow from the use of the SMRC Water Rights on the lands the Rio Grande Canal serves. Although Mr. Warner did not present any evidence of the lands from which he claims return flows or the amount of return flows he claims must be maintained to prevent injury to his water rights, the court agrees that a reduction in the water table in the vicinity of his ranches would make it more difficult for him to flood irrigate his fields.

176. In this case, however, Mr. Warner has no basis upon which to claim he will suffer injury if the SMRC Water Rights are no longer used to irrigate the land surrounding his ranches because the SMRC Water Rights are imported into the Closed Basin. Although a vested water right includes "not only the right to diversion of water from the stream in chronological order of priority, but also the right to maintenance of conditions on the stream existing at the time of appropriation," *Brighton Ditch Co. v. City of Englewood*, 237 P.2d 116, 120 (Colo. 1951), an appropriator is not entitled to the continued availability of foreign or imported water in the stream. *Thornton v. Bijou*, 926 P.2d at 80-81. Appropriators on a stream have no vested right to the continued importation of water which another has brought to the watershed, and cannot

compel the continued importation of water into a watershed by another. *Brighton Ditch Co. v. Englewood*, 124 Colo. 366, 237 P.2d 116 (Colo. 1951) (citing *Stevens v. Oakdale Irr. Dist.*, 13 Cal (2d) 343, 90 P.2d 58 (1932)). Therefore, because the SMRC Water Rights represent water imported into the Closed Basin, Mr. Warner is not entitled to maintenance of return flows from the historical use of those water rights.

177. Moreover, even if Mr. Warner were entitled to maintenance of return flows from the historical use of the SMRC Water rights, he would not be entitled to such return flows to supply his Rocky Hills Seepage Ditch Water Rights. This is because Mr. Warner's predecessor in interest to the Rocky Hills Seepage Ditch Water right appropriated that water prior to the time either of the reservoirs delivered water into the Closed Basin, and, therefore, the SMRC Water Rights cannot, as a matter of fact, be the source of the Rocky Hills Seepage Ditch water rights. The appropriation date for Mr. Warner's Rocky Hill Seepage Ditch water right was November 17, 1891. The undisputed evidence establishes that Santa Maria Reservoir delivered no water into the Closed Basin, or elsewhere, until 1912, *see* paragraph 13 *supra*, and that Continental Reservoir delivered no water into the Closed Basin or elsewhere until at least 1926, *see* paragraph 14, *supra*. The stream conditions that Mr. Warner is entitled to have maintained are those that existed when his predecessor-in-interest made the appropriation, *i.e.* the stream conditions of 1891. *See, e.g., Mendenhall v. Lake Meredith Reservoir Co.*, 257 P.2d 414, 415 (Colo. 1953). Since it is the date of appropriation, not the date of adjudication that defines the scope of the water right, *V-Bar Ranch v. Cotten*, 233 P.3d 1200, 1203 (Colo. 2010), an appropriation cannot create vested rights in conditions **not** existing on the date of appropriation. As a matter of fact, the source of Mr. Warner's predecessor-in-interest's appropriation of water in the Rocky Hills Seepage Ditch did not include and could not be based on any return flow from the SMRC Water Rights imported into the Closed Basin. *See, e.g. V-Bar Ranch, LLC*, 233 P.3d 1200; *Reagle v. Square S. Land and Cattle Co.*, 133 Colo. 392, 394, 296 P.2d 235, 236 (Colo. 1956)("[A]n appropriator of water from a stream may insist that conditions on the stream remain substantially as when he made his original appropriation . . ."). So, to the extent Mr. Warner is entitled to have the stream (and aquifer) conditions maintained for the Rocky Hills Seepage Ditch water right, they are the stream conditions in effect in 1891, which did not include the SMRC Water Rights being imported into the Closed Basin.

