

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Appeal from the District Court Water Division 1 Honorable James F. Hartmann Case No. 2016CW3052</p>	
<p>Concerning the Application for Water Rights of The Farmers Reservoir and Irrigation Company in Adams and Weld Counties.</p> <p><b>Cross-Appellants:</b></p> <p>Arapahoe County Water and Wastewater Authority, East Cherry Creek Valley Water and Sanitation District, and United Water and Sanitation District</p> <p>v.</p> <p><b>Cross-Appellees:</b></p> <p>Centennial Water and Sanitation District; Central Colorado Water Conservancy District, the Ground Water Management Subdistrict of the Central Colorado Water Conservancy District and the Well Augmentation Subdistrict of the Central Colorado Water Conservancy District; City of Aurora; City of Brighton; City of Commerce City; City of Englewood; City of Thornton; Dream Weaver Holdings, LLC; Farmers Reservoir and Irrigation Company; Fort Morgan Reservoir and Irrigation Company; Henrylyn Irrigation District; Irrigationists Association, Water District No. 1; Lower Latham Reservoir Company; Platte Valley Irrigation Company; Public Service Company of Colorado, a Colorado corporation; South Adams County Water and Sanitation District; State and</p>	<p>Supreme Court Case No: 2021SA122</p>

<p>Division Engineers for Water Division No. 1; and Town of Lochbuie</p> <p><b>and Concerning Cross-Appellee Pursuant to C.A.R. 1(e),</b></p> <p>Corey DeAngelis, Division Engineer, Water Division 1.</p>	
<p><b>Attorneys for Cross-Appellants Arapahoe County Water and Wastewater Authority and East Cherry Creek Valley Water and Sanitation District:</b></p> <p>Brian M. Nazarenus, #16984 Sheela S. Stack, #32768 William D. Wombacher, #42354 Stacy L. Brownhill, #48641 NAZARENUS STACK &amp; WOMBACHER LLC 5299 DTC Blvd, Suite 610 Greenwood Village, CO 80111 Telephone: (720) 647-5667 E-mail: <a href="mailto:bnazarenus@nswlaw.com">bnazarenus@nswlaw.com</a> <a href="mailto:sstack@nswlaw.com">sstack@nswlaw.com</a> <a href="mailto:wwombacher@nswlaw.com">wwombacher@nswlaw.com</a> <a href="mailto:sbrownhill@nswlaw.com">sbrownhill@nswlaw.com</a></p>	
<p><b>NOTICE OF CROSS-APPEAL</b></p>	

East Cherry Creek Valley Water and Sanitation District and Arapahoe County Water and Wastewater Authority by and through their undersigned counsel and pursuant to Rule 3(h) of the Colorado Appellate Rules (C.A.R.), submit this Notice of Cross-Appeal as follows:

**I. Brief Description of the Nature of the Case.**

A. General Statement of the Nature of the Controversy.

This case involves the Farmers Reservoir and Irrigation Company's ("FRICO") adjudication of conditional and absolute water rights for storage and direct use of seepage water accumulating to the Beebe Seep Canal system.

This Cross-Appeal challenges the Water Court's award of water rights to FRICO for seepage and other inflow water accruing to the Beebe Seep Canal. Specifically, this Cross-Appeal challenges whether the facts underlying FRICO's claimed appropriations satisfy the meaning of "appropriation" as defined by C.R.S. § 37-92-103(3)(a), including whether FRICO established that it had a "specific plan" to store a "specific quantity" of water for "specific beneficial uses" at the time of its claimed appropriations. Prior to statements at trial from the Water Court to the contrary, FRICO claimed that it possessed the right to beneficially use seep water accruing in the Beebe Seep Canal under its existing water rights. Yet, FRICO simultaneously claimed that its diversions of seep water were pursuant to new water right appropriations claimed in its water court application. At trial, ACWWA and ECCV presented evidence that showed FRICO's diversion practices with respect to seep water in the Beebe Seep Canal resulted in significant amounts of unlawful out-of-priority diversions. The Division 1 Water Court ruled that FRICO's historical diversions of seepage were unlawful under its existing decrees and contrary to prior

orders from the Water Court and the Colorado Supreme Court. *See Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 667 (Colo. 2011). Nonetheless, the Water Court granted new water rights to FRICO based on FRICO’s accounting which showed instances of free river conditions where FRICO’s otherwise unlawful diversion practices were intermittently unlawful. This Cross-Appeal questions whether operations that are otherwise unlawful can serve as the basis for a new appropriation simply because stream conditions arose that made the operations temporarily lawful, and whether FRICO can claim new appropriations based on diversions of seep water that occurred at times when FRICO was claiming to divert that same water under its existing water rights.

**B. Judgment, Order, or Parts Being Appealed and Basis for Appellate Jurisdiction.**

Cross-appellants appeal part of the Amended Findings of Fact, Conclusions of Law, Judgment and Decree of the Court (“Amended Decree”) entered on February 22, 2021, attached as Appendix A, and part of the Findings of Fact,

Conclusions of Law, and Judgment of the Water Court (“Judgment”) entered on October 6, 2020, attached as Appendix B.

C.A.R. 1(a)(2) provides that an appeal may be taken from “[a] judgment and decree, or any portion thereof, in a proceeding concerning water rights[.]” Supreme Court jurisdiction is appropriate under C.R.S. § 13-4-102(1)(d), which excludes from the Court of Appeal’s jurisdiction appeals from final judgments of district courts in “[w]ater cases involving priorities or adjudications.”

C. Whether Judgment or Order Resolved All Issues Pending Before the Trial Court Including Attorneys’ Fees and Costs.

The Amended Decree and the Judgment resolved all issues pending before the Water Court.

D. Whether Judgement Was Made Final for Purposes of Appeal Pursuant to C.R.C.P. 54(b).

Not applicable.

E. Date the Judgment or Order Was Entered and Date of Mailing to Counsel.

The Water Court entered the Amended Decree and electronically served it on all parties via the Colorado Courts E-Filing System (“CCE”) on February 22, 2021. The Water Court entered the Trial Order and electronically served it on all parties via CCE on October 6, 2020.

F. Whether There Were Any Extensions Granted to File Any Motion(s) for Post-Trial Relief.

FRICO sought, and was granted, a one-week extension to file its Motion for Reconsideration of Certain Terms of the Decree.

G. Date Any Motion for Post-Trial Relief Was Filed.

FRICO filed a Motion for Reconsideration of Certain Terms of the Decree on January 11, 2021.

H. Date Any Motion for Post-Trial Relief Was Denied or Deemed Denied Under C.R.C.P. 59(j).

After the Water Court entered the Decree on December 20, 2020, FRICO filed a motion for reconsideration that was largely denied on February 22, 2021. Based on the ruling on that motion, the Water Court entered its Amended Decree on February 22, 2021.

I. Whether There Were Any Extensions Granted to File Any Notice(s) of Appeal.

No such extensions were sought or granted.

**II. Advisory Listing of Issues To Be Raised on Appeal.**

A. Whether the facts that gave rise to the water rights granted to FRICO by the Water Court satisfied the definition of “appropriation” under C.R.S. § 37-92-

103(3)(a) or whether the Water Court erred in awarding FRICO new water rights.

The sub-issues relevant to this Cross-Appeal are follows:

(1) Whether a party who claims to be diverting a source of water under an existing water right on a particular date can, years later, claim that those same diversions support an appropriation of a new water right on that same date when it is later learned that the prior diversions were not lawful under that party's existing water right.

(2) Whether diversion practices that are otherwise unlawful because they result in considerable out of priority diversions and are found by the Water Court to be inconsistent with a parties' existing decrees and prior Water Court orders, can nonetheless serve as the basis for an appropriation of new water rights simply by virtue of the fact that free river conditions intermittently arise resulting in these otherwise unlawful practices being temporarily lawful. Evidence at trial confirmed that FRICO's practice was to divert all of the seep water accruing to the Beebe Seep Canal regardless of the date of the administrative call in effect. This practice resulted in considerable out-of-priority diversions. FRICO's claims for absolute water rights are based on periods of time when its otherwise unlawful diversion practice happened to occur during free river. There was no

evidence at trial that FRICO altered its operational practices based on administrative conditions. Rather, it took all available seep water regardless of the call, and claimed water rights based on those portions of its diversion that were lawful because of free river conditions.

(3) Whether FRICO's post hoc review of accounting records to identify diversions of free river water is sufficient to satisfy the definition of appropriation particularly where FRICO admitted in a discovery response that "FRICO does not necessarily know how or where free river water will be used at the time it is diverted, except that it will either be lost to evaporation and seepage or it will be delivered for other beneficial use." Furthermore, the Beebe Seep Canal terminates in Milton Lake and all unappropriated seep water that accumulates in the Beebe Seep Canal is diverted into Milton Lake. As a result, the fact that FRICO's accounting records show seep water accruing to the Milton Lake, without some other affirmative act, provides no evidence of an "appropriation" by FRICO of this water.

**III. Whether the Transcript of Any Evidence Taken Before the Trial Court Is Necessary to Resolve the Issues to Be Raised on Appeal.**

Yes. The trial transcripts designated on April 16, 2021 by Appellant FRICO 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. Names of Counsel for the Parties, Their Addresses, Telephone Numbers, E-Mail Addresses, and Registration Numbers.**

<p><i>Arapahoe County Water and Wastewater Authority</i> Brian M. Nazareus, #16984 Sheela S. Stack, #32768 William D. Wombacher, #42354 Stacy L. Brownhill, #48641 NAZARENUS STACK &amp; WOMBACHER LLC 5299 DTC Blvd, Suite 610 Greenwood Village, CO 80111 (720) 647-5661 <a href="mailto:bnazareus@nswlaw.com">bnazareus@nswlaw.com</a> <a href="mailto:sstack@nswlaw.com">sstack@nswlaw.com</a> <a href="mailto:wwombacher@nswlaw.com">wwombacher@nswlaw.com</a> <a href="mailto:sbrownhill@nswlaw.com">sbrownhill@nswlaw.com</a></p>	<p><i>Centennial Water and Sanitation District</i> P. Fritz Holleman, #21888 Veronica A. Sperling, #14310 BUCHANAN SPERLING &amp; HOLLEMAN PC 1525 Spruce St., Ste. 200 Boulder, CO 80302 (303) 431-9141 <a href="mailto:fholleman@tbvs.net">fholleman@tbvs.net</a> <a href="mailto:vsperling@tbvs.net">vsperling@tbvs.net</a></p>
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<p><i>City of Englewood</i>  Peter D. Nichols, #33167  Geoffrey M. Williamson, #35891  BERG HILL GREENLEAF RUSCITTI LLP  1712 Pearl Street  Boulder, CO 80302  (303) 402-1600  <a href="mailto:pdn@bhgrllaw.com">pdn@bhgrllaw.com</a>  <a href="mailto:gmw@bhgrllaw.com">gmw@bhgrllaw.com</a></p>	<p><i>City of Thornton</i>  Joanne Herlihy, #17838  City of Thornton  9500 Civic Center Drive  Thornton, CO 80229  (303) 538-7210  <a href="mailto:joanne.herlihy@cityofthornton.net">joanne.herlihy@cityofthornton.net</a></p>

