

Colorado Supreme Court  
2 East 14th Avenue  
Denver, CO 80203

Appeal from the District Court  
Water Division 3, 17CW3003

Concerning the Application for Water Rights of the  
Mike and Jim Kruse Partnership in Saguache  
County

**Opposers-Appellants:** Craig W. Cotten, Division  
Engineer for Water Division 3; and Kevin G. Rein,  
State Engineer

v.

**Applicant-Appellee:** Mike and Jim Kruse  
Partnership

**and**

**Opposers-Appellees:** The United States of  
America Fish and Wildlife Service; the Rio Grande  
Canal Water Users Association; the Rio Grande  
Water Conservation District; and S&T Farms, LLC

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**▲ COURT USE ONLY ▲**

Supreme Court Case No:

2020SA\_\_\_\_\_

**ENGINEERS' NOTICE OF APPEAL**

The State Engineer and Division Engineer for Water Division 3 (“Engineers”), by and through the Attorney General and undersigned Senior Assistant Attorney General, file the following Notice of Appeal pursuant to C.A.R. 3:

**I. Nature of the Case.**

**A. Nature of the controversy.**

This case concerns a water court application filed by Applicant-Appellee, Mike and Jim Kruse Partnership (“Kruse Partnership”) in Case No. 17CW3003, Water Division 3, requesting a determination of the decreed source of water for the Rocky Hill Seepage and Overflow Ditch (“Rocky Hill Ditch”). On April 11, 1933, the Saguache County District Court (“1933 Court”) entered a decree for the Rocky Hill Ditch and two other seepage ditches (“1933 Decree”). The 1933 Decree states that “the water adjudicated to the ditches herein-after named, are waste, seepage and spring waters, which are independent of and non-tributary to any natural running stream or water course, and are not capable of being used upon the lands where the waters first arise.” The 1933 Decree

awarded each seepage ditch, including the Rocky Hill Ditch, “Priority No. 1 on its source of supply” with appropriation dates of November 17, 1891.

The controversy is whether the Rocky Hill Ditch is entitled to La Garita Creek’s tributary surface water siphoned under the Rio Grande Canal and directly diverted into the Rocky Hill Ditch, even though the decreed source of water is “independent of and non-tributary to any natural running stream or water course and are not capable of being used upon the lands where the waters first arise.” The water court held that the 1933 Decree entitles the Rocky Hill Ditch to 44.6 cfs of the water that is siphoned under the Rio Grande Canal from the channelized portion of La Garita Creek.

**B. The judgment and decree being appealed, including the basis for this Court’s jurisdiction.**

The Engineers appeal the water court’s Corrected Judgment and Decree entered in Case No. 17CW3003 on January 7, 2020. Appx. A, Corrected Findings of Fact, Conclusions of Law, Judgment and Decree (“Corrected Judgment and Decree”).

This Court has jurisdiction over this appeal pursuant to C.A.R. (1)(a)(2), which states that an appeal to the appellate court may be taken

from “[a] judgment or decree, or any portion thereof, in a proceeding concerning water rights”; and section 13-4-102(1)(d), C.R.S., which excludes jurisdiction over appeals of “water cases involving priorities or adjudications” from the jurisdiction of the Colorado Court of Appeals.

**C. Whether the judgment and decree resolved all issues pending before the water court, including attorneys’ fees and costs.**

The water court’s Corrected Judgment and Decree resolved all issues pending before the water court, including attorneys’ fees and costs.

**D. Whether the judgment and decree was made final for purposes of appeal pursuant to C.R.C.P. 54(b).**

C.R.C.P. 54(b) is inapplicable to the water court’s final Corrected Judgment and Decree.

**E. The date the judgment and decree was entered.**

The water court entered its initial findings of fact, conclusions of law, judgment and decree on December 20, 2019. The Rio Grande Canal Water Users Association filed a motion pursuant to C.R.C.P. 59 on January 2, 2020 to correct a small typographical error, and the water court entered its Corrected Judgment and Decree on January 7, 2020,

which was electronically served on the parties that same day via the Colorado Courts E-Filing system.

**F. Extensions to file motions for post-trial relief.**

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

**G. Motions for post-trial relief.**

The Rio Grande Canal Water Users Association filed a motion pursuant to C.R.C.P. 59 to correct a typographical error on January 2, 2020. The water court granted that motion and issued its Corrected Judgment and Decree on January 7, 2020. No other motions for post-trial relief were filed.

**H. Denials of motions for post-trial relief.**

There have been no denials of any motions for post-trial relief.

**I. No extensions to file notice of appeal.**

No extensions to file a notice of appeal were requested.

**II. Advisory listing of issues to be raised on appeal.**

**A.** Whether the plain language of the 1933 Decree does not include La Garita Creek's tributary surface water siphoned

under the Rio Grande Canal and directly diverted into the Rocky Hill Ditch as a decreed source for the Rocky Hill Ditch.

- B.** Whether the water court erred in reviewing extrinsic evidence not before the 1933 Court to determine that the 1933 Decree is ambiguous as to whether La Garita Creek's tributary surface water siphoned under the Rio Grande Canal and directly diverted into the Rocky Hill Ditch is a decreed source for the Rocky Hill Ditch.
- C.** If the 1933 Decree is ambiguous regarding whether La Garita Creek's tributary surface water siphoned under the Rio Grande Canal and directly diverted into the Rocky Hill Ditch is a decreed source for the Rocky Hill Ditch, whether the water court erred in determining that the parties adjudicating the Rocky Hill Ditch in 1933 intended to appropriate such La Garita Creek tributary surface water as a source, rather than determining whether the original appropriators in 1891 intended to appropriate such La Garita Creek tributary

surface water as a source at the time of the decreed appropriation date of November 17, 1891.

- D.** If the 1933 Decree is ambiguous regarding whether La Garita Creek tributary surface water siphoned under the Rio Grande Canal and directly diverted into the Rocky Hill Ditch is a decreed source for the Rocky Hill Ditch, whether the evidence is wholly insufficient to support the water court's finding that such La Garita Creek tributary surface water is a decreed source of water for the Rocky Hill Ditch under the 1891 appropriation date.

**III. Transcript of evidence taken before the water court that is necessary to resolve the issues raised on appeal.**

Transcripts from the trial before the Water Court on March 19-22, 2019, and the exhibits entered into evidence at that trial, are necessary to resolve the issues raised on appeal.

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

Not applicable.

**V. Counsel for the parties.**

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**VI. Appendix containing Orders of the Court.**

The following orders of the Water Court are attached:

**Appendix A:** Corrected Findings of Fact, Conclusions of Law,  
Judgment and Decree, dated January 7, 2020.

RESPECTFULLY SUBMITTED this 7th day of February, 2020.

PHILIP J. WEISER  
Attorney General

*Filed pursuant to C.R.C.P. Rule 121 § 1-26.*

*A duly signed original is on file with the Office of the Attorney General  
for the State of Colorado.*



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Senior Assistant Attorney General  
Water Resources Unit  
Natural Resources and Environment Section  
Colorado Attorney General's Office  
Attorneys for the State and Division Engineers  
\*Counsel of Record

## CERTIFICATE OF SERVICE

This is to certify that on the 7<sup>th</sup> day of February, 2020, I caused a true and correct copy of the foregoing **ENGINEERS' NOTICE OF APPEAL** to be served electronically via CO Courts E-filing or by U.S. Mail, First Class, postage pre-paid to each of the following:

Party Name	Party Type	Attorney Name
Division 3 Engineer	Division Engineer	Division 3 Water Engineer (State of Colorado DWR Division 3) Marc David Sarmiento (CO Attorney General) Philip Ernest Lopez (CO Attorney General)
James Warner	Other Interested Party	Richard Lynn Arnett (Brim Robinett Cantu and Brim PC)
Mike And Jim Kruse Partnership	Applicant	Erich Schwiesow (Erich Schwiesow PC) Steven J Bushong (Porzak Browning & Bushong LLP)
Mike And Jim Kruse Partnership	Applicant	Cassidy Lee Woodard (Porzak Browning & Bushong LLP) Steven J Bushong (Porzak Browning & Bushong LLP)
Rio Grande Canal Water Users Association	Defendant	Katrina Fiscella (Carlson, Hammond & Paddock, L.L.C.) William Arthur Paddock (Carlson, Hammond & Paddock, L.L.C.)
Rio Grande Water Conservation District	Opposer	Peter J Ampe (Hill and Robbins PC)
S And T Farms Llc	Opposer	David S Hayes (Petros and White LLC)
State Engineer	State Engineer	Colorado Division Of Water Resources (State of Colorado - Division of Water Resources) Marc David Sarmiento (CO Attorney General) Philip Ernest Lopez (CO Attorney General)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
State Engineer And Water Div 3 Engineer	Opposer	Marc David Sarmiento (CO Attorney General) Philip Ernest Lopez (CO Attorney General)
United States of America	Opposer	James J Dubois (US Department of Justice ENRD)
United States of America	Opposer	James J Dubois (US Department of Justice ENRD)
Clerk of the Division 3 Water Court	District Court	Jennifer Pacheco, Water Clerk

*E-filed pursuant to C.A.R. 30-and C.R.C.P. 121. Duly signed original on file at the Office of the Attorney General.*

*/s/ Pauline Wilber*

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District Court, Water Division 3, State of Colorado Court Address: 8955 Independence Way, Alamosa, CO 81101 Phone Number: (719) 589-4996	DATE FILED: February 7, 2020 9:50 AM CASE NUMBER: 2017CW3003
<p><b>In the Matter of the Application for Water Rights of</b></p> <p><b>Applicants: MIKE AND JIM KRUSE PARTNERSHIP,</b></p> <p><b>v.</b></p> <p><b>Opposers: CRAIG COTTEN, DIVISION ENGINEER, WATER DIVISION 3; KEVIN G. REIN, STATE ENGINEER; THE UNITED STATES OF AMERICA FISH AND WILDLIFE SERVICE; AND THE RIO GRANDE CANAL WATER USERS ASSOCIATION</b></p> <p><b>And</b></p> <p><b>Intervenor: S &amp; T FARMS</b></p> <p><b>In SAGUACHE County</b></p>	<p><b>▲ COURT USE ONLY ▲</b></p> <hr/> <p>Case Number: 2017CW3003</p> <p>Div.: CJ-1 Ctrm:</p>
<p align="center"><b>CORRECTED FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE</b></p>	

Upon the unopposed *Motion to Correct Typographical Error in the Court’s Findings of Fact, Conclusions of Law, Judgment and Decree Entered on December 20, 2019*, filed on January 2, 2020, by Objector Rio Grande Canal Water Users Association, the Court issues the following Corrected Findings of Fact, Conclusions of Law, Judgment and Decree making the requested corrections to paragraph 24.

THIS MATTER comes before the Court on the *Application for Determination of Water Right and for Declaratory and Injunctive Relief* which the Mike and Jim Kruse Partnership filed on March 30, 2017. On May 31, 2017, the United States Fish and Wildlife Service, the Rio Grande Water Conservation District and the Division and State Engineers filed Statements of Opposition to the application. Beginning March 19, 2019, the Court held a three-and-a-half-day

trial on the application. After considering the evidence presented and the arguments of counsel as well as all matters of record in this case, the Court makes the following Findings of Fact and Conclusions of Law and enters the following Judgment and Decree.

**I. PROCEDURAL HISTORY**

On March 30, 2017, the Mike and Jim Kruse Partnership (“Kruse Partnership”) filed an application asking the Court to interpret the April 11, 1933, decree for the Rocky Hill Seepage and Overflow Ditch (“RHSOD Decree” or “Decree”). Specifically, the Kruse Partnership asked the Court to determine that La Garita Ditch (currently owned by the United States Fish and Wildlife Service) was not entitled to any waste or overflow water accumulating in the channelized portion of La Garita Creek immediately west of the Rio Grande Canal. In addition, the Kruse Partnership asked the Court to determine that the Rocky Hill Seepage and Overflow Ditch (“RHSOD”) was entitled to 44.6 c.f.s. of the water accumulating in the channelized portion of La Garita Creek lying west of the Rio Grande Canal, second only to the right of the McLeod Ditches 3, 4, and 5 to 3.77 c.f.s. of that water. The Kruse Partnership asked the Court to interpret the RHSOD Decree as requested and to prohibit the Engineers from administering the water in such a way that the Kruse Partnership was prevented from receiving this water.