178. In addition, Mr. Warner would not be entitled to such flows for the Crow Seepage and Drainage Ditch because the decreed source of that water is wastewater and tailwater. Mr. Warner's water rights in the Crow Seepage and Drainage Ditch are based on water collecting in a drainage ditch that parallels U.S. Highway 285. Mr. Warner testified that both of his senior and junior Crow Seepage and Drainage Ditch rights have the same source of supply. That source is seepage, wastewater, and tailwater from irrigation practices on lands in Sections 11, 12, 13, 14, 24, and 26 and the NW $\frac{1}{4}$ of Section 25, all in T42N, R7E, N.M.P.M. This court's decree in Case No. 96CW41 confirmed the February 2, 1998, Report and Ruling of the Referee. Paragraph 7 of that Report and Ruling makes clear that the Crow Seepage and Drainage Ditch water right does not guarantee Mr. Warner a continuation of the amount, timing, or location of this seepage, wastewater, or tailwater from these sources.

179. “Waste water” is water discharged from a ditch after the ditch company had satisfied all of its wants and needs or which has been discharged from irrigated lands. 47 Denver L. Journal 226, 340 (1976). Such water is sometimes referred to as “tail water.” See § 37-84-101, 108(2), C.R.S. The Supreme Court in *City of Boulder v. Boulder & Left Hand Ditch Co.*, described waste water as water which, after being applied for irrigation use, drains from the surface and is not absorbed into the earth. 557 P.2d 1182, 1185 (Colo. 1976) (“A typical example is that of the irrigator who turns water into individual furrows traversing his field. That portion which is not absorbed into the earth or transpires remains in the furrow at the end thereof, and is collected in a waste ditch. The contents of the waste ditch is waste water.”).

180. In the absence of bad faith, an appropriator of waste water cannot obtain a right against the water waster to compel continuation of the waste water discharge. *Tongue Creek Orchard Co. v. Town of Orchard City* 280 P.2d 426, 428-29 (Colo. 1955). In *Tongue Creek*, the plaintiffs filed a protest to a change in point of diversion of another's water right on the basis that the plaintiffs historically had relied on the resulting waste water. *Id.* The Colorado Supreme Court, however, determined that, so long as the appropriator was acting in good faith, one who used the appropriator's waste water had no vested right in that water and the appropriator was not obliged to continue to irrigate in a way that would continue to supply waste water. *Id.* (citing *Burkart v. Meiberg*, 86 P. 98 (Colo. 1906) (plaintiff cannot compel defendant to use water in such a way as to continue the plaintiff's reliance on the waste) and *Green Val. Ditch Co. v. Schneider*, 50 Colo. 606, 115 P. 705, 706 (Colo. 1911) (plaintiff's appropriation of defendant's waste water does not obligate defendants to continue or maintain conditions so as to supply plaintiff's appropriation of waste water at any time or in any quantity, when acting in good faith)). Rather, appropriators have the right, and in fact it is their duty to prevent, as far as possible, all waste of the water which they have appropriated. *Id.* at 429.

181. Finally, the Company has proposed terms for its requested change of water rights that will mitigate any injury to groundwater users. See ¶¶ 144-174. After an applicant for a change of water rights shows that the proposed change will not cause injury to other adjudicated rights, the objector has the burden of going forward with evidence of such injury. *City of Thornton*, 926 P.2d at 88. Here, Mr. Warner offered no hydrologic or geologic evidence to demonstrate that the Company's proposed change of water right would adversely affect his groundwater rights and, therefore, he has failed to prove injury to his groundwater rights.

JUDGMENT AND DECREE

182. The stipulations entered in this case are approved and shall bind and benefit the parties to each stipulation. Except as expressly provided in this decree or the stipulation, the parties in this case, other than the parties to the stipulations, are not bound by the stipulations.

183. The Company's Application for Change of Water Rights is hereby approved, subject to the conditions set forth above. The terms and conditions of this decree are adequate to prevent injury to other vested water rights, including decreed conditional water rights.

184. The change of use decreed herein is to add augmentation--replacement of stream depletions--to the SMRC Water Rights used under both the Monte Vista Canal and the Rio Grande Canal. In addition, this decree recognizes and confirms the historical conjunctive use practice of using the SMRC Water Rights for recharge of the aquifers within the Closed Basin on the lands served by the Rio Grande Canal, and the right of the Company shareholders to withdraw and use, reuse and successively use the same to extinction, subject to the terms and conditions of this decree.

185. The change of SMRC Water Rights that are the subject of this judgment and decree is based upon an analysis of the historical use of the SMRC Water Rights, and is not based upon a ditch-wide analysis of historical use under either the entire Monte Vista Canal or the entire Rio Grande Canal. This judgment and decree does not quantify the historical use of the separate water rights of either the Monte Vista Water Users Association or the RGCWUA.