<p><i>Dream Weaver Holdings LLC</i>  Jennifer M. DiLalla, #40319  MOSES, WITTEMYER, HARRISON AND  WOODRUFF, P.C.  P.O. Box 1440  Boulder, CO 80306  (303) 443-8782  <a href="mailto:jdilalla@mwhw.com">jdilalla@mwhw.com</a></p>	<p><i>East Cherry Creek Valley Water and  Sanitation District</i>  Brian M. Nazarenus, #16984  Sheela S. Stack, #32768  William D. Wombacher, #42354  Stacy L. Brownhill, #48641  NAZARENUS STACK &amp;  WOMBACHER LLC  5299 DTC Blvd, Suite 610  Greenwood Village, CO 80111  (720) 647-5661  <a href="mailto:bnazarenus@nswlaw.com">bnazarenus@nswlaw.com</a>  <a href="mailto:sstack@nswlaw.com">sstack@nswlaw.com</a>  <a href="mailto:wwombacher@nswlaw.com">wwombacher@nswlaw.com</a>  <a href="mailto:sbrownhill@nswlaw.com">sbrownhill@nswlaw.com</a></p>
<p><i>Farmers Reservoir and Irrigation  Company</i>  Joseph B. Dischinger, #12240  Beth Ann J. Parsons, #32128  Dean C. Hirt, III, #45570  FAIRFIELD AND WOODS, P.C.  1801 California Street, Suite 2600  Denver, CO 80202  (303) 830-2400  <a href="mailto:jdischinger@fwlaw.com">jdischinger@fwlaw.com</a>  <a href="mailto:bparsons@fwlaw.com">bparsons@fwlaw.com</a>  <a href="mailto:dhirt@fwlaw.com">dhirt@fwlaw.com</a></p>	<p><i>Fort Morgan Reservoir and Irrigation  Company</i>  Cynthia F. Covell, #10169  Andrea L. Benson, #33176  Gilbert Y. Marchand, Jr., #19870  ALPERSTEIN &amp; COVELL, P.C.  1600 Broadway, Suite 900  Denver, CO 80202  (303) 894-8191  <a href="mailto:cfc@alpersteincovell.com">cfc@alpersteincovell.com</a>  <a href="mailto:alb@alpersteincovell.com">alb@alpersteincovell.com</a>  <a href="mailto:gym@alpersteincovell.com">gym@alpersteincovell.com</a></p>

<p><i>Henrylyn Irrigation District</i>  Kent H. Holsinger, #33907  David L. Kueter, #26136  HOLSINGER LAW LLC  1800 Glenarm Place, Suite 500  Denver, CO 80202  (303) 722-2828  <a href="mailto:kholsinger@holsingerlaw.com">kholsinger@holsingerlaw.com</a>  <a href="mailto:dkueter@holsingerlaw.com">dkueter@holsingerlaw.com</a></p>	<p><i>Irrigationists Association, Water District No. 1</i>  Karl D. Ohlsen, #32497  Mason H. Brown, #44831  Johanna Hamburger, #45052  CARLSON, HAMMOND &amp; PADDOCK, LLC  1900 Grant Street, Suite 1200  Denver, Colorado 80203  (303) 861-9000  <a href="mailto:kohlsen@chp-law.com">kohlsen@chp-law.com</a>  <a href="mailto:mbrown@chp-law.com">mbrown@chp-law.com</a>  <a href="mailto:jhamburger@chp-law.com">jhamburger@chp-law.com</a></p>
<p><i>Lower Latham Reservoir Company</i>  Daniel K. Brown, #30799  FISCHER BROWN BARTLETT &amp; GUNN P.C.  1319 E. Prospect Road  Ft. Collins, CO 80525  (970) 407-9000  <a href="mailto:danbrown@fbgpc.com">danbrown@fbgpc.com</a></p>	<p><i>Platte Valley Irrigation Company</i>  Scott E. Holwick, #32009  Kara N. Godbehere, #36742  LYONS GADDIS  P.O. Box 978  Longmont, CO 80502  (303) 776-9900  <a href="mailto:sholwick@lyonsgaddis.com">sholwick@lyonsgaddis.com</a>  <a href="mailto:kgodbehere@lyonsgaddis.com">kgodbehere@lyonsgaddis.com</a></p>
<p><i>Public Service Company of Colorado</i>  Carolyn F. Burr, #25978  James M. Noble, #36716  Jens Jensen, #47471  WELBORN SULLIVAN MECK &amp; TOOLEY, P.C.  1125 17th Street, Suite 2200  Denver, CO 80202  (303) 830-2500  <a href="mailto:cburr@wsmtlaw.com">cburr@wsmtlaw.com</a>  <a href="mailto:jnoble@wsmtlaw.com">jnoble@wsmtlaw.com</a>  <a href="mailto:jjensen@wsmtlaw.com">jjensen@wsmtlaw.com</a></p>	<p><i>South Adams County Water and Sanitation District</i>  Richard J. Mehren, #32231  Gregor A. MacGregor, #53900  MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.  2595 Canyon Boulevard, Suite 300  Boulder, CO 80302  (303) 443-8782  <a href="mailto:rmehren@mwhw.com">rmehren@mwhw.com</a>  <a href="mailto:gmacgregor@mwhw.com">gmacgregor@mwhw.com</a></p>

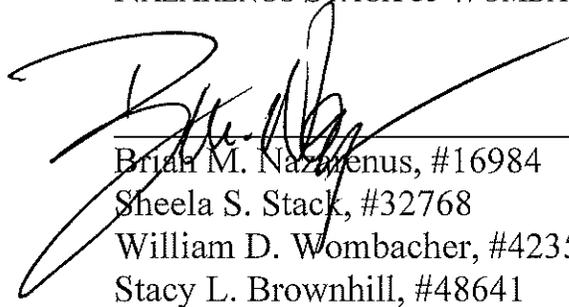
<p><i>State and Division Engineer, Water Division 1</i>  Paul L. Benington, #33079  Office of the Colorado Attorney General  1300 Broadway, 7th Floor  Denver, CO 80203  (720) 508-6309  <a href="mailto:paul.benington@coag.gov">paul.benington@coag.gov</a></p>	<p><i>Town of Lochbuie</i>  Steven P. Jeffers, #17858  Matthew Machado, #31233  LYONS GADDIS  363 Centennial Pkwy, Suite 110  Louisville, CO 80027  720-726-3672  <a href="mailto:sjeffers@lyonsgaddis.com">sjeffers@lyonsgaddis.com</a>  <a href="mailto:mmachado@lyonsgaddis.com">mmachado@lyonsgaddis.com</a></p>
<p><i>United Water and Sanitation District</i>  Tod J. Smith, #15417  THE LAW OFFICE OF TOD J. SMITH  5777 Central Ave, Suite 228  Boulder, CO 80301  (303) 444-4203  <a href="mailto:tod@tjs-law.com">tod@tjs-law.com</a></p> <p>Ann M. Rhodes, #39095  ANN RHODES, LLC  610 Emporia Road  Boulder, CO 80305  (303) 870-7887  <a href="mailto:amr@amr-law.com">amr@amr-law.com</a></p>	

**VI. Appendices Containing Copies of Judgment and Order Being Appealed.**

- a. Appendix A – Amended Findings of Fact, Conclusions of Law, Judgment and Decree of the Court, dated February 22, 2021.
- b. Appendix B – Findings of Fact, Conclusions of Law, and Judgment of the Water Court, dated October 6, 2020.

Respectfully submitted this 26th day of April, 2021.

NAZARENUS STACK & WOMBACHER LLC



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Brian M. Nazarenus, #16984  
Sheela S. Stack, #32768  
William D. Wombacher, #42354  
Stacy L. Brownhill, #48641

*Attorneys for Cross-Appellants Arapahoe  
County Water and Wastewater Authority and  
East Cherry Creek Valley Water and Sanitation  
District*

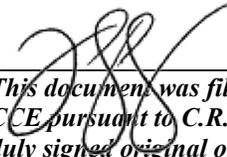
## **CERTIFICATE OF SERVICE**

The undersigned certifies that on this 26th day of April, 2021, a true and correct copy of the foregoing **NOTICE OF CROSS-APPEAL** was served via CCE on the following:

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
Centennial Water and Sanitation District	Opposer-Appellee	Paul F Holleman (Buchanan Sperling and Holleman PC) Veronica A Sperling (Buchanan Sperling and Holleman PC)
Central Colorado Water Conservancy District	Opposer-Appellee	David Phillip Jones (Lawrence Custer Grasmick Jones and Donovan LLP)
City of Aurora	Opposer-Appellee	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)
City of Brighton	Opposer-Appellee	Brent A Bartlett (Fischer Brown Bartlett and Gunn PC) Sara JI Irby (Fischer Brown Bartlett and Gunn PC)
City of Commerce City	Opposer-Appellee	Aaron S Ladd (Vranesh and Raisch) Andrea Aseff Kehrl (Vranesh and Raisch) Paul Zilis (Vranesh and Raisch)
City of Englewood	Opposer-Appellee	Geoffrey M Williamson (Berg Hill Greenleaf & Ruscitti LLP) Katherine Abbott Daniels Ryan (Colorado Water Trust) Leah K Martinsson Peter D Nichols (Berg Hill Greenleaf & Ruscitti LLP)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
City of Thornton	Opposer-Appellee	Joanne Herlihy (City of Thornton)
Division 1 Engineer	Appellee Pursuant to C.A.R. 1(e)	Division 1 Water Engineer (State of Colorado DWR Division 1)
Dream Weaver Holdings LLC	Opposer-Appellee	Jennifer M Dilalla (Moses, Wittemyer, Harrison and Woodruff, P.C.)
Farmers Reservoir and Irrigation Company	Applicant-Appellant	Beth Ann Jones Parsons (Fairfield and Woods, P.C.) Dean Carlton Hirt (Fairfield and Woods, P.C.) Joseph B Dischinger (Fairfield and Woods, P.C.)
Fort Morgan Reservoir and Irrigation Company	Opposer-Appellee	Andrea Luise Benson (Alperstein Covell PC) Cynthia Frazer Covell (Alperstein Covell PC) Gilbert Y Marchand (Alperstein Covell PC)
Henrylyn Irrigation District	Opposer-Appellee	David L Kueter (Holsinger Law LLC) Kent Hugh Holsinger (Holsinger Law LLC)
Irrigationists Association	Opposer-Appellee	Johanna Hamburger Karl David Ohlsen (Carlson, Hammond & Paddock, L.L.C.) Mason Hamill Brown (Carlson, Hammond & Paddock, L.L.C.)
Lower Latham Reservoir Company	Opposer-Appellee	Daniel Kenneth Brown (Fischer Brown Bartlett and Gunn PC)

<b>Party Name</b>	<b>Party Type</b>	<b>Attorney Name</b>
Platte Valley Irrigation Company	Opposer-Appellee	Kara Nicole Godbehere (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC) Scott E Holwick (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC)
Public Service Company of Colorado	Opposer-Appellee	Carolyn F Burr (Welborn Sullivan Meck & Tooley, P.C.) James Merle Noble (Welborn Sullivan Meck & Tooley, P.C.) Jens Jensen (Welborn Sullivan Meck & Tooley, P.C.)
South Adams County Water and Sanitation District	Opposer-Appellee	Alison Id Gorsevski (Vranesh and Raisch) Gregor Allen Macgregor Richard John Mehren (Moses, Wittemyer, Harrison and Woodruff, P.C.)
State and Division Engineer Div. 1	Opposer-Appellee	Paul Louis Benington (CO Attorney General)
Town of Lochbuie	Opposer-Appellee	Matthew Machado (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC) Steven Patrick Jeffers (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC)
United Water and Sanitation District	Opposer-Appellee	Ann Marie Rhodes (The Law Office of Tod J Smith) Tod Jay Smith (The Law Office of Tod J Smith)

  
*This document was filed and served via CCE pursuant to C.R.C.P. Rule 121. A duly signed original of this document is on file at the law firm of NAZARENUS STACK & WOMBACHER LLC.*