The Engineers, the Rio Grande Water Conservation District, and the United States Fish and Wildlife Service filed Statements of Opposition. The Water Referee re-referred the application to the Water Judge on May 12, 2017.

On November 30, 2017, the Engineers filed a motion for partial summary judgment asking the Court to find that the decreed source of water for the RHSOD did not include the water that accumulates in the channelized portion of La Garita Creek west of the Rio Grande Canal which is then siphoned under the Rio Grande Canal, even if that water has historically found its way into the RHSOD. On December 14, 2017, the Kruse Partnership filed a response

to the motion, arguing that the water that is siphoned under the Rio Grande Canal is, in fact, waste and seepage water and therefore a source of the water rights decreed to the RHSOD. In addition, the Kruse Partnership made a cross-motion for partial summary judgment asking the Court to declare that La Garita Ditch has no right to call for water from La Garita Creek. In their response, the Engineers took no position on the cross-motion for partial summary judgment, however, the U.S. Fish and Wildlife Service filed a response asking the Court to deny the cross-motion for summary judgment.

On June 10, 2018, the Court issued its *Order Granting the State and Division Engineers' Motion for Partial Summary Judgment and Partially Granting the Kruse Partnership's Cross-Motion for Partial Summary Judgment*. In that order, the Court found that the decreed source of water for the RHSOD does not include water that collects in the channelized portion of La Garita Creek west of the Rio Grande Canal. The Court determined, however, that La Garita Ditch has no right to call for water from La Garita Creek. After the Court issued that order, the Kruse Partnership filed a motion asking the Court to reconsider the portion of its order granting summary judgment in favor of the Engineers as to the decreed source of water for the RHSOD. The parties fully briefed the motion for reconsideration and, after carefully considering the matter, the Court granted the motion on August 20, 2018, granting the Kruse Partnership summary judgment finding the RHSOD was entitled to divert 44.6 c.f.s. from the water that was siphoned under the Rio Grande Canal from the channelized portion of La Garita Creek, second only to the right of the McLeod Ditches 3, 4, and 5 to 3.77 c.f.s. of that water.

The Engineers then filed a motion asking the Court to reconsider the order granting reconsideration. After reviewing the motion, the Court determined that the parties disagreed about material facts and that the Court could not resolve this portion of the case by way of

summary judgment. On October 3, 2018, the Court issued its order denying the opposing motions for summary judgment because there remained disputed material issues of fact. The Court then set the case for a trial.

**II. FINDINGS OF FACT**

The Court finds that the following facts were proved at trial by a preponderance of the evidence.

**A. Parties**

1. The Applicant in this case, the Mike and Jim Kruse Partnership, owns property in Saguache County, referred to as the Dunn Ranch, which the partnership acquired in 2016. The Dunn Ranch includes land in Sections 9, 10, 11, 15, and 16 in Saguache County, Colorado. The Kruse Partnership owns the following water rights in conjunction with this land: several different priorities of Rio Grande Special Water, 55 shares in the Rio Grande Canal Water Users Association, .65 c.f.s. in the McLeod Ditch No. 3, 10 shares of the Santa Maria Reservoir Company, and rights to various amounts of water from the Rocky Hill Seepage and Overflow Ditch (“RHSOD”) as more particularly described in the Quit Claim Deed that was admitted as Exhibit K-2.

2. The Opposers, the State Engineer and the Division Engineer, are state officials charged with the duty to administer and distribute the waters of the state of Colorado in accordance with the laws of the state.

3. The Intervenor, S & T Farms, owns water rights decreed from La Garita Creek upstream of the Rio Grande Canal.



**B. La Garita Creek, the Rio Grande Canal and the Rocky Hill Seepage and Overflow Ditch**

4. La Garita Creek flows in an easterly direction out of the San Juan Mountains on the west-side of the San Luis Valley north of Del Norte and south of Carnero Creek. As it flows down from the steeper area in the mountains and out onto the flatter area of the plain, La Garita Creek deposits sediments onto the floor of the valley creating an alluvial fan. Historically, the materials suspended in the creek dropped out and created the alluvial fan which obstructed the flow of the creek which then created multiple channels or distributaries. The alluvial fan and the multiple channels caused the water to spread out as it entered the valley. Without human intervention, this water would spread across and saturate the land and, historically, that is what it did.

5. The Rio Grande Canal is a large water structure that was constructed between March 1881 and March 1884. It extends from the Rio Grande in a generally northerly direction crossing the path and alluvial fan of La Garita Creek and continuing north.

6. At present, La Garita Creek is channelized for a little over a mile on the west-side of the Rio Grande Canal. Currently, there is a siphon that takes water from the channelized portion of La Garita Creek on the west-side of the Rio Grande Canal, under the canal, and out into a channel on the east-side of the canal.

7. At present, Headgate No. 2 of the RHSOD is located where the siphon discharges water on the east-side of the Rio Grande Canal. This is not a typical headgate that diverts water from a stream or other water source. Rather, all the water that discharges from the siphon, which would otherwise spread out and flood the land, simply flows through a measuring device and then down the ditch.

8. Whatever natural channel of La Garita Creek—or really channels, because of the creek’s spreading nature—existed to the east of the Rio Grande Canal before the canal was built, no longer exists; there is only the human-made channel that extends directly east from Headgate No. 2. This ditch/channel does not have a direct connection to the part of La Garita Creek which sometimes starts to flow again approximately three-and-one-half or four miles to the east of the siphon under the Rio Grande Canal. The area between the siphon and the place where La Garita Creek sometimes begins to flow again has been farmed over for many years and is currently home to numerous farm fields irrigated by center-pivot sprinklers.

9. At the time the Rio Grande Canal was built, there were several decreed water rights that had been diverting from La Garita Creek to the east of the location of what was to become the Rio Grande Canal. These appropriations were: McLeod Ditch 1 (appropriation date 1873); White Ditch 1 (appropriation date 1878); McLeod Ditch 5 (appropriation date 1880); McLeod Ditch 2 (appropriation date 187\_<sup>1</sup>); McLeod Ditch 4 (appropriation date 1880); McLeod Ditch 3 (appropriation date 1878) and Biedell Home Ditch No. 1 (appropriation date 1870). In addition, in 1911 the Saguache District Court adjudicated another water right for the Biedell Home Ditch No. 1 diverting from La Garita Creek east of the Rio Grande Canal with an appropriation date of 1884, the same year the Rio Grande Canal was completed. In 1926, all these water rights were transferred to new points of diversion upstream of the siphon except the McLeod Ditches 3, 4, and 5, which continued to divert from the channel east of the siphon.

10. Since 1926 there have been no water rights except the McLeod Ditches 3, 4, and 5, that have a right to divert water from La Garita Creek east of the siphon. Although there are four drainage and seepage ditches located below the siphon and below the RHSOD, La Garita

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<sup>1</sup> The decree indicates that this ditch was constructed in “187\_”. Exhibit J-3 at 19.

Creek is not the decreed source for these water rights; rather, their decreed source is waste, seepage and spring water. In addition, no decreed water rights have the right to divert from the channelized portion of La Garita Creek to the west of the Rio Grande Canal above the siphon.

11. The RHSOD Decree aggregated a number of drainage ditches into the Rocky Hill Seepage and Overflow Ditch. Admitted Exhibit K-16 is a summary of all the map and filing statements for seepage and overflow ditches near the RHSOD. According to the RHSOD Decree, those that were ultimately aggregated into the RHSOD were the Newmyer and Carson Seepage Ditch, owned by Petitioners Mildred Newmyer and James Carson; the Camino Seepage Ditch, owned by Petitioner L.R. Sims; La Garita Seepage and Overflow Ditch owned by Petitioner O.A. Cramer; the Sims Seepage Ditch owned by Petitioner L.R. Sims; and the Rocky Hill Seepage Ditch, owned by Petitioners W.E. Gardner, L.M. Gardner, Adam Deitrich, James C. Schmittel and the Colorado Valley Land Company. The owners of these ditches were the petitioners in the 1933 RHSOD adjudication and the RHSOD Decree lists each of them as the owners of the Rocky Hill Seepage and Overflow Ditch. The map and filing statements for all these ditches indicate that construction of them began no earlier than 1905 and that much of it occurred in 1925, 1927 and 1929. The map and filing statements for the Newmyer and Carson Seepage Ditch, the Camino Seepage Ditch, La Garita Seepage Ditch, and the Rocky Hill Seepage Ditch were filed between November 7, 1927 and August 13, 1929.

12. The Rio Grande Canal Water Users Association (“RGCWUA”) was an objector in the 1933 adjudication proceedings that ultimately resulted in the RHSOD Decree. The Rio Grande Canal Water Users Association operated the Rio Grande Canal for the benefit of those who owned rights to divert water from the canal. As Exhibit K-16 indicates, the RGCWUA also made claims to seepage and overflow ditches (which its filing statements described as laterals to

the Rio Grande Canal) in the vicinity of the RHSOD. The RGCWUA claimed water rights for Laterals 7, 8, 9, 9A, and 10. These maps and filing statements were essentially over-filings on the same seepage ditches on which the individual owners and the Colorado Valley Land Company had filed. All these claims were filed on July 15, 1931, several years after the maps and filing statements for the ditches owned by those who ultimately were named as the appropriators of the RHSOD, but the RGCWUA claimed it began construction of all these laterals on November 7, 1891. Ultimately, there was a decree for the Lateral 7 water rights but Laterals 8, 9, 9A and 10 were never decreed.

13. By 1925, and possibly as early as 1914, there was a water structure, called a flume in the earliest references to it, bringing water from the channel of La Garita Creek on the west-side of the Rio Grande Canal to the east-side of that canal.<sup>2</sup> It is likely this so-called flume was constructed in conjunction with the channelization of La Garita Creek to the west of the canal, most probably for the purpose of keeping water from running uncontrollably into the Rio Grande Canal. Although a flume is technically different from a siphon,<sup>3</sup> the Kruse Partnership and the Division Engineer have not distinguished the evidence discussing a “flume” and the evidence concerning a “siphon.” No evidence was presented concerning whether the “flume” was actually a “siphon” or whether the original crossing of the Rio Grande Canal via a flume was replaced later with a siphon. And, in fact, the water commissioner for this area between 1975 and 2007,

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<sup>2</sup> Dacre Dunn, whose family at one time owned the Dunn Ranch, testified about the flume on November 16, 1925, during a hearing in a lawsuit filed by Edward Hurt against Frank Newmyer, Catha C. McClanahan and Al Newmyer. Rio Grande District Court Case No. 3020. Mr. Dunn was asked: “Do you recall where the company canal crosses La Garita creek?” And he answered, “Yes sir, it crosses right at that flume of course.” Exhibit E-31 at page 45 and number 179. Mr. Dunn’s further answers to questions about where he took out his irrigation water with reference to the flume and with reference to his having sold the property to Mr. Hurt in 1914 suggests the flume over the Rio Grande Canal was in place by 1914. *Id.* at pages 44-46.

<sup>3</sup> *See, e.g., Great Western Ry. Co. v. Ackroyd*, 98 P.726, 727, 44, Colo. 454, 457 (Colo. 1908); *Stuart v. David*, 139 P. 577, 25 Colo. App., 568 (Colo. App. 1914). Both cases indicate that a flume is a structure that brings water over an impediment while a siphon is a structure the takes water under an impediment.