186. *Retained Jurisdiction.* The approval of the requested change of water rights shall be subject to reconsideration by the court on the question of injury to the vested water rights and decreed conditional water rights of others for a period of five years from the entry of this Decree. Pursuant to § 37-92-304(6), C.R.S. (2016) the court may extend this five-year period if it determines that the non-occurrence of injury shall not have been conclusively established. The court's retained jurisdiction does not include reconsideration of the historical consumptive use of the SMRC Water Rights. In the event that any party petitions the court for reconsideration of any of the provisions of this decree on the grounds of injury, the court shall order that appropriate notice and an opportunity to be heard be given to all parties. Any petition for reconsideration of this decree on the grounds of injury shall be made in good faith, under oath, and shall set forth with particularity the factual basis upon which the requested reconsideration is premised, together with proposed decree language to effect the petition. The party lodging the petition shall have the burden of going forward to establish *prima facie* the facts alleged in the petition. If the court finds this burden has been met, the Company shall bear the burden of proof to show: (a) that any modification sought by the Company will avoid injury to other appropriators, or (b) that any modification sought by the petitioner is not required to avoid injury to other appropriators, or (c) that any term or condition proposed by the Company in response to the petition does avoid injury to other appropriators. The court's retained jurisdiction does not include reconsideration of the historical uses of the SMRC Water Rights.

187. This Decree and approved method of accounting are predicated upon the present procedures utilized for administration of the Rio Grande Compact. Should these procedures materially change at any time in the future, this decree does not bar the Company from filing, and it has the right to file, an application with the court requesting changes in this Decree to comport with the revised method of Compact administration.

188. This Judgment and Decree is the product of compromise and settlement negotiations between all parties except Mr. Warner and the Applicant, and the issues were not actually litigated by the parties who entered into settlement stipulations. Accordingly, nothing in this Judgment and Decree shall be construed to preclude any settling party from litigating, in any

different case involving the same or similar issues, any matter determined in this Judgment and Decree.

189. A copy of this Decree shall be filed with the State Engineer and with the Division Engineer, pursuant to § 37-92-308(8) C.R.S. (2016).

190. Except to the extent that the court has specifically retained jurisdiction, this Judgment and Decree is final.

191. The court awards the Company its costs to be taxed as provided by law.

Done this 1st day of June 2018.

BY THE COURT:



Pattie P. Swift
Water Judge, Water Division No. 3

DISTRICT COURT, WATER DIVISION NO. 3 COLORADO Alamosa County Courthouse 702 4 th Street Alamosa, Colorado 81101 Phone: 719-589-4996	<p style="text-align: center;">* COURT USE ONLY *</p>
Concerning the Application for Water Rights of THE SANTA MARIA RESERVOIR COMPANY IN THE RIO GRANDE OR ITS TRIBUTARIES	
Attorney for James Warner, Opposer Richard L. Arnett #50360 315 State Ave. Alamosa, Co. 81101 Telephone: 720-366-7774 Fax: 720-368-5008 E-mail: rarnett@arnettlaw.net	Case Number 13CW3002
OPPOSER JAMES WARNER’S MOTION TO AMEND JUDGMENT	

COMES NOW James Warner, Opposer, and, pursuant to Rule 59 of the Colorado Rules of Civil Procedure, files his Motion to Amend Judgment, and would show as follows:

INTRODUCTION

The Court’s Decision endorses the stipulated “recharge” decrees relating to the Rio Grande Canal, San Luis Valley Irrigation District (Farmers Union Canal), San Luis Valley Canal Company and Prairie Ditch Company, and applies similar conclusions to those reached therein to permit Applicant’s water to be sold by lease “to extinction.” The Decision thereby establishes a precedent

that allows the discontinuation of essentially the entirety of the diversions into the Confined and Unconfined Aquifers north of the Rio Grande River, with the water instead being sold by lease to the highest bidder for use as replacement water. The resulting drying up of the Confined and Unconfined Aquifers will insure a market for the water; Applicant's shareholders will be taking the supply for adjudicated water rights and then selling that supply to the affected water rights holders. The Court's ruling effectively authorizes the privatization, liquidation and sale of more than 40% of the flow of the Rio Grande River at Del Norte, based upon the share of these diversions in 2005. Applicant's Expert Report, Table 5 and Figure 5, Exhibit A-22, p. 50, 70; Exhibit A-53.