DISTRICT COURT, WATER DIVISION 1, COLORADO Court Address: 901 9 <sup>th</sup> Avenue, Greeley, Colorado 80632 Mailing Address: P.O. Box 2038, Greeley, Colorado 80631	DATE FILED: February 22, 2021 10:57:38 AM CASE NUMBER: 2016CW3052
CONCERNING THE APPLICATION FOR WATER RIGHTS OF:  <b>The Farmers Reservoir and Irrigation Company</b>  In the South Platte River or its Tributaries  In Adams and Weld Counties.	▲ COURT USE ONLY ▲  <b>Case No.: 2016CW3052</b>  <b>Courtroom: Water Div. No. 1</b>
<b>AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE OF THE COURT</b>	

This matter comes before the Court on the Application for Absolute and Conditional Water Rights (“Application”) of The Farmers Reservoir and Irrigation Company (“FRICO”) filed on April 18, 2016. The Court held trial in this matter on February 25 and 26, 2019; March 1 and 4, 2019; and April 2, 2019. The Court, having made such investigations as are necessary to determine whether or not the statements in the Application are true, and having become fully advised with respect to the subject matter of the Application, entered its Findings of Fact, Conclusions of Law, and Judgment of the Water Court on October 6, 2020. On December 20, 2020, the Court issued its Findings of Fact and Conclusions of Law, Judgment and Decree of the Court. On January 11, 2021, FRICO filed a motion to reconsider and modify paragraphs 29, 30, 32, and 36 of the Decree. The Court issued an order on February 22, 2021, granting FRICO’s motion in part and hereby modifies paragraph 32 of the Decree. FRICO’s requested modifications of paragraphs 29, 30, and 36 were denied by the Court.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Applicant. The Farmers Reservoir and Irrigation Company, 80 South 27th Avenue, Brighton, Colorado 80601. Phone: (303) 659-7373.
2. Application. The Application was filed with the Water Court on April 18, 2016.
3. Notice and Jurisdiction. FRICO properly filed the Application and gave timely and proper notice of the Application in the manner required by law. The Court has jurisdiction over the subject matter of the Application and over all persons who have standing to appear, whether they have appeared or not. §§ 37-92-203 and 302, C.R.S. (2020).
4. No Designated Groundwater. The land and water rights involved herein are not included within the boundaries of any designated groundwater basin.
5. Statements of Opposition. The following parties timely filed Statements of Opposition: Arapahoe County Water and Wastewater Authority (“ACWWA”), Centennial Water and

Sanitation District; Central Colorado Water Conservancy District and the Ground Water Management Subdistrict of the Central Colorado Water Conservancy District and the Well Augmentation Subdistrict of the Central Colorado Water Conservancy District; City of Aurora, acting by and through its Utility Enterprise; City of Brighton; City of Commerce City; City of Englewood; City of Thornton; State and Division Engineers, Water Division No. 1; Dream Weaver Holdings, LLC; East Cherry Creek Water and Sanitation District (“ECCV”); Fort Morgan Reservoir and Irrigation Company; Henrylyn Irrigation District; Irrigationists’ Association, Water District No. 1; Lower Latham Reservoir Company; Platte Valley Irrigation Company; Public Service Company of Colorado; South Adams County Water and Sanitation District; Town of Lochbuie; United Water and Sanitation District (“United”). No other Statements of Opposition were filed and the time for filing such statements has expired. No motions to intervene have been filed.

6. Stipulations. The Applicants have entered into stipulations with the following Opposers: Centennial Water and Sanitation District; Central Colorado Water Conservancy District and the Ground Water Management Subdistrict of the Central Colorado Water Conservancy District and the Well Augmentation Subdistrict of the Central Colorado Water Conservancy District; City of Aurora, acting by and through its Utility Enterprise; City of Commerce City; City of Englewood; City of Thornton; State and Division Engineers, Water Division No. 1; Dream Weaver Holdings, LLC; Fort Morgan Reservoir and Irrigation Company; Henrylyn Irrigation District; Irrigationists’ Association, Water District No. 1; Public Service Company of Colorado; and South Adams County Water and Sanitation District. During the trial, FRICO and the State and Division Engineers entered into an additional Partial Stipulation regarding FRICO’s operations related to out-of-priority seepage flows into the Beebe Canal. The Court has reviewed and approved each stipulation and, pursuant to its October 6, 2020, post-trial Findings of Fact, Conclusions of Law and Judgment of the Water Court, the administration terms of the Partial Stipulation are included in Paragraph 20 of this Decree. The Court finds that this Decree is consistent with the provisions of the stipulations.

7. Summary of Consultation. Because the Division Engineer for Water Division 1 filed a Statement of Opposition in this case, the Water Referee did not issue a Summary of Consultation. Nonetheless, on July 29, 2016, the Division Engineer for Water Division 1 issued his Report of the Division Engineer concerning the Application. This decree addresses all issues raised by the Division Engineer in the Report.

8. Description of the Application. FRICO is a mutual ditch and reservoir company that operates a ditch and reservoir system for the benefit of its stockholders. This application involves only the Barr Lake and Milton Lake Divisions of FRICO’s system. FRICO has been utilizing seepage water accruing to the Beebe Seep Canal for decades without a decree under the misconception that its previous decrees allowed for such use. As noted in previous orders of this Court in Case Nos. 2002CW403 and 2010CW306, FRICO does not have a decreed right to use the seepage water accruing to the Beebe Seep Canal other than the rights decreed herein. FRICO seeks to adjudicate water rights to natural runoff, drainage, waste, return flows, and seepage water arising in, flowing into, accumulating in, and accruing to the Beebe Seep Canal (the

“Subject Rights”). The Beebe Seep Canal (also known as the Beebe Canal) is a private ditch that is owned and operated by FRICO and extends from Barr Lake to Milton Lake. The Beebe Seep Canal is a person-made water delivery structure, and not a natural stream. FRICO seeks to use the Subject Rights within its Barr Lake and Milton Lake Divisions to supplement deliveries to its stockholders for irrigation. FRICO will either store the Subject Rights in Barr Lake, via the Beebe Seep Canal Pump Station, or in Milton Lake, or it will put the water to direct use for irrigation through the Bowles Seep Canal and East Neres Canal.

9. Names and Locations of Structures:

9.1. Direct Use Structures.

9.1.1. Bowles Seep Canal Seep Right: The Bowles Seep Canal extends approximately 7.4 miles from the NE1/4 of the NE1/4 of Section 6, Township 1 North, Range 65 West of the 6th P.M. to the NE1/4 of the SW1/4 of Section 31, Township 1 North, Range 65 West of the 6th P.M. in Weld County, Colorado. The Bowles Seep Canal diverts water from the Beebe Seep Canal.

9.1.2. East Neres Canal Seep Right: The East Neres Canal extends approximately 19.9 miles from the NW1/4 of the SE1/4 of Section 36, Township 5 North, Range 65 West of the 6th P.M. to the SW1/4 of the NE1/4 of Section 10, Township 2 North, Range 65 West of the 6th P.M. in Weld County, Colorado. The East Neres Canal diverts water from the Beebe Seep Canal.

9.2. Storage Structures.

9.2.1. Milton Lake Seep Right. Milton Lake (a/k/a Milton Reservoir) is an off-channel reservoir located in Sections 10, 11, 14, 15, 22, and 23, Township 3 North, Range 65 West of the 6th P.M., Weld County, Colorado.

9.2.2. Barr Lake Seep Right. Barr Lake is an off-channel reservoir located upon the whole or parts of Sections 15, 21, 22, 23, 26, 27, 28 and 33, Township 1 South, Range 66 West of the 6th P.M., Adams County, Colorado. The dam is located near the center of Section 23, Township 1 South, Range 66 West of the 6<sup>th</sup> P.M., Adams County, Colorado, approximately 2,766 feet south of the North line and 3,078 feet east of the West line of Section 23 extending northwesterly approximately 1.25 miles. Latitude 39° 57' 1.15" North; Longitude 104° 44' 25.70" West.

10. Legal Description of Each Point of Diversion. FRICO has diverted or will divert the Subject Rights at the following locations, all of which are located on the Beebe Seep Canal and divert surface water only. A map depicting the diversion points is attached as **Exhibit 1**.

10.1. The headgate of the Bowles Seep Canal, located in the NE1/4 of the SW1/4 of Section 31, Township 1 North, Range 65 West of the 6th P.M., Weld County, Colorado. 40d 0' 21.12" North; 104d 42' 37.89" West. This point is shown as Diversion 2 on **Exhibit 1**. Water

diverted at the Bowles Seep Canal is for delivery for direct use for irrigation to the Bowles Seep Canal under the Bowles Seep Canal Seep right decreed herein.

10.2. The headgate of the East Neres Canal, located in the SW 1/4 of the NE 1/4 of Section 10, Township 2 North, Range 65 West of the 6th P.M., Weld County, Colorado. 40d 9' 19.3" North; 104d 38' 59.79" West. This point is shown as Diversion 3 on **Exhibit 1**. Water diverted at the East Neres Canal is for delivery for direct use for irrigation to the East Neres Canal Seep Right decreed herein.

10.3. The inlet to Milton Lake from the Beebe Seep Canal, located near the center of Section 22, Township 3 North, Range 65 West of the 6th P.M., Weld County, Colorado. 40d 12' 52.73" North; 104d 38' 58.07" West. The dam is located at a point near the east line of the SW1/4 of Section 11, Township 3 North, Range 65 West of the 6<sup>th</sup> P.M., Weld County, Colorado. This point is shown as Diversion 4 on **Exhibit 1**. Water diverted at Milton Lake is for delivery into Milton Lake under the Milton Lake Seep Right decreed herein.

10.4. The Beebe Seep Canal Pump Station, to be located in the NW1/4 of the NW1/4 of Section 23, Township 1 South, Range 66 West of the 6th P.M., Adams County, Colorado. This point is shown as Diversion 1 on Exhibit 1. Water diverted at the Beebe Seep Canal Pump Station is for delivery into Barr Lake under the Barr Lake Seep Right decreed herein. The design and specific location of the Beebe Seep Canal Pump Station has not been finalized to provide distances from section lines and may change. Upon completion of the facility, FRICO shall, without amending this Decree, provide notice of the actual distances from section lines of the diversion structures using the procedures specified in paragraph 39, below.

11. Source. The water rights claimed by FRICO in this case are located between Barr Lake and Milton Lake and consist of unappropriated: (1) seepage from Barr Lake that is discharged to the Beebe Seep Canal through the Barr Lake toe drains and underflow from Barr Lake that is collected in the interceptor ditch below the Barr Lake dam; and (2) natural runoff, drainage, waste, return flows, and seepage water arising in, flowing into, accumulating in, and accruing to the Beebe Seep Canal system (collectively, "Seepage Inflow"). Seepage Inflow does not include recharge accretions that accrue to the Beebe Seep Canal from decreed recharge facilities in the Beebe Draw and remain under dominion and control of others, or are properly accounted for under another water user's rights that are senior in priority to FRICO's rights.

12. Appropriation Dates.

12.1. Bowles Seep Canal Seep Right: July 25, 2011, for the absolute portion of the water right and April 18, 2016, for the conditional portion of the water right, all for direct use.

12.2. East Neres Canal Seep Right: July 2, 2011, for the absolute portion of the water right and April 18, 2016, for the conditional portion of the water right, all for direct use.

12.3. Milton Lake Seep Right: May 11, 2015, for the absolute portion of the water right and April 18, 2016, for the conditional portion of the water right, all for storage.

12.4. Barr Lake Seep Right: April 18, 2016, all for storage, all conditional.

13. How Appropriation Initiated.

13.1. The claimed appropriation dates are based on the dates that FRICO could show that it made an in-priority diversion of seepage gains at the Bowles Seep Canal and East Neres Canal headgates and delivered the water to shareholders for irrigation, as shown in its Barr Lake accounting spreadsheet. The claimed appropriation date for storage in Milton Lake is based on the date the accounting demonstrates FRICO's in-priority storage of flows from the Beebe Seep Canal in Milton Lake.