Perry Alspaugh, called the current structure bringing water *under* the Rio Grande Canal, a flume. Exhibit K-9, Affidavit of Perry Alspaugh at paragraph 3. Given the state of the evidence in this case, the Court finds that there was a means to bring water from the channelized portion of La Garita Creek on the west-side of the Rio Grande Canal to the east-side either under or over the canal beginning at least in 1914 and continuing to the present day. The earliest structure technically may have been a flume, but it is now a siphon. For the purposes of this decision, the actual type of structure is unimportant.

14. Diversion records indicate that generally all the water in La Garita Creek is diverted by the water rights with points of diversion upstream from the siphon and that the water that reaches the siphon is typically return flow from irrigation from these diversions. In addition, in wet years when upstream diverters are unable to divert all the water in La Garita Creek, some of that water will reach the siphon. The water that does reach the siphon under these circumstances is essentially flood water. Finally, in some years there are low elevation snows which melt and cause runoff to flow into the siphon below the points of diversion for the upstream ditches.

15. There are reliable records of the flow of water through the siphon and into the RHSOD from 1992 through 2017. Some years there has been no measurable flow. Other years, the flow has ranged from a few hundred acre-feet to as high as 6,200 acre-feet. The flow is highly variable.

16. Historically, the land to both the west and the east of the Rio Grande Canal was irrigated by flood irrigation or sub-irrigation. This resulted in much more return flow to La Garita Creek as well as much more return flow seeping into all the branches of the entire length of the RHSOD. Now that most of the irrigation in the area of the RHSOD is done by more

efficient center-pivot sprinklers, the amount of return flow from that irrigation has been greatly reduced and there is very little water that accumulates in the RHSOD by seeping into the ditch. Currently, the water flowing out of the siphon under the Rio Grande Canal is by far the greatest portion of the water that flows in the RHSOD.

**C. Recent Historical Administration of the Water Coming Out of the Siphon and the Origins of the Current Controversy**

17. From 1975 to 2007, Perry Alspaugh was the water commissioner for water districts 20 and 27, which encompasses the area that includes the RHSOD. Part of his duties as water commissioner were to record stream flow and ditch diversions as well as to administer water rights in water districts 20 and 27. He worked under the direction of the Division Engineer. Over the course of his career, Mr. Alspaugh worked for four different Division Engineers.

18. Throughout the time he was water commissioner, Mr. Alspaugh understood that the channel to the east of the Rio Grande Canal where water flowed out of the siphon was the RHSOD. He measured the water flowing under the Rio Grande Canal and out of the siphon and then administered that water so the first 3.77 c.f.s. were diverted by the McLeod Ditches 3, 4, and 5, and the remainder continued in the RHSOD to be diverted according to the ownership rights of the owners of that ditch. In some of his records, Mr. Alspaugh indicated that the source of this water was La Garita Creek. No Division Engineer ever asked Mr. Alspaugh to administer this water in a different way. Mr. Alspaugh had no difficulties administering the water that came out of the siphon.

19. The water commissioners continued to measure and administer the water that came out of the siphon under the Rio Grande Canal in the same way as Mr. Alspaugh did, until 2016. In the early part of that year, personnel from the Division Engineer's office informed the

owners of the RHSOD that the U.S. Fish and Wildlife Service, which owns La Garita Ditch, had placed a call on La Garita Creek. The Division Engineer believed that the U.S. Fish and Wildlife Service's La Garita Ditch water right entitled it to priority 75 on La Garita Creek. The headgate for La Garita Ditch is located twenty-some miles to the east of the siphon under the Rio Grande Canal on the portion of La Garita Creek that is disconnected from the portion of the creek that exists to the west of the Rio Grande Canal.

20. In 2016, the Division Engineer attempted to send water to La Garita Ditch although there was some question whether the call for La Garita Ditch was a futile call. The Division Engineer was able to move water coming out of the siphon through the Rocky Hill Ditch and place it back into the natural channel of La Garita Creek to the east of U.S. Highway 285 (several miles to the east), but none of that water made it down the creek to the La Garita Ditch headgate. That summer, the RHSOD also received some water from the siphon and from other tailwater that seeped into the ditch.

21. During the winter of 2016-17, the Division Engineer informed the owners of the RHSOD that he had determined that the RHSOD was not entitled to water that flowed down La Garita Creek, through the channelized portion on the west-side of the Rio Grande Canal, through the siphon and out into the channel on the east-side of the Rio Grande Canal because the RHSOD Decree only awarded the RHSOD seepage, waste and tailwater and did not award the RHSOD the right to directly divert water from La Garita Creek to the ditch. The Division Engineer caused a gate to be installed directly to the west of where the siphon begins on the west-side of the Rio Grande Canal, so the Division Engineer could shut off the flow of water through the siphon.

22. When this gate is closed, the water that comes down La Garita Creek to the channelized portion of the creek on the west-side of the Rio Grande Canal is directed into the Rio Grande Canal rather than flowing through the siphon. On April 1, 2017, the Division Engineer closed the gate and diverted the water that was coming down La Garita Creek into the Rio Grande Canal. The Division Engineer attempted to take this water through various ditches to get it to La Garita Ditch, some twenty miles distant. Again, he was not successful. He was successful, however, in getting the water into the natural channel of La Garita Creek to the east of U.S. Highway 285. The Division Engineer's purpose in having the gate installed and moving the water through the Rio Grande Canal was to avoid trying to move the water through the RHSOD because when he put this water into the RHSOD to move it to the native channel of La Garita Creek, the RHSOD owners would not comply with his orders to leave the water in the ditch; instead, they diverted the water. Rather than require each of those water owners to install locking gates and measuring devices at their headgates, a large outlay of money, the Division Engineer believed the better method to get this water down to the lower reach of La Garita Creek was to have the gate installed on the west-side of the siphon under the Rio Grande Canal.

23. After the Division Engineer unsuccessfully attempted to deliver water from La Garita Creek to La Garita Ditch, Peter Ampe, the attorney for the Rio Grande Water Conservation District, found a stipulation executed in 1961 by the predecessor in interest to the U.S. Fish and Wildlife Service in which it agreed to never claim rights under its priority 75 on La Garita Creek. On June 10, 2018, this Court granted the Applicant's Cross-Motion for Partial Summary Judgment on this issue declaring that under currently existing water rights decrees and this stipulation, La Garita Ditch is not entitled to call for water from La Garita Creek.



Accordingly, the Division Engineer no longer has a reason to divert water from the channelized portion of La Garita Creek west of the Rio Grande Canal.

24. The owner of the Rio Grande Canal, the Rio Grande Canal Water Users Association (“RGCWUA”), entered into a stipulation with the Applicant in this case. In that stipulation, made an order of the Court on January 3, 2019, the RGCWUA agreed that if the Applicant prevailed in this action, the RGCWUA would pass under the Rio Grande Canal all flows in La Garita Creek up to the first 48.37 c.f.s. (44.6 c.f.s. for the RHSOD and 3.77 c.f.s. for the McLeod Ditches 3, 4, and 5). Further, the RGCWUA agreed that if the Applicant did not prevail, the RGCWUA would not oppose a future application filed by the owners of the RHSOD seeking a new appropriation from La Garita Creek sufficient to yield, in combination with all other inflow into the RHSOD, a total of 44.6 c.f.s. of water. Accordingly, the RGCWUA does not claim that the Rio Grande Canal has the right to the water the Applicant is claiming in this case and, therefore, the Division Engineer has no need to divert this water with the gate on the west-side of the Rio Grande Canal.

25. Even though there is no current claimant, other than the RHSOD, for the water that accumulates in the channelized portion of La Garita Creek to the west of the Rio Grande Canal, the Division Engineer has decided not to return to the water administration regime that prevailed for many years and has determined that the RHSOD is not entitled to receive the water that has historically flowed out of the siphon under the Rio Grande Canal. The Division Engineer has taken the position that this water must be used to provide water to sustain the confined and unconfined aquifers for the benefit of junior groundwater users. Although the owners of the RHSOD have made applications for the surface water that comes out of the siphon--Case Numbers: 17CW2, Application of Wagon Tracks West; 17CW10, Application of

Mike and Cathy Hale; 17CW3028 Application of James Warner; 17CW3030, Application of Kruse Partnership; 17CW3033, Application of David Toews; and 18CW1, Application of Arrow Cattle--the Division Engineer's Office has recommended that those applications be denied or that any water rights decreed in those cases be subject to curtailment until a sustainable water supply has been achieved in the confined and unconfined aquifers.

**D. Depictions of La Garita Creek on Maps**

26. In this Court's first summary judgment order, the Court determined that in 1891 the natural channel of La Garita Creek extended east of the Rio Grande Canal. The Court based this finding on the Siebenthal Map, Exhibit K-19(a), prepared in 1906 and published as part of Siebenthal's United States Geological Survey report in 1910, which indicated that La Garita Creek flowed uninterrupted on both sides of the canal. In that same order, the Court also determined that by 1915, the natural channel of La Garita Creek had been obliterated for some distance to the east of the Rio Grande Canal. The Court based this determination on a 1915 United States Geological Survey Topographic Map. Exhibit K-20(a).

27. The evidence presented during the trial has persuaded the Court that the Court cannot make a factual finding about the natural course of La Garita Creek based on either the depiction of La Garita Creek on these maps or the depiction of La Garita Creek on any other maps. All the maps were created by reputable entities, including the United States Geological Survey, the Rio Grande Joint Investigation,<sup>4</sup> someone on behalf of the Rio Grande Canal (Exhibits E-14 and E-18), and others, and yet each of them depicted La Garita Creek in different locations. One can see this very clearly on Exhibit K-27 which plots, on one map, the varying

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<sup>4</sup> The Rio Grande Joint Investigation was a comprehensive study of the entire Rio Grande basin from the headwaters in Colorado down to Texas published in 1938. The study was performed on behalf of Colorado, New Mexico, and Texas when those states were in conflict over how the water of the Rio Grande should be divided.

courses of La Garita Creek as depicted on different maps. *See also* Exhibit E-94. Since there was no evidence presented to cause the Court to find that one mapmaker was more reliable than the others, the differing depictions of La Garita Creek make it impossible to rely on any one of them. Moreover, some of the more recent maps are contradicted by aerial photographs of the same area because the maps show La Garita Creek existing in places that the aerial photographs show were farm fields at the time the map was made.

28. The reason for these variations in the location of La Garita Creek over the various maps is likely due to the somewhat subjective nature of drawing maps especially when the feature being mapped could be a natural stream or could be a ditch (like the channel extending east from the siphon under the Rio Grande Canal) and when the feature being mapped is a watercourse that sometimes flows and sometimes does not flow (like La Garita Creek and the channel extending east from the siphon under the Rio Grande Canal).

29. The Division Engineer also offered a hand-drawn map of La Garita Creek, showing two branches of the creek extending to the east of the Rio Grande Canal, as evidence that in the 1920s there was a natural channel of La Garita Creek running east of the canal. This map was an exhibit in a lawsuit titled *Hurt v. Newmyer*. In the early 1920s, Ed Hurt, who owned the Northwest Quarter of Section 16, Township 41 N, Range 7 E, sued Frank Newmyer, who owned the quarter section directly east of Mr. Hurt's quarter section (the Northeast Quarter of Section 16) as well as approximately 320 acres north of Mr. Hurt's quarter section (the East Half of the Southeast Quarter of Section 8, the Southwest Quarter of Section 9 and the South Half of the Southeast Quarter of Section 9). Mr. Hurt claimed that Mr. Newmyer had interfered with Mr. Hurt's use of a ditch because Mr. Newmyer had built a dike across the ditch so it would no longer bring water to Mr. Hurt's property. In the course of the 1925 hearing on this complaint,

Mr. Hurt offered a map he drew of the area, admitted in the current case as Exhibit K-72, which depicts two branches of La Garita Creek as well as a ditch (indicated with a heavy dashed line) built straight along the southwest-side of what is marked as the old creek bed.