Opposer has previously set forth controlling authorities and undisputed, determinative facts that compel denial of the Application, including the uncontested evidence relating to the flow of Applicant's water into the *Confined* Aquifer and eventually into the Conejos River, as well as other admissions from the expert witness which are not addressed in the Court's decision. Opposer adopts and incorporates by reference his previous submissions, including his briefs, Motion to Dismiss, Proposed Decree, and appeal of the 2018-19 renewal of the Substitute Water Supply Plan, and, without waiving same, this Motion will not reiterate the arguments and discussion therein.

This Motion to Amend Judgment will primarily be limited to the reasons why the Judgment should be Amended to deny the Application, even under the Court's conclusion that the water right is to "imported water," or the determination that Applicant's shareholders took possession of the return flows from their surface water rights by using them to supply their wells.

II.

LACK OF EVIDENCE OF HISTORIC CONSUMPTIVE USE

The Court's conclusion that Applicant's water rights may be "used to extinction" is based upon the conclusion that the rights are to "imported water." However, the water is considered as "imported water" only due to its diversion into the Rio Grande Canal service area, including what is inaccurately termed a Closed Basin. Once the change in place of use of the water rights is granted, and it is used in the Rio Grande River, it is no longer "imported" anywhere and loses its character as "imported water." We are aware of no case that supports a claim that water remains fictionally "imported" once its use is returned to its river of origin, nor does any rationale supporting the concept of "imported water" remain applicable following such a change in place of use. Thus, Applicant's water rights can no longer be used to extinction once their place of use is changed to the Rio Grande River, and any such change of use must be limited to the historical consumptive use of the water right at the time of its appropriation.

Second, the Court found that Applicant's shareholders fully consumed their water right and took possession of the return flows by creating "the artificial aquifer ... that has sustained the production [of] the wells used to irrigate the shareholders' lands." Findings of Fact, Conclusions of Law, Judgment and Decree, paragraph 61. Setting aside the legality of this allocation of historic return flows to Applicant's shareholders' wells without regard to their seniority relative to other surface and ground water rights dependent on these same return flows, under the change of water right granted by the Court the return flows are no longer being supplied to the aquifer to support the wells of Applicant's shareholders. Accordingly, the use of such wells must be reduced by the

amount of the “recharge” being removed from the aquifers through the change of use and place of use approved by the Court.

Opposer has previously discussed binding Colorado cases requiring that a change case be evaluated based upon consumptive use at the time of the appropriation, in this case the early 1900’s, and continues in his position that the Application must be denied in the absence of any evidence quantifying this consumptive use. However, even if this evidence is not otherwise required, the determination of historic consumptive use is necessary to determine the amount of first use water that is available after the place of use is changed and the water is no longer “imported.” Similarly, evidence of historic consumptive use is necessary to determine the amount of “recharge” (return flows, historically) that is no longer being introduced into the aquifers to supply Applicant’s shareholders’ wells, by which amount the wells’ production must be reduced. Because Applicant failed to present any evidence of historic consumptive use as necessary to quantify these amounts, the Application should be denied.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Opposer Warner requests that Judgment herein be amended to deny the Applicant’s claims relating to water rights historically diverted through the Rio Grande Canal.

Respectfully submitted the 15th day of June, 2018.

*E-filed pursuant to C.R.C.P. 121. Duly signed
Original on file in office of Richard Arnett.*

/s/ Richard L. Arnett
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Certificate of Service

This is to certify that on the 15th day of June, 2018, I caused a true and correct copy of the foregoing Opposer James Warner's Motion to Amend Judgment to be served electronically via ICCES to all parties of record.