13.2. The date of filing is the claimed appropriation date for the Barr Lake Seep Right and the conditional portions of the Bowles Seep Canal Seep Right, East Neres Seep Canal Seep Right, and the Milton Lake Seep Right.

14. Date Water First Applied to Beneficial Use:

14.1. Bowles Seep Canal Seep Right: July 25, 2011.

14.2. East Neres Canal Seep Right: July 2, 2011.

14.3. Milton Lake Seep Right: May 11, 2015.

14.4. Barr Lake Seep Right: N/A.

15. Amount:

15.1. Bowles Seep Canal Seep Right: 27.0 c.f.s. for direct use, of which 9.9 c.f.s. is absolute and 17.1 c.f.s. is conditional.

15.2. East Neres Canal Seep Right: 43.0 c.f.s. for direct use, of which 25.0 c.f.s. is absolute and 18.0 c.f.s. is conditional.

15.3. Milton Lake Seep Right: 80.0 c.f.s. and 4,563 a.f. for storage, of which 50.0 c.f.s. and 3,777 a.f. are absolute and 30.0 c.f.s and 786 a.f. are conditional.

15.4. Barr Lake Seep Right: 12.0 c.f.s. and 2,805 a.f., all of which is conditional.

16. Use: Water diverted at the Bowles Seep Canal headgate has been and will be used during the irrigation season directly for irrigation of lands under the Bowles Seep Canal in the Barr Lake Division. Water diverted at the East Neres Canal headgate has been and will be used during the irrigation season directly for irrigation of lands under the East Neres Canal in the Barr Lake Division. Water diverted at the Beebe Seep Canal Pump Station and the inlet to Milton Lake will be stored in Barr Lake and Milton Lake, respectively, and subsequently released to any of the delivery ditches from those reservoirs for irrigation of lands under the Barr Lake and Milton Lake Divisions. "Irrigation season" is defined as the period of the year when agricultural

users could make beneficial use of water for open field irrigation, provided, that in no event shall such season of use commence prior to March 1 or extend beyond November 30. **Exhibit 2** shows the approximate service area of the Barr Lake and Milton Lake Divisions.

17. FRICO's Need for Subject Rights: FRICO has demonstrated a need for the Subject Rights. FRICO's Barr Lake and Milton Lake Divisions are water short, meaning that shareholders do not always receive enough water from all sources presently available to meet the consumptive use needs of their crops. Even with the addition of the Subject Rights sought in this case to their water supply, FRICO shareholders will still not have enough water to meet the full irrigation needs of their crops.

18. Water Availability. There is water available periodically at the claimed points of diversion for direct use through the Bowles Seep Canal and the East Neres Canal and there is water available for storage in Milton Lake and in Barr Lake.

19. FRICO's Ability to Divert Water and Put it to Beneficial Use. FRICO owns and operates the Bowles Seep Canal and East Neres Canal headgates on the Beebe Seep Canal. Development of the Beebe Seep Canal Pump Station is technically feasible and FRICO has constructed several similar water supply and delivery facilities required to deliver water for irrigation within its system. FRICO can and will deliver water directly for irrigation from the Bowles Seep Canal and the East Neres Canal, or store it in Barr Lake and in Milton Lake for irrigation within the Barr Lake and Milton Lake Divisions and put such water to beneficial use.

20. Administration Terms from State and Division Engineers Partial Stipulation. By Order of the Court, the State and Division Engineers Partial Stipulation with FRICO regarding the operational terms related to out-of-priority Seepage Inflow into the Beebe Canal are set forth below.

20.1. Bowles Seep Canal and East Neres Canal. When there is Seepage Inflow in the Beebe Seep Canal and the Subject Water Rights are out-of-priority (OOPSI):

20.1.1. FRICO may not divert OOPSI at the Bowles Seep headgate unless it is judicially determined in a future Water Court proceeding that FRICO has that right.

20.1.2. FRICO may not divert OOPSI at the East Neres Canal headgate, unless it is judicially determined in a future Water Court proceeding that FRICO has that right, subject to the following:

20.1.2.1. If FRICO is performing maintenance or construction in the Beebe Canal between the East Neres Canal headgate and Milton Lake, it may divert OOPSI at the East Neres Canal headgate and convey it toward Box Elder Creek through the Gilmore Canal without beneficial use by FRICO, its shareholders, or any other party to which FRICO delivers water, provided no other water is diverted or delivered into the East Neres Canal headgate at the same time.

20.1.2.2. If FRICO is performing maintenance or construction in the Beebe Canal between the East Neres Canal headgate and Milton Lake, FRICO may divert OOPSI at the East Neres Canal headgate and convey it toward Box Elder Creek through the Gilmore Canal without beneficial use by FRICO, its shareholders, or any other party to which FRICO delivers water, when prior diversion of other water has not fully exited the canal, but shall ensure that no delivery of OOPSI occurs at the farm headgates. Likewise, FRICO may deliver water other than OOPSI through the East Neres Canal headgate for delivery to its shareholders before OOPSI has fully exited the canal, but shall ensure that no delivery of OOPSI occurs at the farm headgates.

20.2. Milton Lake. FRICO has no right to store or use OOPSI delivered to Milton Lake unless it obtains the legal right to do so in a future Water Court proceeding or obtains a Water Court finding that FRICO can divert water from the Beebe Canal under its 1909 Storage Right. FRICO's ability to release OOPSI in Milton Lake is at times limited. Subject to the approval of the Division Engineer, FRICO may use the following operations to address such OOPSI:

20.2.1. Accounting. FRICO shall modify its Milton Lake accounting to separately track Seepage Inflow flowing into Milton Lake and add a 2016 Milton Seepage Right account. When such inflows are in priority, this amount is added to the 2016 Milton Seepage Right account, subject to the limitations decreed herein. All OOPSI is added to the owe-the-river (OTR) account.

20.2.1.1. When FRICO cannot measure flows into Milton Lake due to icing, FRICO will use an overall mass balance calculation to account for Seepage Inflow.

20.2.2. Substitution. FRICO may substitute OOPSI for its 1909 Milton Lake Storage Right or its 1909 Milton Direct Flow Right on a one-for-one basis in real time (Substitution) when those rights are in priority in the following manner:

20.2.2.1. Milton Lake Storage Right Substitution. When FRICO diverts water at the Platte Valley Canal (PVC) under its 1909 Milton Lake Storage Right, it may bypass or return a portion of such diversion to the South Platte River pursuant to the Division Engineer's requirements to measure or quantify such bypass or returns pursuant to section 37-92-502, C.R.S. Such amount, no greater than the inflow rate of OOPSI, shall be substituted into the 1909 Milton Lake Storage Right Account in Milton Lake, if operated pursuant to the terms of section 37-80-120, C.R.S.

20.2.2.2. Milton Direct Flow Right Substitution. When FRICO diverts water at the PVC under its 1909 Milton Direct Flow Right, it may bypass or return a portion of such diversion to the South Platte River pursuant to the Division Engineer's requirements to measure or quantify such bypass or returns pursuant to section 37-92-502, C.R.S. Such amount, no greater than the inflow rate of OOPSI, shall be substituted for a release of 1909 Milton Direct Flow Right water from Milton Lake for direct flow use if operated pursuant to the terms of section 37-80-120, C.R.S.

20.2.2.3. The operations in paragraphs 20.2.2.1 and 20.2.2.2 may occur if water is available in priority under the 1909 Milton Lake Storage Right or the 1909 Milton Direct Flow Right and FRICO is bypassing or returning a portion of such diversion to the South Platte River pursuant to the Division Engineer's requirements to measure or quantify such bypass or returns pursuant to section 37-92-502, C.R.S. at the PVC under such rights.

20.2.3. Bookover. FRICO may book water from its OTR account to its 1909 Milton Lake Storage Right Account (Bookover) at a rate equal to the amount of substitute supply bypassed or returned to the South Platte River at the PVC (Substitution) pursuant to the Division Engineer's requirements to measure or quantify such bypass or returns pursuant to section 37-92-502, C.R.S. The rate of the Bookover shall be limited to the lesser of the release capacity from Milton Lake or the amount bypassed or returned pursuant to the Substitution to the South Platte River, subject to paragraph 20.2.4 below.

20.2.4. FRICO can operate the Substitutions and Bookovers as described in paragraphs 20.2.2 and 20.2.3 simultaneously, provided the amount bypassed or returned to the South Platte River pursuant to the Division Engineer's requirements to measure or quantify such bypass or returns pursuant to section 37-92-502, C.R.S., is the sum of the Substitution and Bookover rates.

20.2.5. The administrative Substitutions described in paragraph 20.2 and its subsections may operate as described herein but do not represent decreed water rights unless and until FRICO obtains decrees for such operations in the future.

20.2.6. FRICO may release water from the OTR account to the Gilmore Canal and deliver said water toward Box Elder Creek. When any other water is simultaneously delivered into the Gilmore Canal, conveyance losses shall be assessed pro-rata to the amount of water released from the OTR account such that FRICO obtains no benefit from such release in the Gilmore Canal. FRICO's accounting shall be modified to account for the assessment of pro-rata losses.

20.2.7. At times, the Division Engineer can require releases of out-of-priority storage pursuant section 37-92-502, C.R.S. Such releases may be ordered at times when releases can physically be made and at such rates to ensure that the release will not cause damage pursuant to section 37-92-502(3), C.R.S.

21. Burden of Proof. Based on the evidence presented, the Court finds that FRICO has demonstrated a specific plan for diversion and storage of the Subject Rights; demonstrated a need for the Subject Rights; and shown that unappropriated water is available for diversion by the Subject Rights. FRICO has demonstrated that the Subject Rights have been and can and will be diverted and beneficially used; and that the conditional appropriations described in this Decree can and will be completed and water used for the described beneficial uses within a reasonable time.

22. Application Contemplated by Law. The application herein is contemplated by law and satisfies the requirements of §37-92-101, C.R.S., *et seq.*, including but not limited to §§37-92-103(3), 37-92-103(6), 37-92-302, and 37-92-305. FRICO has demonstrated that water has been and can and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time. §37-92-305(9), C.R.S.
23. First Step. FRICO appropriated the conditional portion of the Subject Rights by forming the intent and taking overt acts that constitute the first steps toward completion of the appropriation and application of water to beneficial use by FRICO.
24. Integrated System. The Subject Rights decreed herein are part of FRICO's integrated water system in the Barr and Milton Divisions as contemplated by §37-92-301(4)(b), C.R.S.
25. Application Lawful. FRICO's application for the claimed water rights is authorized by the Water Right Determination and Administration Act of 1969, C.R.S. §§ 37-92-101 to -602, and can be granted in accordance with the Act, subject to the terms and conditions of this Decree.