30. During the 1925 hearing, the court admitted Mr. Hurt's drawing over the objection of Mr. Newmyer's lawyer. The *Hurt v. Newmyer* court said: "We will let it go in for what it is worth if the Court finds there is any value to it." Exhibit E-31 at 26. Although the Division Engineer asks this Court to rely on this map as one basis for finding that La Garita Creek existed in its natural channel below the siphon in 1925, this Court finds the 1925 court's comments to be telling. Since that court did not consider the map to be highly reliable, and that court had the opportunity to hear and observe the witness testify, it would be unreasonable for this Court, looking only at a cold transcript almost one hundred years later, to put more stock in the map.

31. The Division Engineer also presented maps and filing statements for La Garita Feeder Ditch and the Ed Hurt Ditch showing that both ditches were located east of the McLeod Ditches on La Garita Creek and were constructed after the Rio Grande Canal was completed in 1884 and claimed La Garita Creek as their source of supply.

32. In July 1889, the Rio Grande Land & Canal Company filed a map and filing statement for La Garita Feeder Ditch claiming it constructed the feeder ditch beginning on June 12, 1889 and completed the ditch on June 22, 1889. The map of the feeder ditch shows it runs from La Garita Creek to Lateral No. 10 of the Rio Grande Canal. Exhibit E-11. The map and filing statement does not indicate what is the source of water for this ditch, but in 1920, the then-president of the Rio Grande Canal and Land Company filed a Supplemental Statement, Exhibit E-23, which listed the source of supply for the feeder ditch as La Garita Creek. The Division

Engineer testified that this map and filing statement shows that La Garita Creek existed east of the Rio Grande Canal in a discrete enough channel to have a point of diversion off that channel in 1889. But, this map and filing statement never resulted in a decreed water right.

33. In June 1920, Ed Hurt filed a map for the Ed Hurt Ditch, which was admitted as Exhibit E-24. The map shows what is labelled as La Garita Creek crossing land owned by Dacre Dunn in the Southeast Quarter of the Southeast Quarter of Section 8, Township 41 North, Range 7 East and indicates a headgate taking off from the creek. According to Division Engineer Craig Cotten, the Engineers' expert witness, the purported location of La Garita Creek on this map is south of where he believes the main branch was located and so he believes this is a branch of the creek. Mr. Cotten opined that this map shows that in 1920 La Garita Creek existed east of the Rio Grande Canal in a definite enough channel to allow Mr. Hurt to divert water from it. The Court declines to make such a factual finding because it does not appear that this ditch was ever built. Mr. Hurt never obtained a decree for the ditch and the map seems to indicate that the only work done on the ditch at the time the map was made was the survey which created the map. It says: "Work was commenced by the survey on the eighth day of June A.D. 1920." Exhibit E-24.

34. Accordingly, the Court finds that it cannot rely on any of the maps offered in this case to determine, by a preponderance of the evidence, what was the situation on the ground to the east of the Rio Grande Canal in the vicinity of the RHSOD in 1891, in 1933 or for the intervening time. The most the Court can say from this evidence is that it appears there were several different channels to the east of the canal that different people called La Garita Creek at different times. This evidence does not answer the question concerning the intended source of water for the RHSOD.

**E. Intended Source of Water for the RHSOD**

35. The evidence presented during the 1933 adjudication hearing as well as the contents of the 1933 Contract and Definition of Rights, Exhibit J-2, which all the RHSOD appropriators signed, shows that it is more likely true than not that the intended source of water for the RHSOD included all water that made its way into any of the ditches of the RHSOD including water that flowed out of the siphon under the Rio Grande Canal.

*i. 1933 Adjudication Proceedings*

36. The original petitioners in this general adjudication for water rights in Water District No. 27 were the Colorado Valley Land Company seeking a decree for the Gunbarrel Seepage and Overflow Ditch as well as the Valley Seepage and Overflow Ditch; O.A. Cramer, seeking a decree for La Garita Seepage and Overflow Ditch; W.E. Gardner, L.M. Gardner, Adam Deitrich, James C. Schmittel and the Colorado Valley Land Company seeking a decree for the Rocky Hill Seepage Ditch; L.M. Gardner and Jacob Refior seeking a decree for the Winchell Ditch; Mildred Newmyer and James Carson seeking a decree for the Newmyer and Carson Seepage Ditch; L.R. Sims seeking a decree for the Camino Seepage Ditch; and L.R. Sims seeking a decree for the Sims Seepage Ditch. The Rio Grande Canal Water Users Association (“RGCWUA”) and the San Luis Valley Irrigation District were objectors in this adjudication proceeding.

37. At the beginning of the adjudication hearing, on April 10, 1933, the Colorado Valley Land Company withdrew its statement of claim for the Valley Seepage and Overflow Ditch, as it agreed to do in its October 8, 1932 contract with the RGCWUA.<sup>5</sup> In addition, the

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<sup>5</sup> The contract was admitted as Exhibit J-21. In the 1932 Contract, the RGCWUA also agreed to withdraw its water court claims for the Camino, Gunbarrel, La Garita and Rocky Hill Seepage and Drainage Ditches. As part of this agreement, the Colorado Valley Land Company agreed to maintain all the portions of the RGCWUA Laterals 7, 8, 9, 10 and 10A where those laterals entered property of the Colorado Valley Land Company.

claimants for the Rocky Hill Seepage Ditch, the Gunbarrel Seepage and Overflow Ditch and the La Garita Seepage and Overflow Ditch asked to be allowed to amend their statements of claim to show the date of appropriation for these water rights was November 17, 1891, rather than the dates listed on their petitions. The attorney for the RGCWUA, Mr. Corlett, objected to this amendment at that time, but said he thought the parties would be able to reach an agreement that evening and present it to the judge the next morning.

38. On the first day of the adjudication hearing, Frank Goudy testified concerning the Rocky Hill Seepage Ditch. He described its location and extent, which is a part of the entire ditch system that was decreed as the RHSOD. He listed the owners of the Rocky Hill Seepage Ditch and he included among them not only the original petitioners for the Rocky Hill but also Mildred Newmyer, L.R. Sims, J.L. Carson, and O.A. Cramer, suggesting that the parties had already agreed that the Newmyer and Carson Seepage Ditch, the Camino Seepage Ditch, the Sims Seepage Ditch and the La Garita Seepage and Overflow Ditch were going to be combined into the Rocky Hill Seepage Ditch.

39. Mr. Goudy described the land that was irrigated with water from the Rocky Hill Seepage Ditch and he was asked to state the source of the water. He answered:

This water is overflow and seepage water from the irrigation of certain land in the La Garita basin and certain seepage water developed from irrigation of land through the Rio Grande Canal and are not tributary to any natural stream or water course.

Exhibit J-22 at 6. Then the following exchange between the attorney and Mr. Goudy occurred:

[Attorney]: And it might be well to make a further specific statement as to the fact that this water arises upon lands in the lower drainage basin of La Garita Creek in order that we may be assured of its being in Water District No. 27?

[Mr. Goudy]: Yes, they arise in the lower drainage basin of La Garita Creek below the canal and these lands are all in Saguache County.

[Attorney]: Are these waters developed upon lands in Water District No. 27?

[Mr. Goudy]: Yes they are. I might state for the benefit of the court I have been personally familiar with these lands since I was a small boy and was first on these lands and the Cramer land in 1891 and I have direct knowledge of this situation and have been in charge of the distribution of water under the Rio Grande Canal for a great many years.

*Id.*

40. L.R. Sims, the owner of the Camino and Sims Seepage Ditches, which were being combined with the other ditches to form the RHSOD, testified that he had owned land under the Rocky Hill Seepage Ditch for twenty-two or twenty-three years—so since approximately 1910 or 1911. Mr. Sims stated that “by hearsay” he understood the land had been under cultivation for many years, back to 1887.

41. Mr. Sims testified that his land “was watered from one of the laterals of La Garita creek, not a lateral but one of the branches of the creek. . . . The creek just came out on the land down there and spread over it.” *Id.* at 10. From this testimony it is clear that without human intervention, the water from La Garita Creek just spread out over the land in the area of the RHSOD and saturated it.

42. Mr. Sims also testified that he filed a statement of claim for the Camino Seepage Ditch which was consolidated into the RHSOD. He said that ditch was completed on July 27, 1927 and that construction began on that ditch seven or eight days before it was completed. He further testified that the “drainage ditch leading up to [the Camino Seepage Ditch]” was constructed beginning on June 11, 1925. A little later he explained that the drainage ditch was about two miles long and that it was all part of the same system that they had planned out in advance and that the purpose of all of this was “to control this water.” *Id.* at 11. Again, this testimony shows that the purpose of the drainage ditch system was to control the water so it would no longer saturate Mr. Sims’ and his neighbors’ fields.



43. John Green, a licensed civil engineer and a surveyor, testified about his December 31, 1930, survey of the Camino Seepage Ditch, of Mr. Sims' land and of "the water courses running through it." *Id.* at 12. Mr. Green testified that the La Garita Creek channel passed through Mr. Sims' land, from west to east, starting at a point approximately 100 feet south of the East quarter corner of the NE1/4 of Section 16, Township 41 North, Range 7 East and headed north-east through the S1/2 of the NW1/4 of Section 15 to a point 160 feet north of the middle of the NE1/4 of Section 15 and then east through the N1/2 of the NW1/4 of Section 14 and on through the N1/2 of the NE1/4 of Section 14 and then it crosses into Section 11 to the north. The channel was very wide, between 50 feet and 150 feet and shallow, only about two feet deep, and covered with grass. Mr. Green could distinguish the channel as a "depression of two feet from the surrounding ground" with the surveying instruments he had with him. *Id.* at 13. The court then asked Mr. Green if this channel carried flood water and he answered, "yes, sir." *Id.* This makes clear that this depression was not the clear channel of a running river or creek so much as a depression, hard or impossible to see with the naked eye, that carried flood water when it was available. Greg Sullivan, the Applicant's expert witness, explained at trial, this depression is an example of one of the distributaries of La Garita Creek. Also, as Mr. Sullivan explained at the trial, it would be difficult, if not impossible, to construct a headgate on this kind of wide and shallow channel and, therefore, difficult to appropriate water from it.

44. The judge at the 1933 adjudication trial wanted to know if this was a determinable and dependable source of water and the attorney, Mr. Corlett, called Mr. Sims back to the witness stand to answer the question of how he watered his land prior to the construction of the Camino Seepage Ditch and he answered:

[Mr. Sims]: It was watered through this natural channel from the water that came down the natural channel of La Garita Creek.

[Attorney]: Was it adequate?

[Mr. Sims]: Entirely so, there was to [sic] much of it, we could'nt [sic] control it, that is the reason we went in and drained it so as to contro [sic] the water.

[Attorney]: And since then you have been diverting the water?

[Mr. Sims]: I am not using near as much water as I had been, as I did before the drainage ditch was put in.

*Id.* This testimony shows that the flood water from La Garita Creek was a routine occurrence before the farmers constructed the drainage ditches that were eventually amalgamated into the RHSOD. This also shows that in its natural state, this water, originating from La Garita Creek, was difficult to control and was a source of the water that flowed into and was controlled by the ditches that were combined into the RHSOD.

45. On the second day of the adjudication trial, Mr. Goudy testified to the location of each of the three headgates of the Rocky Hill Seepage and Overflow Ditch. This is the first time during the proceedings when the words “and Overflow” are added to the name of the ditch. This new name is the name given to the amalgamated ditch in the RHSOD Decree. The name of the ditch implies that its purpose is to capture both seepage and flood water.

46. The only other thing that happened on the second day of the trial was that Mr. Corlett, the attorney for the RGCWUA, told the court that the parties had settled the case and had prepared stipulated findings and a decree which they would like to have entered in the case, subject to 60 days for anyone to file an objection. All the attorneys agreed to this resolution of the case and the trial was concluded.

47. The 1933 Adjudication proceedings resulted in decrees for two water rights other than the RHSOD: the Gunbarrel Seepage and Overflow Ditch and the Lateral 7 Seepage and Overflow Ditch. The appropriation date for both these ditches was also decreed as November

17, 1891, and the source of each of these ditches' supply was listed as waste, seepage and spring waters just like the source for the RHSOD.