*E-filed pursuant to C.R.C.P. 121. Duly signed
Original on file in office of Richard Arnett.*

/s/ Richard Arnett
Richard L. Arnett
Attorney at Law

District Court, Water Division 3, State of Colorado Court Address: 702 Fourth St., Alamosa, CO 81101 Phone Number: (719) 589-4996	DATE FILED: Sep 28, 2018 8:57:40 AM CASE NUMBER: 2013CW3002
In the Matter of the Application for Water Rights of: THE SANTA MARIA RESERVOIR COMPANY IN THE RIO GRANDE OR ITS TRIBUTARIES	▲ COURT USE ONLY ▲ <hr/> Case Number: 2013CW3002 Div.: 1
<p style="text-align: center;">ORDER DENYING MOTION TO AMEND JUDGMENT AND GRANTING REQUEST FOR ATTORNEY’S FEES</p>	

THIS MATTER comes before the court on Opposer James Warner’s *Motion to Amend Judgment* (“Motion”) filed on June 15, 2018. On June 22, 2018, Applicant, the Santa Maria Reservoir Company, filed a response and on July 2, 2018, the Opposer filed a reply. In the response, Applicant requested that the court award it attorney’s fees pursuant to C.R.S. § 13-17-101 because the Opposer’s claims in the Motion were substantially frivolous and/or substantially groundless. After reviewing the Motion, response and reply, and all matters of record in this case, the court denies the Opposer’s *Motion to Amend Judgment* and grants the Applicant’s request for attorney’s fees.

I. BACKGROUND

On January 31, 2013, the Santa Maria Reservoir Company (“Company”, “Applicant” or “SMRC”) filed an *Application for Change of Water Right* (the “Application”). James Warner (“Opposer”) filed a timely statement of opposition. By order dated April 26, 2016, the Water Referee referred the case back to the Water Judge. At that time, the Applicant had reached a settlement with all active opposers except Mr. Warner. The court subsequently held a trial setting conference on June 27, 2016, and set the matter for trial on December 5, 2016, which date

was later continued to January 5, 2017, and then continued to April 6, 2017. On March 8, 2017, Richard Arnett entered his appearance as counsel of record for Mr. Warner.

This matter came before the court for trial on April 6 and 7, 2017, and May 2, 2017. On June 1, 2018, the court issued its *Findings of Fact, Conclusions of Law, Judgment and Decree* (Order). In the Order, the court approved the Company's *Application for Change of Water Right*. On June 15, 2018, Mr. Warner filed his *Motion to Amend Judgment*.

II. ANALYSIS

A. *Motion to Amend*

Mr. Warner filed a motion to amend judgment pursuant to C.R.C.P. 59. Decisions on C.R.C.P. 59 motions are within the discretion of the trial court. *Blood v. Quest Service Corp.*, 224 P.3d 301, 320 (Colo. App. 2009). Mr. Warner does not present any new evidence in his Motion. Instead, he argues that the court's judgment was incorrect and that the court should reverse its previous decision and deny the application. Mr. Warner makes three main arguments in support of this conclusion.

Mr. Warner's first argument is that the court wrongfully concluded that SMRC water delivered into the Closed Basin is imported water. Mr. Warner does not argue that SMRC water rights naturally flow into the Closed Basin. Instead, he argues that "[o]nce the change in place of use of the water rights is granted, and it is used in the Rio Grande River, it is no longer 'imported' anywhere and loses its character as 'imported water.'" *Motion* at 3. Mr. Warner cites no authority in support of his position.

As provided in C.R.S. § 37-82-106,

Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator 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 streams into which it is introduced.

This statute codified the common law concept of foreign water. In this case, the court found that the Company lawfully introduced water into the Closed Basin that would not flow there naturally. Mr. Warner has not challenged this fact. At trial, Mr. Warner challenged whether water diverted into the Closed Basin would return to the Rio Grande. The court addressed this argument finding that Company water did not return to the Rio Grande. *See Order* ¶¶ 69-91. Mr. Warner's current argument, that water can lose its character as imported water based on a change in its place of use, is unsupported by facts or law. Once the court determines that water is imported water, the appropriator may make successive uses of that water. This includes the change of use approved in this case: to add augmentation or replacement of stream depletions as an approved use of SMRC water rights under both the Monte Vista Canal and the Rio Grande Canal. Because Mr. Warner's position is unsupported by facts or law, the court denies his *Motion to Amend Judgment* on this basis.