### **JUDGMENT AND DECREE OF THE COURT**

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters the following Judgment and Decree:

26. Incorporation of Findings of Fact and Conclusions of Law. The foregoing Findings of Fact and Conclusions of Law are fully incorporated into this Judgment and Decree.
27. Accounting. FRICO shall maintain accounting to track diversions under the Subject Water Rights into the Bowles Seep Canal and the East Neres Canal and diversions and volumetric limits on the amounts stored under the Subject Rights in Barr Lake and Milton Lake with separate accounting for diversions made pursuant to the Subject Rights and OOPSI. All water diverted to storage in Barr Lake and Milton Lake shall be accounted for in separate storage accounts by priority and owner. FRICO shall integrate accounting for the Subject Rights into the existing Barr Lake accounting spreadsheet developed for Case No. 02CW105(A), District Court, Water Division No. 1 consistent with Paragraph 19 of that decree. The Barr Lake accounting form was revised to include accounting for Milton Lake for Case No. 02CW404/03CW442. The Court in Case No. 02CW105(A) changed and established accounting procedures for certain water rights decreed to Barr Lake. Nothing in this Decree shall alter, amend, modify or supersede the decree in Case No. 02CW105(A). FRICO shall complete the accounting daily and report the accounting monthly to the Division Engineer and Water Commissioner. The accounting form shall, at a minimum, include the following information for the Subject Rights: the name, location and date of the calling water right; measurements at the diversion points from approved measuring devices and recorders; all inflows to and outflows from each reservoir (total and by water type and water rights); reservoir contents (total and by water type and water right); evaporation, precipitation, in and out of priority measured and unmeasured inflows; change in

storage; running totals on the volumetric limits; carryover and paper fill in each reservoir; and transit losses as described below in Paragraph 29. FRICO accounting shall also track the information required by the State Engineer to administer the provisions in the Partial Stipulation described in Paragraph 20 above. The Barr Lake and Milton Lake accounting form is attached hereto as **Exhibit 3**. Copies of FRICO's accounting shall be made available to Opposers at their request in electronic format, in an Excel spreadsheet, or in a comparable format if technology changes. The accounting forms are not decreed herein and the accounting for the Subject Rights may be changed from time to time by Applicant or at the direction of, or at the request of the Division Engineer so long as (1) all the information included in **Exhibit 3** and in this paragraph is included in the accounting forms, (2) FRICO serves written notice of the proposed changes to the accounting forms on the Division Engineer and Objectors, (3) Objectors have sixty-three (63) days after such notice of the proposed changes is served to provide comments to the Division Engineer, and (4) the Division Engineer approves the proposed changes after the expiration of the sixty-three (63) day comment period.

28. Evaporation. Real time daily net reservoir evaporation shall be determined for Barr Lake and Milton Lake by multiplying the daily exposed water surface area by the daily rate of net reservoir evaporation in feet. Daily gross pan evaporation shall be computed by multiplying the daily standard alfalfa reference crop evapotranspiration (ET<sub>r</sub>) in feet by 1.2. Daily gross pan evaporation shall then be multiplied by a pan coefficient of 0.7 to obtain daily gross reservoir evaporation. Daily net reservoir evaporation will be determined by subtracting 70 percent of the daily measured precipitation from the daily gross reservoir evaporation. For Barr Lake, the ET<sub>r</sub> shall be determined from the published data for the Milton Lake weather station that was installed at Milton Lake in 2010 or, if such data are not available from the Milton Lake weather station, from the published data for the Northern Colorado Water Conservancy District (NCWCD) Ft. Lupton weather station or, if such data are not available from the Milton Lake weather station and the NCWCD Ft. Lupton weather station, from the published data for the NCWCD Longmont South weather station. If, in the future, a weather station is installed at Barr Lake that collects data from which ET<sub>r</sub> can be calculated, the ET<sub>r</sub> shall be determined from the published data from such Barr Lake weather station. For Milton Lake, the ET<sub>r</sub> shall be determined from the published data for the Milton Lake weather station or, if such data are not available from the Milton Lake weather station, from the published data for the NCWCD Gilcrest weather station.

29. Transit Losses. The Seepage Inflow is tributary water and is subject to administration as waters of the state under the priority system. For the purpose of quantifying the Subject Rights, FRICO shall account for the amount of water released from Barr Lake and Milton Lake for delivery to shareholders and then calculate the amount of transit loss if assessed by the Division Engineer. This will ensure that FRICO does not divert seepage water out-of-priority or divert others' recharge water and will allow certainty that FRICO is delivering the correct amount of water released from storage to shareholders. This will also ensure that FRICO accurately accounts for deliveries from FRICO's other water rights and the amount attributable to seepage water diverted in priority. This will assure that FRICO is not expanding the Subject Rights, in the event there is seepage water available above the amounts decreed to FRICO, for other water

users to appropriate. FRICO shall develop accounting forms that account for transit losses in coordination with the Division Engineer's Office to guarantee that FRICO's accounting is sufficient for proper administration of all FRICO's Beebe Seep Canal system water rights by the Division Engineer.

30. Out-of-Priority Inflows. FRICO's accounting for Barr Lake and Milton Lake addresses out-of-priority inflows. Such accounting for Barr Lake was decreed in Case No. 11CW280, District Court, Water Division No. 1. FRICO shall continue to calculate out-of-priority inflows, including OOPSI, for Barr Lake and Milton Lake consistent with the methodology decreed in Case No. 11CW280, District Court, Water Division No. 1 and the terms of paragraph 20 and its subparagraphs, above. FRICO's pro rata out-of-priority inflows that are stored in Barr Lake and Milton Lake shall be accounted for in an owe-the-river account in each reservoir and releases of such water shall be made in accordance with Paragraphs 30.1 and 30.2. Out-of-priority inflows, which include measured and unmeasured inflows, could be from, among other things, rainfall, unmeasured surface runoff or ground water seepage into Barr Lake and Milton Lake. FRICO is not claiming the right to store out-of-priority inflows in Barr Lake or Milton Lake in this case. FRICO will not divert water, or place a call, under the Barr Lake Seep Right or Milton Lake Seep Right if there is any water in the OTR accounts in those respective reservoirs. When FRICO cannot divert under the Milton Lake Seep Right because of the presence of water in the OTR account in Milton, all inflows of Seepage Inflow in Milton Lake shall be accounted for as OOPSI in FRICO's OTR account consistent with paragraph 20.2.1 above.

30.1. Barr Lake is equipped with outlet works capable of bypassing any out-of-priority inflows. Out-of-priority inflows accounted for in the owe-the-river account pursuant to Paragraph 30 shall be released to the Beebe Seep Canal within 72-hours without use by FRICO in any manner, unless such out-of-priority inflows are replaced pursuant to a substitute water supply plan approved by the State Engineer pursuant to C.R.S. 37-92-308(4) or successor statute or decreed plan for augmentation. Such out-of-priority inflows shall be returned to the Beebe Seep Canal at the Barr Lake outlet works, the location of which is in the NW1/4 of the NW1/4 of Section 23, Township 1 South, Range 66 West of the 6th P.M., and shall not be available for diversion or use by FRICO under the Subject Water Rights.

30.2. Milton Lake is equipped with outlet works capable of bypassing any out-of-priority inflows. Out-of-priority inflows accounted for in the owe-the-river account pursuant to Paragraph 30 above shall be released pursuant to the methods set forth above in Paragraph 20.2. Releases of such out-of-priority inflows to the Gilmore Canal at the outlet works of Milton Lake, the location of which is in the NW1/4 of the SW1/4 of Section 11, Township 3 North, Range 65 West and released from the Gilmore Canal and shall not be available for diversion or use by FRICO.

31. Barr Lake Carryover. Water stored in Barr Lake under the Barr Lake Seep Right during previous water years that remains in storage at the beginning of the new water year shall be considered carryover storage against the Barr Lake Seep Right decreed herein in the new water year. All water diverted to storage in Barr Lake shall be accounted for in separate storage

accounts by priority and owner. Since separate accounts for each water right will be tracked, water stored in Barr Lake pursuant to the Barr Lake Seep Right will only be stored in and carried over in the account for the Barr Lake Seep Right. If water attributable to the Barr Lake Seep Right is stored in the reservoir to which it is decreed and is relocated to another account or reservoir, the amount of water that was relocated that is still remaining in that other account or reservoir at the end of the water year shall count against the fill of the respective storage right in the new water year.

32. Milton Lake Carryover. Water stored in Milton Lake under this Decree during previous water years that remains in storage at the beginning of the new water year shall be considered carryover storage against the Milton Lake Seep Right decreed herein in the new water year. All water diverted to storage in Milton Lake shall be accounted for in separate storage accounts by priority and owner. Since separate accounts for each water right will be tracked, water stored in Milton Lake under the Milton Lake Seep Right will only be stored in and carried over in the account for the Milton Lake Seep Right. Any water carried over hereunder may be counted as water stored in the new water year for the purpose of making conditional rights absolute. If water attributable to the Milton Lake Seep Right in the new water year, is stored in the reservoir to which it is decreed and is relocated to another account or reservoir, the amount of water that was relocated that is still remaining in that other account or reservoir at the end of the water year shall count against the fill of the respective storage right in the new water year.

33. Barr Lake Paper Fill/Bookover.

33.1. Barr Lake Water Storage Rights. The “Barr Lake Water Storage Rights” are the: (1) 1885 Burlington storage right, (2) 1909 FRICO first enlargement storage right, (3) 1909 FRICO refill right, and (4) FRICO Multi-Purpose Water Right decreed in Case No. 2002CW403, District Court, Water Division No. 1.

33.2. Barr Lake Storage. To the extent any water diverted into Barr Lake under this Decree occupies storage space in Barr Lake that is otherwise required for storage of water under the Barr Lake Water Storage Rights, including conditions when Barr Lake is at Winter Fill as described in Paragraph 18.2.1.5 of the decree entered in Case No. 2002CW105(A), District Court, Water Division No. 1, then the Barr Lake Water Storage Right then legally and physically available for diversion from the South Platte River shall be paper-filled at the rate that such right is legally and physically available for diversion at the Burlington Ditch headgate and could be delivered into Barr Lake but is not diverted. If any of the Barr Lake Water Storage Rights are paper-filled in accordance with this provision, such paper-filled Barr Lake Water Storage Right is not considered released for purposes of determining refill of the 1909 Barr Lake Storage Right as operated under Paragraph 18.2.1.1.1 of the decree entered in Case No. 2002CW105(A). Alternatively, water stored in Barr Lake under this Decree shall be released or booked over to the Barr Lake Water Storage Right then legally and physically available for diversion from the South Platte River at the rate that such right is legally and physically available for diversion at the Burlington Ditch headgate and could be delivered into Barr Lake. Any water diverted and stored

in Barr Lake under the Subject Rights that is booked over or released and not beneficially used for irrigation cannot be used to make such water right absolute.

34. Milton Lake Paper Fill/Bookover.

34.1. Milton Lake Senior Water Storage Right. The “Milton Lake Senior Water Storage Right” consists of a 1909 storage right decreed in Case No. 54658, District Court, Water Division No. 1.

34.2. Milton Lake Storage. To the extent any water stored in Milton Lake under this Decree occupies storage space in Milton Lake that is otherwise required for storage of water under the Milton Lake Senior Water Storage Right, then the Milton Lake Senior Water Storage Right shall be paper-filled at the rate that such right is legally and physically available for diversion at the Platte Valley Canal headgate and could be delivered into Milton Lake but is not diverted. Alternatively, water stored in Milton Lake under this Decree the Subject Rights shall be released or booked over to the Milton Lake Senior Water Storage Right at the rate that such right is legally and physically available for diversion at the Platte Valley Canal headgate and could be delivered into Milton Lake. Any water diverted and stored in Milton Lake under the Subject Rights that is booked over or released and not beneficially used for irrigation cannot be used to make such water right absolute.

35. Barr Lake – One Fill. If during any water year, the Barr Lake Seep Right is in priority but FRICO does not divert and store water legally and physically available under such storage right, the amount of water not diverted when such storage right is in priority shall count against the one fill of the Barr Lake Seep Right decreed herein. The amount of water physically available under the Barr Lake Seep Right decreed herein shall equal the measured flow at the gage on the Beebe Seep Canal immediately below Barr Lake less the amount of water released from Barr Lake to the Beebe Seep Canal. The amount of water physically and legally available but not diverted under the Barr Lake Seep Right shall not count against the one fill of the Barr Lake Seep Right if that amount is diverted at another diversion point claimed herein.