48. As noted in paragraph 36 above, L.M. Gardner and Jacob Refior were petitioners in the 1933 Adjudication that resulted in the RHSOD Decree as well as a decree for the Gunbarrel Ditch. Mr. Gardner and Mr. Refior, however, filed a petition for adjudication of water rights under the Winchell Ditch. Similar to the consolidation of various ditches into the RHSOD, the claimants for the Winchell Ditch agreed to combine their claims with the claim for the Gunbarrel Ditch and they even entered into an April 11, 1933, contract setting out their rights to the Gunbarrel Ditch water, Exhibit K-61, similar to the 1933 RHSOD contract. The original map and filing statement for the Winchell Ditch indicated that the source of water for that ditch was "seepage and overflow water (tributary to La Garita Creek) developed and collected by said ditch." Exhibit J-14. The final decree for the Gunbarrel Ditch, however, determined that the source of water for that ditch was the same as the source for the RHSOD: ". . . waste, seepage and spring waters, which are independent of and non-tributary to any natural running stream or water course." Exhibit J-1 at PDF 7.

*ii. 1933 Contract and Definition of Rights*

49. The parties to the 1933 Contract and Definition of Rights, Exhibit J-2, were all the claimants to water rights in the various drainage ditches that were consolidated to form the RHSOD. The terms of the contract indicate that the RHSOD has been completed. The contract explains that the RHSOD was constructed by the efforts of the County of Saguache and the claimants who joined their water rights to form the RHSOD. The contract explains that the reason the county contributed to the construction of these ditches was "to secure more satisfactory road beds along the county

roads” and the reason the landowners contributed to this construction was “to secure adequate surface drainage for [the landowners’] lands, and for the further purpose of controlling and properly distributing the waters arising therefrom theretofore overflowing said lands.” Exhibit J-2 at 1.

50. The contract explains that all the claimants “interested in the use or ownership of water developed or accumulated by said Rocky Hill Seepage and Overflow Ditch” had appeared at the adjudication trial that day, either in person or through counsel, and that they all agreed that their claims should be combined and

. . . a Decree be entered to the Rocky Hill Seepage and Overflow Ditch for all of the waters found to have been developed thereby, for the use and benefit of the undersigned [the landowners] . . .

*Id.* at 3. The fact that this contract discusses not only water “developed,” but also water “accumulated” in the consolidated ditch, shows that the parties intended to appropriate any water that drained into the ditch. And, the fact that the contract refers to a decree for “all” the waters developed in the ditch, shows that the parties intended to appropriate all the water that flowed into the ditch, not just a part of it.

51. The contract includes a legal description of all the component parts of the RHSOD including the “second branch,” which more or less describes the channel that runs east from the siphon under the Rio Grande Canal to what is now Saguache County Road 43.5.<sup>6</sup> *Id.* at 2. The contract indicates that its purpose is to determine the rights of the appropriators and to divide the water among them and it begins that division of waters by apportioning a certain

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<sup>6</sup> Exhibit E 3-15 is a map with a depiction of the “second branch” as described in the 1933 contract and a depiction of the “second branch” as described in the 1933 RHSOD Decree. Neither description is exactly where the ditch exists on the ground but both are relatively close. Furthermore, as discussed in paragraphs 55-59 below, there is no evidence of a “second branch” existing anywhere but where it does exist on the ground and no evidence of a Headgate No. 2 existing north of where the siphon comes out on the east side of the Rio Grande Canal.

amount “of all of the waters accumulated by said drainage ditch” to J.M. Carson. *Id.* at 4. Since the “second branch” runs from directly east of the siphon under the Rio Grande Canal, “all of the waters accumulated by said drainage ditch” would have to include all the water discharging from the siphon. Nothing in this contract discusses parceling out a portion of the water that flows into the “second branch” and diverting it for some use other than the benefit of the RHSOD appropriators. The water coming out of the siphon would have been a significant source of water for the RHSOD and, as Mr. Sullivan said, it would not make sense for these farmer-appropriators in an arid region to exclude this water from their appropriation.

52. The 1933 contract explains how the water in the RHSOD is to be divided among the various appropriators at each of the seven diversions from the ditch. At some locations, the contract indicates that one owner or two owners between them may divert all the water in the ditch. The contract, however, also limits each diversion to the amount of water that can be beneficially used on a specifically described field or fields. When there is little water coming into the ditch, it would be likely that some of the upper diversions would remove all the water but when there is a lot of water in the ditch, or when it is flowing at its maximum of 44.6 c.f.s., the beneficial use limits on the diversion of that water would result in none of the upper diversions taking all the water in the ditch.

**F. The RHSOD Decree and the Locations of Headgate No. 2 and the Second Branch of the RHSOD**

53. The Saguache County District Court issued the RHSOD Decree on April 11, 1933. The court granted the RHSOD an appropriation date of November 17, 1891, which was the date when original construction of the ditch began. The court found that the RHSOD had “been added to and enlarged since that time and *completed* with reasonable diligence and is entitled to a priority as of the date of November 17, 1891.” Exhibit J-1 at 5 (Emphasis added).

The RHSOD Decree grants the RHSOD priority number 1 on its source which the Decree determined was “waste, seepage and spring waters, which are independent of and non-tributary to any natural running stream or water course.” *Id.* at 6. The RHSOD Decree finds that water from the ditch was applied for beneficial use to 20,980 acres of land and further states that up to 44.6 c.f.s. of waste, seepage, and spring waters “shall be permitted to flow into said ditch.” *Id.*

54. The RHSOD Decree described the location of three headgates for the RHSOD and the course of the ditch as follows:

This ditch has three headgates, one located at the West Quarter corner of Section 21, Township 41 North Range 7 [“Headgate No. 1”]; one at about the North side of the West Half of the Southeast Quarter Of Section 8, in Township 41, North Range 7, just east of the Rio Grande Canal [“Headgate No. 2”], and one on the Township line between Township 41, North Range 7 and Township 42 North Range, approximately two miles West of the Northwest corner of Section 2, in Township 41, North of Range 7 [“Headgate No. 3”]; That the ditches from the two headgates first above described run in a northeasterly and southeasterly direction respectively to a junction at the center of Section 16, Township 41, North Range 7; thence the ditch runs East one-half mile to the East Quarter corner of said Section 16, thence North one-fourth mile thence East three-fourths mile, thence North one-fourth mile, then East one fourth mile to the Southeast corner of Section 10, in Township 41, Range 7; thence North two miles to the Northeast corner of Section 2, Township 41, North Range 7, thence East two miles to the Northeast corner of Section 1, in Township 41, North Range 7, thence North two miles to a junction with Lateral No. 10 of the Rio Grande Canal at a point near the Northeast corner of Section 25, township 42 North Range 7.

*Id.* at 4-5 (bracketed names of Headgates added).

55. The decreed location of Headgate No. 2—“one at about the North side of the West Half of the Southeast Quarter of Section 8, in Township 41, North Range 7, just east of the Rio Grande Canal”—appears to be located approximately one-quarter mile north of the location where the siphon that carries water from the channelized portion of La Garita Creek on the west-side of the Rio Grande Canal empties into the channel on the east-side of the Rio Grande Canal. In addition, the decreed location of the “second branch” starting from the location of Headgate

No. 2 running in a southeasterly direction “to a junction at the center of Section 16, Township 41, North Range 7,” *id.* at 5, is different from the actual location of the “second branch.” The RHSOD Decree does not state the exact path of the “second branch” from the decreed location of Headgate No. 2 to the north-south channel of the ditch that runs beside County Road 43.5. If the path of the “second branch” were a straight line, then it would be as indicated on Exhibit E 3-16 where the Division Engineer placed a dashed line between Headgate No. 2 (denoted by a red square) and the north-south channel of the ditch that runs beside County Road 43.5.

56. On the ground, the “second branch” goes directly east from the siphon under the Rio Grande Canal and joins the north-south branch of the RHSOD (which is properly described in the April 1933 contract) which runs along Saguache County Road 43.5. The north-south branch runs south to the center of Section 16 where there is a junction with a branch of the RHSOD going east and another headed south.

57. Based on this decree language, Mr. Cotten opined that the parties to the RHSOD Decree did not intend for Headgate No. 2 to be located at the place where the siphon discharges on the east-side of the Rio Grande Canal but meant that this headgate was located a quarter mile north of this location and, therefore, that the parties to the RHSOD decree did not intend to appropriate the water coming out of the siphon. The Court is not persuaded by this opinion for several reasons. First, Mr. Cotten, himself, agreed that there is no evidence that there was ever a headgate located at the decreed location for Headgate No. 2. Second, the Court is persuaded by the opinion of Applicant’s expert, Mr. Sullivan, that the decreed location is not an exact location. Exhibit K-41 shows the ambiguity in the RHSOD Decree. On a 1936 aerial photograph of the area of the siphon, Mr. Sullivan has drawn an orange square that corresponds to the language: “about the North side of the West Half of the Southeast Quarter of Section 8.” This exhibit

shows that the decree language could be construed to place Headgate No. 2 in a variety of locations. This lack of exactitude is not surprising since it is not uncommon to find old decrees that do not exactly match the facts on the ground.

58. Mr. Sullivan opined, and the Court agrees, that Headgate No. 2 was originally constructed where it is currently located, where the siphon (or flume as discussed in paragraph 13 above) crossing under (or over) the Rio Grande Canal empties on the east-side of the canal. The Court further determines that the “second branch” of the RHSOD was originally constructed where it currently exists running from the actual location of Headgate No. 2 to the north-south branch of the RHSOD that runs beside Saguache County Road 43.5.

59. The Court bases this finding, in part, on the aerial photograph from August 8, 1936, Exhibit J-23(A)-(E)<sup>7</sup> taken only three years after the RHSOD Decree was issued, which shows a channel taking water from the location where the siphon empties on the east-side of the Rio Grande Canal. There is no evidence in this photograph that there was ever a headgate at the decreed location one-quarter mile north of the siphon or that there was ever a channel that ran in a southeasterly direction from that decreed location to the center of Section 16. Furthermore, the Court agrees with Mr. Sullivan’s reasoning when he explained that it would not have made sense for the original appropriators to build Headgate No. 2 a quarter mile north of where the water from La Garita Creek empties out of the siphon under the Rio Grande Canal since their goal in constructing the RHSOD was to control the water that had been flooding their farm fields.

60. Mr. Cotten disagreed with Mr. Sullivan’s views concerning what the 1936 aerial photograph shows. He pointed out that we can only see obvious evidence of water in the channel

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<sup>7</sup> The aerial photographs were submitted in several different file formats. The highest resolution and best photographs were submitted in a .tiff format. It was impossible to upload these high-resolution photographs because of the size of the files and the parties provided the Court with a separate flash drive with the high-resolution images.



to the east of the Rio Grande Canal for part of the distance between the Rio Grande Canal and County Road 43.5. Exhibit J-23 (C) shows this most clearly. Mr. Cotten believes we cannot see water in the channel as it goes to the east because in 1936 there was not a channel all the way to County Road 43.5. Instead, his opinion is that in 1936 the channel ended and the water simply flowed out and southeast into various distributaries of La Garita Creek. Mr. Cotten testified that the water then would have flowed across nearby farm fields, including fields owned by the Newmyers, in various channels until it reached the RHSOD where it runs north and south along County Road 43.5. Mr. Cotten opined that the water then flowed out of the RHSOD through a culvert under County Road 43.5 near the Dunn Ranch headquarters and continued to flow in a remnant channel of La Garita Creek, through the Dunn Ranch and on east for three or more miles until it reached the natural channel of La Garita Creek where the creek comes back into existence. Mr. Cotten supported this claim with the observation that we can see water in a ditch to the east of the Newmyer house in the 1936 photograph. He also pointed to a structure on the RHSOD in the 1941 photograph that he indicated was a diversion structure used to place RHSOD water back into the creek. Mr. Cotten opined that in 1936 (and so also in 1933) the channel to the east of the siphon was only a channelized section of La Garita Creek and not a part of the RHSOD because it did not connect with the remainder of the RHSOD.