Mr. Warner's second argument is that the court should have ordered the Applicant's shareholders to reduce the use of their wells "by the amount of 'recharge' being removed from the aquifers through the change of use and place of use approved by the [c]ourt." *Motion* at 3-4. Mr. Warner is referring to SMRC water imported into the Closed Basin when he references "recharge" water that has been removed. This issue is not before the court. The Application did not raise the question of the use of wells among SMRC shareholders. In fact, the use of these wells is governed by other rules and court decisions. As noted in the response brief, to the extent that the shareholder wells are located in Special Improvement District No. 1 of the Rio Grande Water Conservation District ("Subdistrict No.1"), they are governed by Subdistrict No. 1's *Plan of Water Management* which this court approved in Cases No. 2007CW52 and 2006CV64. And,

wells that are not within Subdistrict No. 1, will be governed by the State Engineer's groundwater regulations. These issues of groundwater administration were never before the court in this case. Further, characterizing imported water as return flows is inaccurate because SMRC does not have an obligation to replace the water imported into the Closed Basin. Therefore, the court denies the *Motion to Amend Judgment* on this basis.

Finally, Mr. Warner argues that the court erred by failing to determine historic consumptive use of the changed water rights. Specifically, Mr. Warner argues that the court should have determined (1) "the amount of first use water available after the place of use is changed and the water is no longer 'imported'" and (2) "the amount of 'recharge' (return flows, historically) that is no longer being introduced into the aquifers to supply Applicant's shareholders' wells, by which amount the wells' production must be reduced." *Motion* at 4. As noted previously, SMRC is not obligated to replace imported water in the Closed Basin and the pumping of shareholder wells was never at issue in this matter. Also, as noted by SMRC, the court determined the historical diversions and consumptive use of the SMRC water rights. *Order* at ¶¶ 131-143, 157-171. The court also determined that the change in use of water rights would result in a small change in accretions to the Rio Grande. *Id.* ¶ 80-91. The court required the SMRC to deliver water to the Rio Grande to replace these lost accretions. *Id.* Mr. Warner has not provided any evidence to suggest that the court made this calculation incorrectly. He has only, mistakenly, claimed that the court failed to calculate historic consumptive use. Since the court has made such a calculation, the court also denies the Motion on this basis.

B. Attorney's Fees

SMRC asks the court to award attorney's fees because the Motion to Amend was substantially groundless pursuant to C.R.S. § 13-17-101. Whether a claim or defense is

groundless or frivolous, and whether to award attorney's fees, are matters within the court's discretion. *Bernal v. Lumbermens Mut. Cas. Co.*, 97 P.3d 197, 203 (Colo. App. 2003).

“[G]roundlessness involves the inability to produce evidence in support of a claim or defense.” *Id.* at 204. Frivolousness is “the inability to present a rational argument supporting the claim or defense.” *Id.*

In this matter, the court finds that Mr. Warner's Motion to Amend is substantially groundless and frivolous. Many of Mr. Warner's arguments stem from an incorrect understanding of the concept of imported water. He claimed, without any authority, that such water loses its imported status if its place of use is changed. He also claimed, without evidence or legal authority, that SMRC is required to replace imported water within the Closed Basin even though, under Colorado law, other water users diverting from the Closed Basin are not entitled to rely on the continued diversion of the imported water rights into the Closed Basin. Also, as noted by SMRC, Mr. Warner included arguments in the introduction to his Motion that are obviously false. *See Response* at 1. These false statements are groundless. Finally, as noted by SMRC and in this order, several of Mr. Warner's arguments ignore the parts of the court's Order that address the issues raised in the Motion to Amend. For example, Mr. Warner does not provide new evidence on the question of historical consumptive use. Rather, he wrongfully argues that the court failed to consider historical consumptive use. This is further evidence of the groundless nature of the Motion. Accordingly, the court grants the Applicant's request for the attorney's fees Applicant expended to address the Motion to Amend.

IT IS THEREFORE ORDERED THAT Mr. Warner's Motion to Amend is denied;
and

IT IS FURTHER ORDERED THAT the Applicant's request for attorney's fees is granted and SMRC shall submit an affidavit in support of those fees within 21 days of this order.

DONE this 9th day of August 2018.

BY THE COURT



Pattie P. Swift
Water Judge
Water Division 3