36. Milton Lake – One Fill. Milton Lake is entitled to one annual fill from diversions under its existing 1909 Storage Right or from the Milton Lake Seep Right. When Milton Lake has filled or achieved its winter fill level, no additional in-priority diversions under the Milton Lake Seep Right can occur during that water year, except to increase from the winter fill to the normal fill level. If during any water year, the Milton Lake Seep Right decreed herein is in priority but FRICO does not divert and store water legally and physically available to such storage right, the amount of water not diverted when such storage right is in priority shall count against the one fill of the Milton Lake Seep Right decreed herein. The amount of water physically available under the Milton Lake Seep Right decreed herein shall equal the measured flow at the gage at the inlet to Milton Lake less other water being conveyed in the Beebe Seep Canal past the gage that is under dominion or control of FRICO or others.

37. Measuring Devices. All diversions of the Bowles Seep Canal Right and East Neres Canal Right at the Bowles Seep Canal and East Neres Canal, respectively, and diversions,

deliveries to and releases of the Barr Lake Seep Right and Milton Lake Seep Right from Barr Lake and Milton Lake shall be measured with continuous recording devices. Barr Lake and Milton Lake shall be equipped with staff gages. In addition to the existing measuring and recording devices, and the measuring and recording devices expressly required under this Decree, FRICO shall install and maintain such additional measuring and recording devices as may be reasonably required by the Division Engineer for the administration of this Decree.

38. Water Commissioner Permission. FRICO may divert water under this Decree only when the Subject Rights are in priority. FRICO will notify and obtain approval from the Water Commissioner prior to diverting the Subject Rights under this Decree, except during periods of no downstream call. The Subject Rights shall be considered in priority, and the Water Commissioner shall only approve the diversion of the Subject Rights, when the requirements of this decree are met and there are no downstream calls senior to the Subject Rights, including those on the South Platte River downstream of the location of the Powell Spillway, at a point on the South Platte River in the NE1/4 SE1/4 of Section 14, Township 5 North, Range 65 West, of the 6th P.M., Weld County, Colorado, except for administration of the South Platte River Compact in District 64 as set forth in section 37-65-101 et. seq. FRICO will not exercise the Subject Rights under a futile call condition when a call is placed below the Powell Spillway as such condition is determined by the Division Engineer pursuant to section 37-92-502(2)(a), C.R.S. The inclusion of the Powell Spillway in this paragraph is for reference to the point of administration only.

39. Maintenance of Seepage and Waste Water. To the extent FRICO's appropriation relies on seepage and waste water from upstream diversions, FRICO acknowledges that this decree does not give it a permanent right to the maintenance of the conditions giving rise to the availability of that water and, absent bad faith, any diminution in the timing and amount or any change in the location of discharge of such waste and seepage water shall not be the basis for FRICO to assert injury to the Subject Rights.

40. Final Location of the Beebe Canal Pump Station. The design and location of the Beebe Canal Pump Station described herein have not been finalized to provide distances from section lines and may change upon final construction of said structures. FRICO shall, without amending this Decree, provide the correct distances to section lines to reflect as-built locations in a decree to be entered during the earliest diligence proceeding when this information becomes available, provided: (1) the as-built location is in the quarter-quarter section identified in this decree or within five hundred (500) feet of the specified quarter-quarter section; and (2) there are no intervening surface diversion points not owned by FRICO between the originally proposed location and the as-built location. No later than thirty-five (35) days after the filing of a diligence application that provides the final designed location for the Beebe Canal Pump Station, FRICO shall serve notice of the filing of such application on all Opposers to this matter. If the final location of a surface diversion does not meet the requirements set forth above, FRICO shall file an application with the Water Court to revise the location for that structure.

41. No Sale or Lease of Subject Rights. FRICO shall not lease or sell the water diverted under the Subject Rights.

42. No Effect on 1921 Agreement among FRICO, Burlington, and Henrylyn. Nothing in this Decree shall be construed so as to abrogate, alter, supersede, or otherwise affect any legal rights and obligations set forth in the agreement dated July 1, 1921 among FRICO, Burlington, and Henrylyn.

43. No Right to Deliver Water to or through the Lower Latham System. Nothing in this decree shall be construed as necessitating, authorizing or allowing the delivery or release of water into the Morrison Seepage Ditch, the Lower Latham Reservoir, the Lower Latham Reservoir Outlet, Lower Latham Ditch or the Powell Spillway (“Lower Latham System”) or the delivery or release of water to and through the Lower Latham System for purposes of delivering the water to the South Platte River, without Lower Latham’s prior consent.

44. Decree Administrable. Upon entry by the Court, this Decree will be administrable by the Division Engineer for Water Division 1. So long as water is diverted and used in conformance with the terms and conditions of this Decree, there will be no injurious effects to the vested water rights or decreed conditional water rights of others.

45. Approval of Subject Rights. The Subject Rights are confirmed, adjudicated, approved, and decreed, subject to the terms and conditions of this Decree. Diversion and use of the Subject Rights will not injuriously affect any vested water right or decreed conditional water right, or the owners or persons entitled to use such water rights, provided the Subject Rights are operated and administered in accordance with the terms and conditions of this Decree. The Subject Rights are decreed as follows:

Point of Diversion	Rate Claimed (cfs)	Rate Absolute (cfs)	Rate Conditional (cfs)	Volume Claimed (ac-ft)	Volume Absolute (ac-ft)	Volume Conditional (ac-ft)	Appropriation Date
Bowles Seep	27.0	9.9	17.1	N/A	N/A	N/A	7/25/2011 (Abs) 4/18/2016 (Cond)
East Neres	43.0	25.0	18.0	N/A	N/A	N/A	7/2/2011 (Abs) 4/18/2016 (Cond)
Milton Lake	80.0	50.0	30.0	4,563	3,777	786	5/11/2015 (Abs) 4/18/2016 (Cond)
Barr Lake	12.0	0.0	12.0	2,805	0	2,805	4/18/2016

46. Future Applications for a Finding of Diligence. The conditional water rights adjudicated

herein shall remain in full force and effect until December 31, 2026. If FRICO desires to maintain such water rights, it must file an application for finding of reasonable diligence for the remaining conditional amounts decreed herein or to make the water rights absolute prior to or during the month of December 2026, and thereafter as required by law, unless previously decreed absolute in all respects. In all future diligence proceedings, FRICO shall have the burden of proving its need for the conditional portion of the water rights under any and all legal standards applicable to conditional water rights. *See e.g. Upper Eagle Regional Water Auth. v. Wolfe*, 371 P.3d 681 (Colo. 2016) and *Upper Yampa Water Conservancy Dist. v. Wolfe*, 255 P.3d 1180 (Colo. 2011).

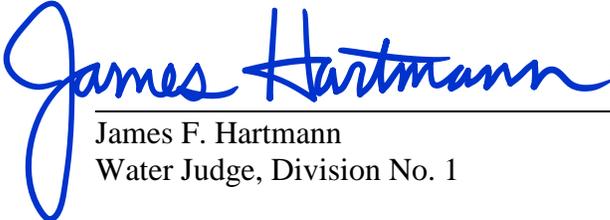
47. Administration. The application for the Subject Rights decreed herein was filed in the Water Court in 2016, and such the Subject Rights shall be administered as having been filed for in that year, and shall be junior to all water rights for which applications were filed in previous years. The appropriation dates confirmed herein for each of the Subject Rights shall establish the relative priority date of that water right as between all water rights for which applications were filed in that same calendar year.

48. Filing of Copies. A copy of this Ruling and Decree shall be filed with the Water Clerk for Water Division 1, and this Decree shall become effective upon filing. It is further ordered that a copy of this Decree shall be filed with the Division Engineer for Water Division 1 and with the State Engineer.

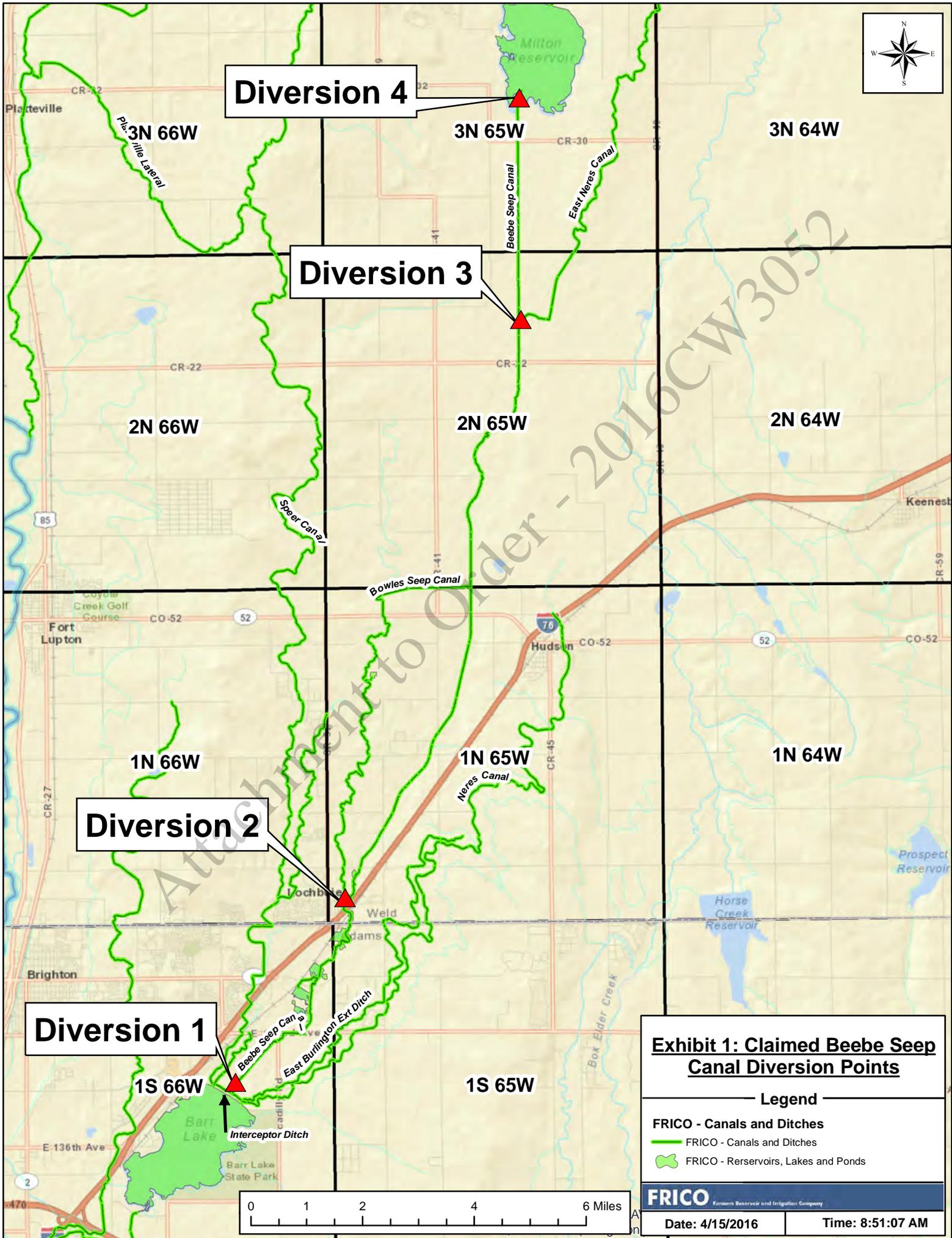
49. Exhibits 1 and 2 are attached to the Decree; however, Exhibit 3 cannot be attached to the Decree or uploaded into JPOD/CCE because of the size of the exhibit. Exhibit 3 is saved on the 19<sup>th</sup> Judicial District H-Drive in the Water Court files and an electronic copy may be obtained by contacting the Division One Water Court Specialist.