61. In contrast to Mr. Cotten's explanation, Mr. Sullivan, explained that the reason it is difficult to see water in the ditch as the RHSOD continues east from Headgate No. 2 to County Road 43.5 is because 1936 was a dry year and August would have been one of the driest times of the year.<sup>8</sup> He pointed out that in the August 8, 1936 aerial photograph it is also difficult, if not

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<sup>8</sup> It will be difficult for someone who was not at the trial to interpret the testimony concerning aerial photographs because the witness is talking about a photograph that was moved around and zoomed in and out during testimony. If this decision is appealed, it may help the appellate court to first review Exhibits K-28 and K-12(c) which show the

impossible, to see water in the channel of La Garita Creek to the west of the Rio Grande Canal. He also explained that the water was most visible in the portion of the RHSOD that was directly east of Headgate No. 2 because there were check structures installed in the ditch in that location to hold back the water and raise the water table to allow sub-irrigation. Finally, Mr. Sullivan pointed out that since there was so little water available in August of 1936, it is likely the McLeod Ditches 3, 4, and 5 were taking whatever water was available and their headgates off the RHSOD are closer to the siphon.

62. In addition, Mr. Kruse testified on rebuttal that the culvert under County Road 43.5 that was visible in the 1936 and 1941 aerial photographs is a culvert he currently uses to bring Rio Grande Special Water into his property which was once the Dunn Ranch. And, Mr. Sullivan explained, on rebuttal, that the ditch Mr. Cotten identified in the 1936 aerial photograph, Exhibit J-23, as carrying RHSOD water was actually the ditch that carried Special Water to the Dunn Ranch and that continues, to this day, to carry Special Water. There are references to this Special Water ditch in the *Hurt v. Newmyer* testimony as well as in the 1933 Contract and Definition of Rights in the RHSOD which permitted the Newmyers to use the RHSOD to carry their Special Water.

63. Special Water is the name given to water rights for water appropriated in the 1880s from the Rio Grande before the Rio Grande Canal was built. In the 1870s, several landowners in the vicinity of what is now the RHSOD, Dacre Dunn, A.W. McLeod and Mike White, dug a ditch to bring water to the area. They transferred their right-of-way for the ditch to the company building the Rio Grande Canal and in exchange received a contract—titled Special

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1936 photo with Applicant's mapped structures overlaid on the map. These maps are just the Applicant's argument about where certain structures, such as Headgate No. 2, are located. But, reviewing these maps will help the reviewing court to know what area of the 1936 map is being discussed in the testimony.

Contract—providing that the Rio Grande Canal would carry their previously appropriated water rights in the Rio Grande to their land. The Special Water rights are very senior to the other rights carried in the Rio Grande Canal and they are administered separately from the Rio Grande Canal water rights. Because they are so senior, the Special Water rights are a very dependable water supply and they are usually flowing into the Dunn Ranch throughout the summer and throughout the irrigation season.

64. Historically, the Special Water rights were the main source of water for the Dunn Ranch, while the RHSOD rights were only a source of supplemental water because water was only sporadically available in the RHSOD. Accordingly, it is more likely true than not that the water that is visible flowing through the culvert under County Road 43.5 in the 1936 aerial photograph is Special Water rather than water the RHSOD appropriators allowed to escape from the RHSOD.

65. Mr. Cotten also pointed to the fact that there are no water commissioner diversion records for the RHSOD from La Garita Creek from the 1950s and earlier as evidence that the water coming out of the siphon did not, in the 1950s or at the time of the 1933 decree and before, enter the RHSOD. The Court finds it more likely, however, that the reason there are no diversion records for the RHSOD from La Garita Creek in that time frame is because there was no need to “divert” La Garita Creek water to allow it to flow into the RHSOD since it had nowhere else to go when it came out of the siphon. As Mr. Sullivan explained, the appropriators of the RHSOD intended to appropriate all the water that previously had flooded, saturated and arose on their land and the only way to do that after the flume/siphon was built crossing the Rio Grande Canal was to build a ditch, the second branch of the RHSOD, to accept and control that water before it went on their land.

66. Mr. Sullivan's opinion that the channel to the east of the siphon under the Rio Grande Canal was a part of the RHSOD and extended all the way to what is now Saguache County Road 43.5 in the 1936 aerial photograph and also that it was in the same location in 1933 comports with the findings in the RHSOD Decree in which the court found that the RHSOD, including the "second branch," had been completed by 1933. In addition, an aerial photograph taken on November 14, 1941, Exhibit J-24(A)-(E) further supports this finding. The year 1941 was much wetter than 1936 and the weather was warm enough even into November of 1941 that the farmers would still have been irrigating at that time. Both Mr. Sullivan and Mr. Cotten agreed that the 1941 aerial photograph shows that the "second branch" of the RHSOD extends from the location of the siphon to County Road 43.5.

67. Mr. Sullivan's explanation also makes more sense because, as explained in paragraph 51 above, it is highly unlikely that farmers appropriating water in an arid area such as the San Luis Valley would not appropriate all the water that became available to them. Here, the water coming out of the siphon and draining through Headgate No. 2 into the second branch of the RHSOD was water that was available to the RHSOD appropriators. There were no claimants for this water downstream of the RHSOD except additional drainage and seepage ditches, so there was no requirement that the RHSOD appropriators send a certain amount of water downstream. Furthermore, one of the purposes of the RHSOD was to drain the farmers' valuable farmlands of water that was seeping into it and saturating it. Capturing the water from the siphon into a channelized ditch and then allowing it to spill back out over some of their lands, as suggested by the Division Engineer, does not comport with this purpose and would not be a reasonable thing for them to do. Furthermore, since the evidence in this trial was clear that the State does not administer water once it enters into a ditch, and so will not and did not administer

the water that made it into the RHSOD from the siphon, the only way the Division Engineer's theory could come to fruition would be if the appropriators of the RHSOD water took it upon themselves to measure the water coming out of the siphon and then had someone measure the same amount of water to be turned out of the RHSOD through the culvert at County Road 43.5 near the Dunn Ranch house. The Court cannot imagine a scenario where farmers in an arid land who, as a general rule, need all the water they can lay their hands on, would voluntarily send water downstream when not required to do so and when there were no senior water rights calling for that water downstream. Therefore, the only thing that makes sense is that they intended to appropriate all the water that showed up in any of the ditches that made up the RHSOD including any water that discharged from the siphon under the Rio Grande Canal.

68. The Court finds Mr. Sullivan's explanation most persuasive and, therefore, finds that at the time of the RHSOD Decree, water exiting the siphon under the Rio Grande Canal entered a channel of the RHSOD, the second branch, that was complete all the way to where it intersected with a north-south branch of the ditch that ran alongside what is now Saguache County Road 43.5.

**G. Development of the Farms under the RHSOD**

69. A comparison of the aerial photographs of the area near the siphon taken between 1936 and 2017 shows that the siphon and the "second branch" of the RHSOD continue to exist in the same place today as they did in 1933. In addition, the entire length of the RHSOD, as decreed in 1933, is apparent in each of these photographs. Over time the fields become more developed and beginning in the 1970s, the aerial photographs show that the landowners began installing center pivot sprinklers on their fields. By 2017, almost all the fields had been converted to center-pivot sprinklers.

## **H. The McLeod Ditches**

70. In the first order granting summary judgment in this case, the Court determined it was more likely true than not that La Garita Creek continued to run in its natural channel east of the Rio Grande Canal after the canal was constructed. The Court based this determination, in part, on the fact that on December 15, 1881, after the Rio Grande Canal had been constructed in 1879, the McLeod Ditch No. 4 obtained a water right for an appropriation dated April 1880, from La Garita Creek with a point of diversion on La Garita Creek east of the Rio Grande Canal. The Court concluded that this meant there was a natural channel of La Garita Creek existing east of the Rio Grande Canal at least as late as April 1880.

71. The evidence at trial concerning the original decreed locations for the headgates for the McLeod Ditches 1, 2, 3, 4 and 5, however, shows that it is more likely true than not that La Garita Creek flowed in several channels or distributaries rather than in one, clear, natural channel at the time the McLeod Ditches appropriated their water rights. Exhibit K-27 not only plots the various depictions of the location of La Garita Creek on the various maps over the years, but it also contains the location for each of the original McLeod Ditch headgates and three of those headgates are not located on any of the lines depicting La Garita Creek and the other two headgates are depicted as diverting from different versions of La Garita Creek. This evidence supports the finding that historically, after La Garita Creek discharged from the siphon under the Rio Grande Canal it tended to spread across the land in various distributaries and shallow channels and saturated the farm fields.

72. The McLeod Ditches 1 and 2 now divert their water from La Garita Creek on the west-side of the Rio Grande Canal. The McLeod Ditches 3, 4 and 5 divert their water from the RHSOD on the east-side of the canal. In 2012, the owner of the McLeod Ditches filed an

application in the Division 3 Water Court to correct the point of diversion for these ditches. The final decreed points of diversion for the McLeod Ditches 3, 4, and 5 in that case, Case No. 2012CW7, are from locations on the second branch of the RHSOD but the McLeod Ditch decrees indicate the source of water for these ditches is La Garita Creek. In the past, the Division Engineer considered the second branch of the RHSOD, which comes from the siphon over to County Road 43.5, to be a dual-purpose channel, acting as both the RHSOD and La Garita Creek.<sup>9</sup> Given that the McLeod Ditches divert from portions of the RHSOD and their decreed source of water is La Garita Creek, the Court finds that the most reasonable way to understand the second branch of the RHSOD is that it is the dual purpose channel the Division Engineer originally considered it to be.

**I. Other Contemporaneous Evidence that the Purpose of the RHSOD was to Capture and Control Flooding from La Garita Creek**

73. A review of the transcript of testimony in the 1925 *Hurt v. Newmyer* trial shows that La Garita Creek water was flooding and overflowing land in the area, particularly Mr. Hurt's land, and that there were several channels through which La Garita Creek water flowed at various times in that area.

74. In addition, in the summer of 1928, one of the RHSOD appropriators, L.R. Sims, sued three of the other appropriators, Mildred Newmyer, Frank Newmyer and James Carson in Saguache District Court Action Number 1168 claiming they and their drainage ditch, the

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<sup>9</sup> In Exhibit 5 to the Engineers' Motion for Partial Summary Judgment, Division Engineer Craig Cotten indicates: "East of the Rio Grande Canal, the natural channel of La Garita Creek no longer exists for about 4 miles. It is my understanding that this portion of the natural channel was farmed over and obliterated several decades ago. The natural channel of La Garita Creek reemerges and continues to exist starting about 4 miles east of the Rio Grande Canal." *Revised Affidavit of Craig W. Cotten, P.E.* at ¶ 5. Mr. Cotten continues: "Water in the channel west of the Rio Grande Canal is considered by my office to be native La Garita Creek water. That native La Garita Creek water can be siphoned under the Rio Grande Canal and placed into the Rocky Hill Seepage and Overflow Ditch and carried by the Ditch to the McLeod Ditches and/or to the point where the natural channel of La Garita Creek still exists, or it has been diverted at times during high water periods into the Rio Grande Canal." *Id.* at ¶ 6.

Newmyer and Carson Seepage Ditch, were interfering with his receipt of water through his drainage ditch, the Camino Seepage Ditch. In the complaint, answer, and replication (or answer to a cross-complaint) filed in that case, all the parties agreed that before anyone constructed drainage ditches in the area that the water from La Garita Creek came out of the mountains and spread over the parties' lands. The parties agreed that their lands had become so saturated with water that they were unable to grow crops on the lands other than hay, pasture and forage. All parties claimed they had constructed drainage ditches—the plaintiffs in 1925 and the defendant in 1927—to reclaim the ground and make it farmable. The parties disagreed about who constructed their ditch first and who had priority for the water. The parties' statements in their pleadings show that the parties intended these drainage ditches to capture the water that was previously flooding and saturating their lands and then to control the water and use it to irrigate those lands.

75. In his complaint, Mr. Sims alleged that the water flooding these lands was from a supply “entirely separate and apart from any stream, river or other adjudicated source.” Exhibit J-17 at 3. The parties clearly knew this water originated with La Garita Creek as indicated in paragraphs II, III, and IV of the Complaint and paragraph 2 of the Answer, nevertheless, the parties considered this water as independent of the stream because it was floodwater and seepage water that was saturating their fields and was not headed toward any other watercourse. In the answer to the cross-complaint, Mr. Sims indicated that he and his predecessors in title had been using the water at issue to irrigate his land for at least twenty years before he built the drainage ditch and that the ditch only served to accumulate and control the water that previously flooded his land.



76. Later, at meetings held on May 23, 1938 and June 30, 1938, the Board of Directors of the Rio Grande Canal Water Users Association (“RGCWUA”), *i.e.* the operator of the Rio Grande Canal, discussed the siphon under the Rio Grande Canal. Exhibits J-28 and J-29. They decided that although the operation of the “waste-way” conveying water under the Rio Grande Canal and out the channel to the east of the canal was “an inconvenience” to the association, “its discontinuance would subject a large number of members of the association to the possibility of serious injury from cloudbursts or floods from La Garita Creek” and so the Board of Directors decided to continue its contract with Saguache County for this structure. Exhibit J-29. These minutes are evidence that if the channel that extends from Headgate No. 2 to the east were destroyed, the water that comes out of the siphon would spread across the land, saturating farm fields. It is more likely true than not that when the Rio Grande Canal was constructed and the siphon was built, causing the water from the west-side of the canal to concentrate in one point of discharge on the east-side of the canal, that the concentrated flow made the flooding on the east-side, especially near the discharge location, even worse than before. Furthermore, this is further evidence that the parties to the RHSOD Decree considered the majority of the water flowing out of the siphon on the east-side of the canal to be wastewater rather than water of La Garita Creek.

**J. The Division Engineer’s Theory of How Water Was Administered on the Channel East of the Siphon Under the Rio Grande Canal**

77. The Division Engineer’s theory of what happened with the RHSOD is that in 1933, the channel that accepted discharge from the siphon was actually La Garita Creek and not the second branch of the RHSOD. He contends that the appropriators of the RHSOD had channelized the creek to protect some of their valuable farm fields but had not connected that channel to the remainder of the RHSOD. He opined that despite the court’s finding in the

RHSOD Decree that the RHSOD was completed, the RHSOD appropriators had not yet completed the channel from Headgate No. 2 to County Road 43.5. Instead, the appropriators turned the water out of the channel east of the Rio Grande Canal but west of County Road 43.5 and allowed that water to flow down one or more remaining natural channels of La Garita Creek while also flowing over fields the farmers were attempting to cultivate and irrigate. The Division Engineer contends the water flowed into the RHSOD where it existed along County Road 43.5 and then the RHSOD appropriators calculated how much of that water came from discharge at the siphon and turned that amount of water back out into a ditch that flowed around what was the old Dunn place, which became the Newmyer place and which is now the Kruse place, and allowed that water to make its way through the Newmyer farm, and continue east until it re-connected with the natural channel of La Garita Creek. The Division Engineer believes this is what the original appropriators of the RHSOD did because “they did not have the right to take that water.” Testimony of Craig Cotten, 3-21-19 p.m.

78. The Court agrees with Mr. Sullivan that it is unlikely the RHSOD appropriators would have engaged in such an exercise. Because the flow through the siphon fluctuates from day to day, as shown by the historical diversion records, the RHSOD appropriators would have had to adjust the amount of water they discharged out of the RHSOD and into the ditch into the Dunn Ranch on a nearly daily basis during the irrigation season. Furthermore, they would have had to reduce the amount of water they turned out from the RHSOD at the diversion structure near the Dunn Ranch to account for the ditch loss attributable to the water coming into the RHSOD from the siphon. In addition, they would have had to account for the amount of water each of the McLeod Ditches was diverting and reduce the amount they turned out of the RHSOD accordingly. It is impossible for the Court to believe the appropriators of the RHSOD would

have done this or seen the need to do this since there was no water right that could call for this water downstream of the RHSOD. Rather, it makes more sense that they intended and believed they had appropriated all the water that made it into the RHSOD east of the siphon, except the McLeod Ditch water, and that the water we see flowing through the culvert under County Road 43.5 in the 1936 aerial photograph is Special Water the Dunn Ranch owned.

79. The Court further agrees with Mr. Sullivan's opinion that the Division Engineer's theory of how the original RHSOD appropriators administered water in the RHSOD would have been impractical because of the check structures that the parties agree existed below the siphon. The check structures would cause some of the water coming out of the siphon to sub-irrigate lands around the check structures and that amount would have to have been accounted for, which would have been extremely difficult. Mr. Sullivan said, and the Court agrees, that it is unlikely the RHSOD appropriators would go to this amount of trouble to calculate and discharge water from the RHSOD when there was not a downstream water right that could have placed a call on this water.

80. Finally, even if the Court found that the Division Engineer's theory was the way things worked in 1933 and 1936, the Court would still find that the water coming out of the siphon in those days belonged to the RHSOD because even if the appropriators chose to send the water out of the claimed partial channel to the east of the siphon, the water would have ended up in the north-south branch of the RHSOD that runs along County Road 43.5. At that point, this would have been water flowing uncontrolled across farm fields and then entering the RHSOD and thus, it would clearly be flood and seepage water to which the RHSOD was entitled and could, then, be divided among the RHSOD appropriators.

**K. The Court's View**

81. From a fair consideration of all of the evidence in this case, the Court finds, by a preponderance of the evidence, that before the drainage ditches were constructed in the area of the RHSOD, La Garita Creek flowed uncontrollably through this area, in multiple shallow channels, seeping and flooding the farm fields and causing problems on the county roads. In response to this problem, the farmers as well as Saguache County constructed drainage ditches to drain this land and the roads and to control the water that was causing the seeping and flooding. Since they were concerned with controlling the flooding on their land and with obtaining a controlled source of water to irrigate their fields, the farmers and the County had no reason to distinguish between sources of this water—any and all water coming out of the siphon under the Rio Grande Canal was causing the flooding and seeping problem as well as other water seeping into the drainage ditches from return flows from irrigation. Accordingly, the water they appropriated in the RHSOD Decree was all of the water that was seeping and flooding their land which included all of the water coming out of the siphon under the Rio Grande Canal except for the 3.77 c.f.s. that had been appropriated by the McLeod Ditches 3, 4, and 5.

**III. CONCLUSIONS OF LAW**

The Applicant, the Kruse Partnership, asks this Court to determine that the decreed source of water for the RHSOD includes water that collects in the channelized portion of La Garita Creek on the west-side of the Rio Grande Canal and then is siphoned under the Canal and into the second branch of the RHSOD. The Kruse Partnership argues that the RHSOD appropriators intended to appropriate all the water that flooded and seeped their lands and that included the water that came through the siphon after the siphon or flume was built. The Kruse Partnership argues that the court in 1933 made a finding of fact that all this water was waste and

seepage water and not tributary to a natural running stream and that this finding is binding on this Court. In contrast, the Engineers ask the Court to find that the plain meaning of the 1933 RHSOD Decree is that the RHSOD is only entitled to non-tributary seepage and waste water and, looking at the current siphon arrangement on La Garita Creek, the water that collects in the channelized portion of the stream on the west-side of the siphon under the Rio Grande Canal is water that is tributary to La Garita Creek and it remains tributary after it is siphoned to the east-side of the Rio Grande Canal. The Engineers argue that since this water is tributary to a natural stream, La Garita Creek, this water cannot be a source of the water rights for the RHSOD. The Engineers further opine that if the RHSOD Decree is ambiguous, the extrinsic evidence demonstrates that the RHSOD appropriators, at the time of the 1933 decree, actually segregated the water that came through the siphon from other water that accumulated in the RHSOD, and transported the siphon water several miles downstream and then turned it back out into the remnant natural channel of La Garita Creek, because they knew they had no right to that water. The Engineers further argue that, if the Court were to rule in the Kruse Partnership's favor, the Court would be granting the Kruse Partnership a water right in La Garita Creek and the Engineers would be unable to enforce the Decree because the Decree grants the RHSOD priority number one on its source of supply. The Intervenor, S & T Farms, takes no position on whether the water that accumulates in the channelized portion of La Garita Creek directly west of the siphon is or is not included in the source of water for the RHSOD, but asks the Court to interpret the scope of the source of the water right for the RHSOD in a way that preserves the separate regime for administration of priorities decreed from La Garita Creek. The Court agrees with the Kruse Partnership and determines that the Division Engineer can return to the water administration regime that was in place up until 2016 to ensure that all owners of water with La

Garita Creek as the source receive their water rights prior to the water discharging into the RHSOD.

**A. The Decree is Ambiguous**

“[T]he scope of a water right is defined by the intent of the appropriator at the time of the appropriation.” *V Bar Ranch, LLC v. Cotten*, 233 P.3d 1200, 1208 (Colo. 2010). A water court decree “reflects the judicial confirmation of the appropriator’s intent because it is founded on the claimant’s own assertion of his demand.” *Grand Valley Water Users Ass’n v. Busk-Ivanhoe, Inc.*, 386 P.3d 452, 468 (Colo. 2016). “A court’s primary goal [in decree interpretation] is to implement the intent of the parties as expressed in the language of the decree.” *City of Golden v. Simpson*, 83 P.3d 87, 93 (Colo. 2004).

When a court reviews a water rights decree, the court must first look at the plain language of the decree. *Dill v. Yamasaki Ring, LLC*, 435 P.3d 1067, 1074 (Colo. 2019)(citation omitted). If the meaning of the decree is ambiguous, the court may “look to extrinsic evidence.” *Id.* (citing *Select Energy Servs., LLC v. K-LOW, LLC*, 2017 CO 43, ¶ 13, 394 P.3d 695, 698 (Colo. 2017)). But, if the decree is unambiguous, the court cannot consider extrinsic evidence to reach an interpretation at variance with the unambiguous, plain language. *Id.* (citing *Farmers High Line Canal & Res. Co. v. City of Golden*, 975 P.2d 189, 199 n. 14 (Colo. 1999)). “[A]bsent a determination of ambiguity,” the court should not “look beyond the four corners of the Decree.” *Id.* “In ascertaining whether a provision in a decree is ambiguous, [the court examines] the decree’s language and construe[s] it in accordance with the plain and generally accepted meaning of the words employed.” *Id.*

Here, the RHSOD Decree includes only one source of water for the ditch: “waste, seepage and spring waters, which are independent of and non-tributary to any natural running

stream or water course.” Exhibit J-1 at 6. The Decree unambiguously does not include La Garita Creek as a source of water for the RHSOD and it clearly states that the source of the RHSOD water right is waters which are non-tributary to any natural running stream. The Division Engineer argues that this means that the source of the RHSOD water cannot be the water that exits the siphon under the Rio Grande Canal because that water is water that is tributary to a natural running stream, La Garita Creek.

The Engineers’ assertions raise the following questions: (1) what water were the RHSOD appropriators intending to appropriate and what water did the 1933 court intend to decree to them? And, (2) did that water include the water that currently comes out of the siphon on the east-side of the Rio Grande Canal? The fact that the RHSOD Decree describes Headgate No. 2 of the RHSOD as a part of the ditch system suggests that the water that comes out of the east-side of the siphon must be a source of water for the RHSOD decree. Although the Decree does not specifically discuss the siphon, it does indicate the RHSOD was completed by the time of the Decree, in 1933, and it describes Headgate No. 2 of the RHSOD which is so located as to capture all the water that empties from the siphon. Since the Decree identifies Headgate No. 2 but does not discuss the water discharging from the siphon, the Court must look at extrinsic evidence to determine whether the RHSOD appropriators and the 1933 court intended the decreed source of water for the RHSOD, waste, seepage and spring waters, to include the water that came out of the siphon after the first 3.77 c.f.s. that belonged to the McLeod Ditches.