Dated: February 22, 2021.

BY THE COURT:

  
\_\_\_\_\_  
James F. Hartmann  
Water Judge, Division No. 1





DISTRICT COURT, WATER DIVISION NO. 1, STATE of COLORADO, Court Address: 901 9 <sup>th</sup> Avenue Greeley, Colorado 80631	DATE FILED: April 6, 2016 10:03:48 AM CASE NUMBER: 2016CW3052 <b>▲ COURT USE ONLY ▲</b>
CONCERNING THE APPLICATION FOR WATER RIGHTS OF:  <b>THE FARMERS RESERVOIR AND IRRIGATION COMPANY IN THE SOUTH PLATTE RIVER OR ITS TRIBUTARIES</b>  IN ADAMS AND WELD COUNTIES, COLORADO.	Case No. 2016 CW 3052 Courtroom No. 1
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF THE WATER COURT</b>	

This matter comes before the Court for ruling after trial. Farmers Reservoir and Irrigation Company (“FRICO” or “Applicant”) filed an application seeking a decree for conditional and absolute water rights for storage and direct use of seepage water accumulating to the Beebe Seep Canal system and Milton Reservoir from a variety of sources. Twenty parties initially filed statements of opposition to the application and the majority of opposers reached stipulations with FRICO prior to trial. The opposing parties participating at trial were: (1) East Cherry Creek Valley Water and Sanitation District (“ECCV”), Arapahoe County Water and Wastewater Authority (“ACWWA”), and United Water and Sanitation District (“United Water”), and these parties will be collectively referred to as “EAU” because their positions in this case are closely aligned; and Lower Latham Reservoir Company (“Lower Latham”), which participated at trial for a limited purpose of ensuring that its irrigation structures and water rights are not impacted by FRICO’s proposed water rights.

FRICO and United Water independently seek, through separate water court cases, to appropriate the seepage water accumulating to the Beebe Seep Canal system and Milton

Reservoir and FRICO's application in the present matter, if approved, would establish a priority date (April 18, 2016) one day senior to United Water's pending claims (filed on April 19, 2016). ACWWA and ECCV have agreements with United Water to use the seepage water as part of their respective water portfolios if United Water is successful in securing these water rights.

After considering the evidence presented at trial, the contents of the file, and the applicable legal standards, the Court finds that FRICO has met its burden of proof to establish absolute and conditional water rights to the seepage water accruing in the Beebe Seep Canal system and Milton Reservoir, when such seepage water is available for diversion in priority under this decree, in the amounts set forth in this ruling.

#### **I. FRICO OPERATIONS AND WATER RIGHTS CLAIMS**

FRICO provides water to over five hundred shareholders for irrigation of several thousand acres of land in Weld and Adams counties. FRICO's system includes four large lakes and reservoirs – Barr, Milton, Standley, and Marshall – and several smaller reservoirs. FRICO operations are divided into general geographical locations ("divisions") characterized by the reservoir serving as the centerpiece of the division. Water is delivered to shareholders through over four hundred miles of canals.

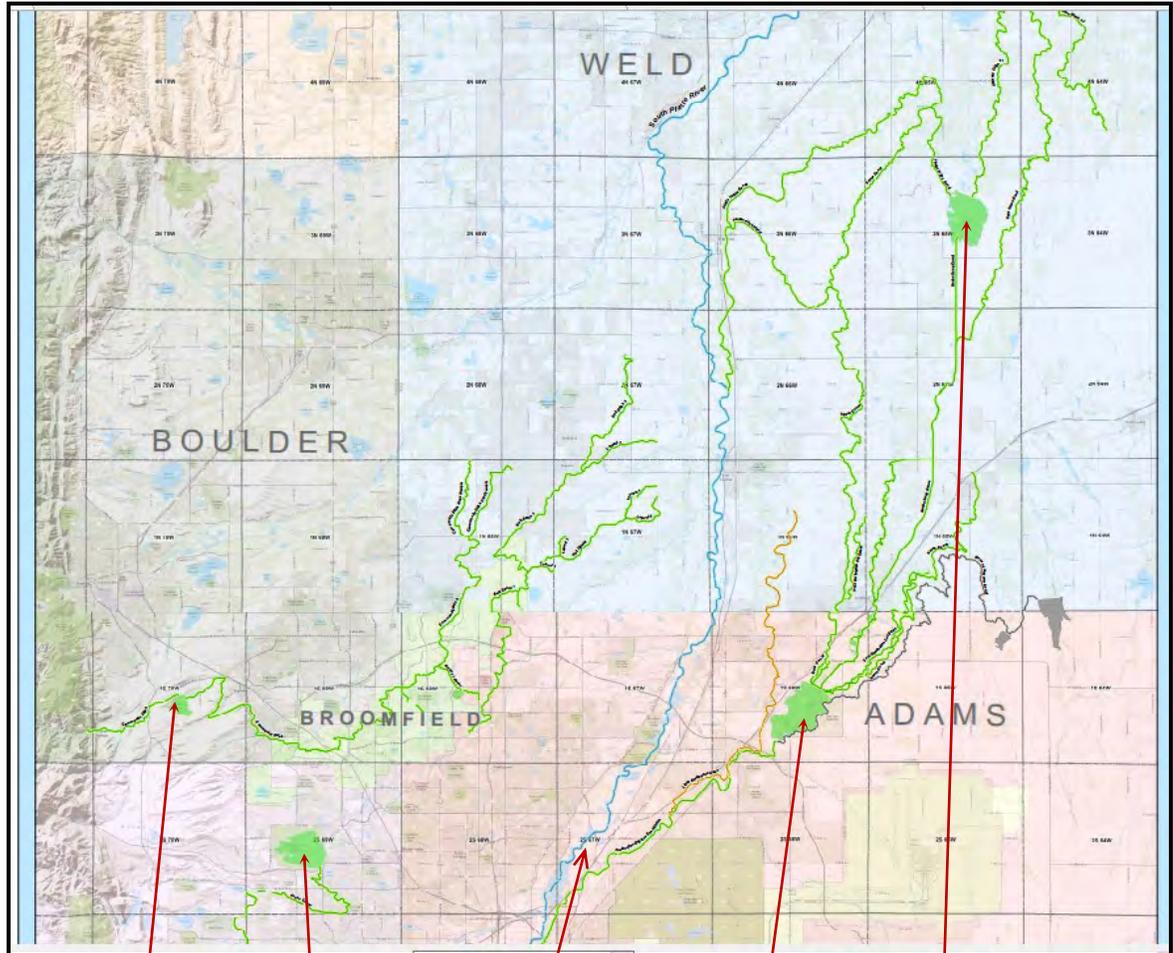
Marshall Lake and Standley Lake are located west of the South Platte River, while Barr Lake and Milton Reservoir are situated east of the South Platte River. FRICO shares are issued for each division separately and the shareholder receives water from the reservoir associated with a specific share. Most shareholders receive their water from one division, although there are some shareholders who hold shares in different divisions and receive water from multiple FRICO sources. The water rights FRICO seeks to appropriate in this case are in the Barr Lake and Milton Reservoir divisions of FRICO's operations.

FRICO also operates a municipal division through an agreement with Denver Water for 5,000 acre-feet (ac-ft) of fully consumable water that FRICO is in the process of

transferring to South Adams Water and Sanitation District in 2021.

Map A shows the general locations of FRICO's operations, with the four primary reservoirs and canals displayed in green.

**Map A**



Marshall Lake   Standley Lake   South Platte River   Barr Lake   Milton Reservoir

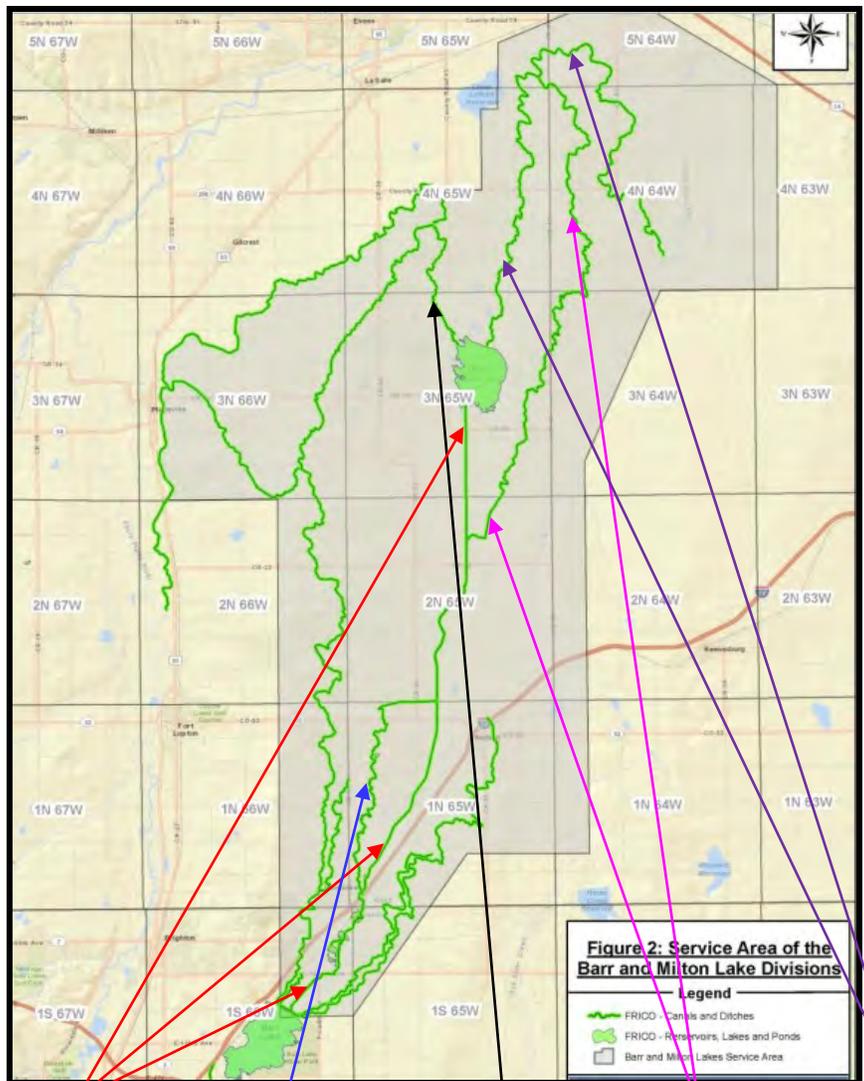
FRICO diverts water to fill Barr Lake from the South Platte River primarily through the Burlington Canal. FRICO can also divert water several miles downstream from the Burlington Canal through United Diversion Facility No.3, where the water is delivered through a pipeline to the Burlington-O'Brian Canal for delivery to Barr Lake. Other water users also store water in Barr Lake, such as the Burlington Ditch and Reservoir Co. and

ECCV. United Water and ECCV also hold water exchange plans that utilize Barr Lake.

Barr Lake is located approximately twenty miles south, or upstream, from Milton Reservoir. FRICO constructed the Beebe Seep Canal connecting Barr Lake and Milton Reservoir to deliver water to shareholders through diversion structures located between Barr Lake and Milton Reservoir, and this canal is also used by FRICO to transport water from Barr Lake to Milton Reservoir.

Map B below shows in gray shading the FRICO service area in the Barr and Milton Divisions, with the relevant canals labeled and marked with arrows.