**B. Extrinsic Evidence Shows the RHSOD Appropriators Intended to Appropriate All the Water Available**

A water rights decree “is not woven out of thin air; it is a determination of a specific issue presented to the court.” *Hinderlider v. Canon Heights Irrigation & Reservoir Co.*, 185 P.2d 325, 327 (Colo. 1947). “It is grounded on the facts creating that issue; and where construction is

necessary, it must be construed in the light of the facts which gave it birth and limited by the issue it resolved.” *Id.* Because the scope of a water right is defined by the intent of the appropriator at the time of the appropriation, “an applicant’s statement of claim and the transcripts of testimony in adjudication proceedings are admissible evidence in other actions involving the construction or interpretation of water decrees.” *Grand Valley Water Users Ass’n*, 386 P.3d at 466.

The evidence at the adjudication hearing in 1933 showed that prior to the construction of the ditches that made up the RHSOD, water from La Garita Creek discharged from under the Rio Grande Canal and spread across the farmlands located in the vicinity of the RHSOD in an uncontrollable fashion. To resolve this situation, the RHSOD claimants constructed drainage ditches to control the wastewater so it could be beneficially used and to drain their farmlands so they could be productively used. The testimony indicates that the appropriators intended to appropriate all the water that water-logged and saturated their farmlands. The evidence at the trial in this case showed that after La Garita Creek was channelized on the west-side of the Rio Grande Canal and siphoned under the canal, the water-logging and saturation problem was worse, especially in the vicinity of the discharge from the siphon. The evidence also showed that without the second branch of the RHSOD, water from the siphon would spread across the farm fields and again saturate the farm fields.

In addition, the evidence at trial showed that at the time the Saguache District Court entered the RHSOD Decree, water from La Garita Creek discharged through the siphon and through Headgate No. 2 and into the second branch of the RHSOD. According to the Decree as well as the evidence presented at the trial in this case, the RHSOD was completed by that time, including the second branch of the RHSOD extending all the way east from the siphon to



intersect with the north-south branch of the RHSOD that ran along County Road 43.5. The RHSOD appropriators executed a contract, the 1933 Contract and Definition of Rights, on the night after the first day of testimony at the 1933 adjudication hearing, in which they agreed on the way they would divide the water that came into the RHSOD. Neither the contract, nor the Decree, nor any other evidence presented to the Court, suggests that the RHSOD appropriators intended to appropriate only some of the water that entered the RHSOD, and the contract specifically discusses the division of all the water in the ditch among the RHSOD appropriators. All this evidence makes clear that the intent of the RHSOD appropriators was to appropriate all the water that escaped from La Garita Creek and saturated their fields and that included all the water that came out of the east-side of the siphon and discharged into the second branch of the RHSOD.

**C. The 1933 Adjudication Determined this Water was Non-Tributary**

The Engineers argue that the water that comes out of the siphon cannot be considered a source of water for the RHSOD because that water was, and is, tributary to a natural running stream and, therefore, does not meet the definition of non-tributary as decreed. In contrast, the Kruse Partnership asks the Court to find that the 1933 court determined that the water coming out of the siphon is non-tributary because the Decree awarded the RHSOD appropriators all the water that had previously saturated and water-logged their fields, and, once the siphon was built, that included all the water coming out of the siphon. The Court agrees with the Kruse Partnership.

There are two places in the Decree that indicate the source of the water being appropriated. First, the Decree provides general information for all three of the ditches being decreed and states:

3. That the water adjudicated to the ditches hereinafter named, are waste, seepage and spring waters, which are independent of and non-tributary to any natural running stream or water course, and are not capable of being used upon the lands where the waters first arise.”

Exhibit J-1, Decree at 1-2. And then, later, the court states the source of water specifically for the RHSOD:

That said ditch takes its supply of water from waste, seepage and spring waters, which are independent and non-tributary to any natural running stream or water course.

*Id.* at 6. As the Division Engineer stated, the Decree describes the source of the water being appropriated in the language of a statute the Colorado legislature enacted in 1889:

Sec. 1: That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; provided, that the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands.

Sess. Laws 1889, p. 215.<sup>10</sup> The statute makes clear that waste and seepage ditches are governed by the same priority system as other water rights appropriations except that if the water actually arises on someone’s land, the owner of the land where the water arises has a prior right to the water. The exception does not come into play in the current case. Since this Court has determined that the RHSOD appropriators intended to appropriate all the water that flooded and seeped their fields and since the Court found that the 1933 court intended to decree this water to them, the only logical result is that the 1933 court found and decreed that the water coming out of the siphon was not tributary to a natural running stream.

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<sup>10</sup> As the Engineers explained in their Trial Brief, this statute is nearly identical to current C.R.S. § 37-82-102. *State and Division Engineer’s Trial Brief* at 6.

This determination makes sense under the state of La Garita Creek and the water rights appropriated from it at the time of the Decree. That is because, as this Court has already found, in 1933 there were no decreed water rights that diverted from La Garita Creek below the diversions for the McLeod Ditches 3, 4, and 5, meaning there were no downstream appropriators dependent upon the water that was saturating the RHSOD appropriators' lands or discharging from the siphon. In *Comstock v. Ramsay*, the Colorado Supreme Court explained that although one could not appropriate seepage or return flow water when that water was required to supply downstream appropriations already decreed, "where such appropriation does not interfere with a prior right, [an independent appropriation may be made] upon facts and conditions which warrant it." 55 Colo. 244, 256, 133 P. 1107, 1111 (Colo. 1913). Here, the 1933 court found that the facts and conditions warranted finding that the water that flowed over and saturated the RHSOD appropriators' lands was waste, seepage and spring water that was not tributary to any natural stream.

The Engineers, however, argue that the Court should find that the water coming out of the siphon is and was tributary to La Garita Creek because there was a natural channel of La Garita Creek running below the siphon after the RHSOD's appropriation date, 1891. But, although this Court determined the previous motions for summary judgment on when there was and was not a natural channel of La Garita Creek below the siphon, after hearing the evidence at trial, the Court is persuaded that the real question is not whether or when La Garita Creek existed as a natural running stream. Rather, the question is, what water did the RHSOD appropriators intend to appropriate? And, the answer to that question is: all the water seeping and flooding their land. And, the testimony at the adjudication hearing made clear that supply included water overflowing from the various branches and distributaries of La Garita Creek. It makes sense that

the 1933 court found this water to be wastewater once it escaped from La Garita Creek and awarded the water to the RHSOD appropriators who had built the ditches to control the water.

Moreover, this determination of the 1933 court is not subject to collateral attack. Even if this determination were incorrect under the law of tributary and non-tributary water, it is part of a valid decree. Although this 1933 decision could have been reviewed if it had been appealed, now that the appeal period is long past, this judgment, “entered within the jurisdiction of the court, even [if] wrong, is not subject to collateral attack.” *Closed Basin Landowners Ass’n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 636 (1987)(citations omitted).

The Engineers also argue that the water that comes out of the siphon cannot be the water that was decreed to the RHSOD because it does not arise on either the lands of the RHSOD appropriators or others but instead it floods and saturates them. Mr. Cotten testified during the trial that he considers the non-tributary water that is the source of supply for the RHSOD to be the kind of water that arises out of the ground (or seeps out of the ground into the ditches of the RHSOD) and not to be water that flows across the surface. But, the statute on which the decree language is based distinguishes between spring and seepage water on the one hand and wastewater on the other. The statute indicates that ditches constructed to use “waste, seepage, or spring waters . . .” are to be governed by the law of prior appropriation. Sec. 1., Sess. Laws 1889, p. 251. The statute goes on to say, however, that there is an exception for “the person upon whose lands the seepage and spring waters first arise . . .” *Id.* The person on whose lands such seepage and spring waters first arise has a prior right to use that water if he or she is able to use the water on the lands upon which it arises. *Id.* The statute, however, only applies this exception to seepage and spring waters, *i.e.* waters that arise on lands, but does not mention wastewaters with regard to water that arises on the land. Logically, then, wastewater is not water

that arises on lands but, rather, appears there in some other way, *e.g.* by flooding or overflowing the land. So, when the 1933 decree determined that the source of supply for the RHSOD was “waste, seepage, and spring waters,” the court and the appropriators were not confining that appropriation to water that arose on the land and, therefore, the water coming out of the siphon, which would be overflow water if not confined to the second branch of the RHSOD, is, appropriately, a source of water for the RHSOD.

Finally, it would be illogical to classify water that seeps into the RHSOD from return flow from irrigation of lands under the Rio Grande Canal and under the McLeod Ditches 3, 4, and 5, as non-tributary, and thus a source of supply for the RHSOD, while classifying water that flows out of the siphon as tributary and thus, not a source of supply for the ditch. But this is exactly the distinction the Engineers make when they claim the RHSOD is entitled to the return flow that accumulates in the ditch but not to the water flowing out of the siphon. As the Court has already found, prior to the time the RHSOD or its predecessor ditches was built, the water coming out of the siphon would have saturated and flooded the fields in the area and, ultimately, would have flowed into one of the RHSOD or its predecessors’ ditches. There would be no way to distinguish between the water that flowed into the RHSOD after coming out of the siphon and the water that flowed into the RHSOD as return flow from irrigation. Accordingly, if the water coming out of the siphon is tributary to a natural running stream, so is the return flow entering the RHSOD waterways, and vice versa. The Engineers’ attempt to distinguish between the two is unreasonable and the 1933 court’s decision that all the water was of the same classification and that all of it was non-tributary is reasonable.

This Court agrees with the Division Engineer that it is puzzling that the Decree does not mention the siphon. But, even so, the great weight of the evidence and the law supports the

argument of the Kruse Partnership that the RHSOD court determined that all the water that made its way into the RHSOD was non-tributary waste, seepage and spring water and was the source of supply for the RHSOD.

**D. The Decree has Sufficient Indicia of Enforceability**

The Division Engineer argues that the Decree is not enforceable if the Court determines that the RHSOD is entitled to the first 44.6 c.f.s. that flows out of the siphon after the 3.77 c.f.s. decreed to the McLeod Ditches 3, 4, and 5 because the 1933 court decreed the RHSOD priority number one on its source of supply. This is a problem because, if the RHSOD had been decreed water rights with La Garita Creek as their source, their priority would have been priority number 75. The Engineers, therefore, argue that the Decree “lacks the ‘indicia of enforceability’ for any water right with La Garita Creek as its source of water.” *State and Division Engineer’s Trial Brief* at 8. The Kruse Partnership, however, is not asking this Court to modify the Decree or to change the decreed source of water for the RHSOD. The RHSOD is not entitled to divert water from La Garita Creek, but it is entitled to receive the first 44.6 c.f.s of the water that flows out of the siphon after the McLeod Ditches 3, 4, and 5 receive their decreed water. The Decree has all the required indicia of enforceability: an appropriation date, a priority date, and a decreed rate of diversion. *See Yamasaki Ring*, 435 P.3d at 1076. Furthermore, as the testimony of former water commissioner Perry Alspaugh made clear, this Decree is eminently enforceable; all the Division Engineer needs to do is to return to the water administration system in place prior to 2016.

**IV. ORDER**

The Court orders and decrees that the RHSOD Decree entitles the RHSOD to 44.6 c.f.s. of the water that is siphoned under the Rio Grande Canal from the channelized portion of La

Garita Creek, second only to the right of the McLeod Ditches 3, 4, and 5 to 3.77 c.f.s. of that water.

DONE this 7<sup>th</sup> day of January, 2020, correcting the original *Findings of Fact, Conclusions of Law, Judgment and Decree* issued on December 20, 2019.

BY THE COURT



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Pattie P. Swift  
Water Judge  
Water Division No. 3