**Map B**

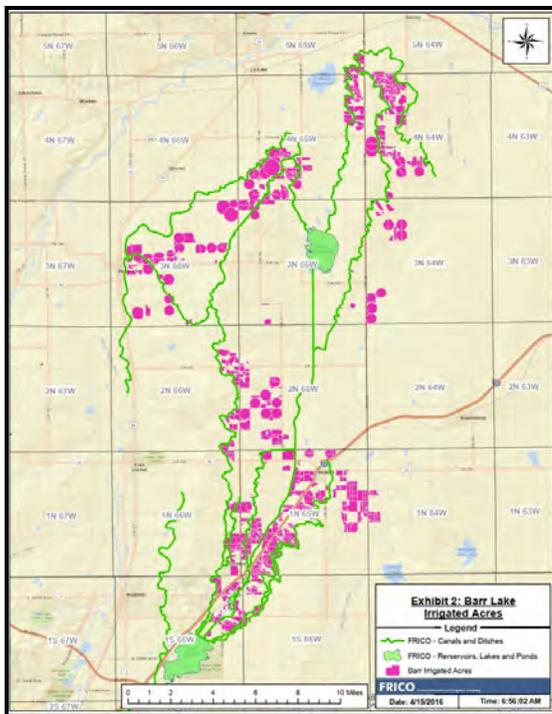


Beebe Seep Canal    Bowles Seep Canal    Platte Valley Canal    East Neres Canal    Gilmore Canal

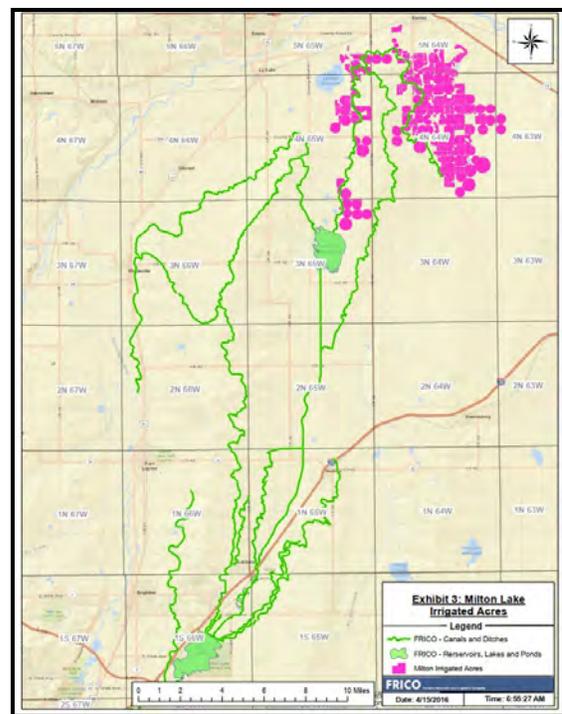
The Milton Lake Division primarily receives its water from the South Platte River through the Platte Valley Canal, but FRICO also holds a decree allowing water to be diverted through the Burlington Canal to Barr Lake, and the water is then carried downstream through the Beebe Seep Canal to Milton Reservoir.

FRICO has shareholders who receive their water from water rights decreed through Barr Lake, shown in purple on Map C, and other shareholders receive water decreed through Milton Reservoir, shown in fuchsia on Map D.

Map C



Map D



FRICO holds several decreed water rights for storage in Barr Lake and direct flow irrigation rights for its Barr Lake Division, as set forth in Table 1 below.

**Table 1-Barr Lake Division Water Rights**

<b>Absolute Water Rights that are Delivered below Barr Lake</b>			
<b>Water Right</b>	<b>Decreed Rate/Amount</b>	<b>20-yr Annual Average Barr Lake Release Limit (ac-ft)<sup>6</sup></b>	<b>Pro rata 20-yr Average Barr Lake Release Limit for Unchanged shares(ac-ft)<sup>7</sup></b>
1885 Storage Right	10,573 ac-ft <sup>1</sup>	5,456	4,544
1909 Storage Right	19,484 ac-ft <sup>2</sup>	11,616	10,347
1909 Refill Right	30,057 ac-ft <sup>3</sup>		
1908 Direct Right	600 cfs	4,621	4,116
84CW090 Water Right	900 cfs 10,000 ac-ft/yr at all decreed div. pts. <sup>4</sup>	---	---
2002 Multipurpose Right	900 cfs 15,000 ac-ft/yr at all decreed div. pts. <sup>5</sup>	---	---
<b>TOTAL</b>		<b>21,693</b>	<b>19,007</b>

The third column of Table 1 reflects the twenty-year average Barr Lake release limits placed on FRICO in the 2002CW403 decree. These release limits apply to FRICO’s 1885 storage right, the 1909 storage right, and the 1908 direct flow right, but the release limits do not apply to FRICO’s 84CW90 right and the 2002 multipurpose right. The maximum amount of water FRICO can release each year from Barr Lake is 21,693 ac-ft, which is significantly less than the maximum amount of water FRICO can store in Barr Lake under the 1885 and 1909 water rights, as shown in the second column of Table 1. There could be occasions when Barr Lake contains FRICO water, but FRICO cannot release the water for shareholder use because FRICO has reached its release limit for the irrigation season. Thus, FRICO must manage its Barr Lake Division water resources very carefully.

In addition to the Barr Lake Division water rights listed in Table 1, FRICO owns two decreed water rights in the Milton Reservoir Division: a May 29, 1909 storage right of 21,695 ac-ft in Milton Reservoir and a June 9, 1909 direct flow right of 215 cubic feet per second (cfs) of water from the South Platte River through the Platte Valley Canal. There are several wells used by FRICO shareholders that supplement surface water deliveries with 3,000 to 3,400 ac-ft of groundwater per year.

FRICO monitors the amount of water stored in its reservoirs daily and receives information on the snowpack level throughout the year, and then estimates prior to the start of the irrigation season (typically April 1) the amount of water to be allocated per share. This figure can be adjusted higher or lower during the irrigation season based on available water supplies, free river water, and weather conditions. Each shareholder is entitled to a pro rata allocation of the available reservoir water based on their share ownership. Direct flow water does not count against a shareholder's allocation of reservoir water. There have been years when FRICO delivered water to shareholders prior to April 1, depending upon availability of water and the need of shareholders.

Although FRICO holds direct flow rights and there are times when its 1908 Barr Lake Division direct flow right would otherwise be in priority, FRICO often opts to receive water under the more junior 1909 storage right in lieu of diverting the 1908 direct flow right to ensure that Barr Lake fills with FRICO water.

FRICO is a water-short system, meaning that shareholders do not receive enough water from all sources presently available to meet the consumptive use needs of their crops. Even with the addition of the seepage water sought in this case to the supply, FRICO shareholders will still not have enough water to meet the full irrigation needs of their crops. EAU concedes that FRICO is a water-short system.

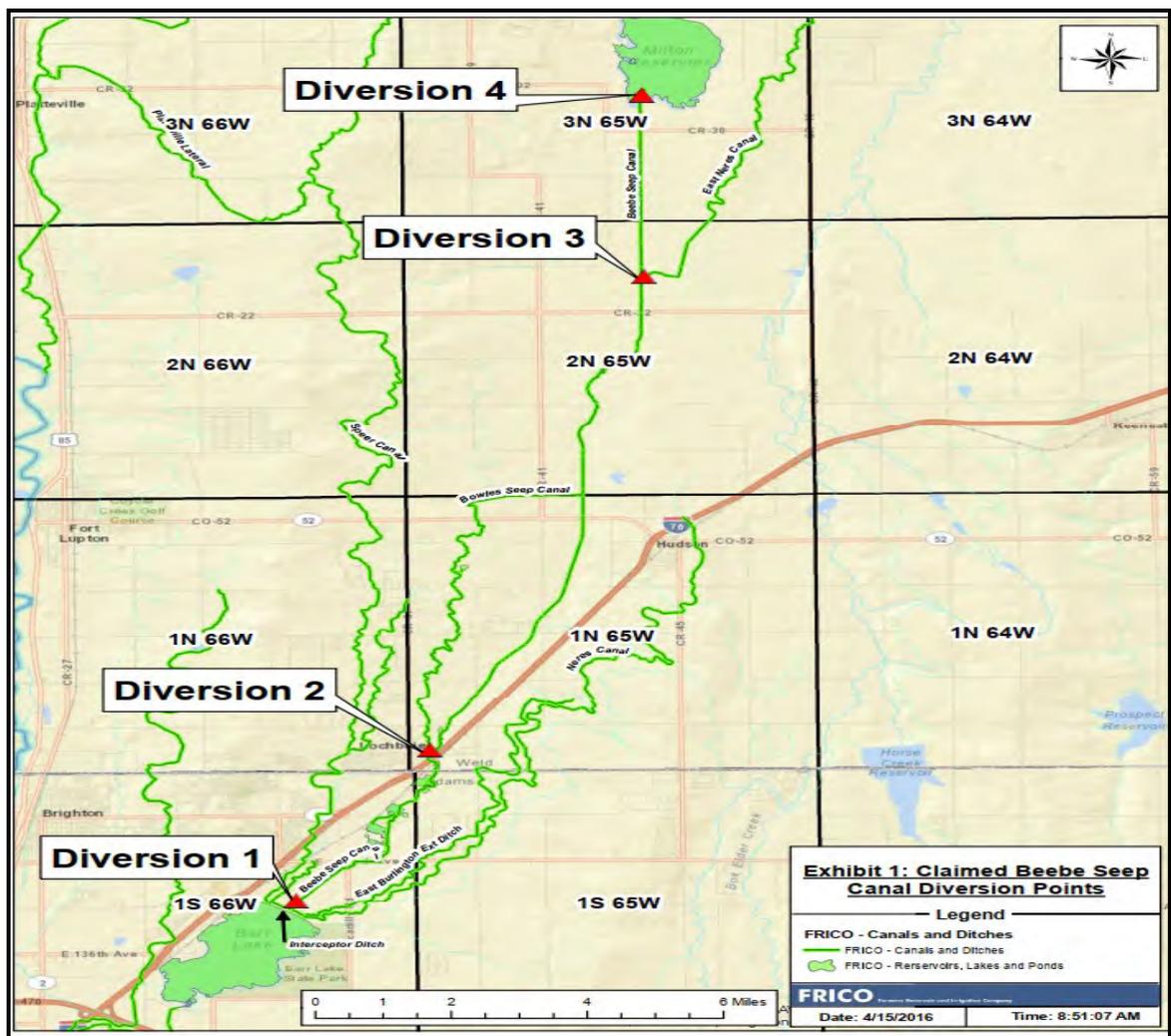
FRICO has been utilizing seepage water accruing to the Beebe Seep Canal for decades without a decree under the misconception that its previous decrees allowed for such use. For example, FRICO has previously used seepage water to account for carriage loss as water was transported from Barr Lake along the Beebe Seep Canal. FRICO often delivered to shareholders the full amount of water released from Barr Lake without deducting for carriage loss, thereby utilizing the seepage water accruing to Beebe Seep Canal for shareholder use. This court has informed FRICO in written orders on two separate occasions, in case numbers 2002CW403 and 2010CW306, that FRICO does not have a decreed right to use the seepage water accruing to the Beebe Canal.

FRICO filed the application in this case to obtain a decree to use the seepage water

within the priority system. The water rights claimed by FRICO in this case are located between Barr Lake and Milton Reservoir and consist of: (1) seepage from Barr Lake that is discharged to the Beebe Seep Canal through the Barr Lake toe drains and underflow from Barr Lake that is collected in the interceptor ditch below the Barr Lake dam; and (2) natural runoff, drainage, waste, return flows, and seepage water arising in, flowing into, accumulating in, and accruing to the Beebe Seep Canal system and Milton Reservoir. FRICO seeks to use this water for storage and direct use.

FRICO proposes four diversion points along the Beebe Seep Canal, shown as Diversions 1 through 4 on Map E.

Map E



Diversion 1 is the Beebe Canal Pump Station, which has not yet been constructed, and FRICO intends to pump water collected at this station back to Barr Lake for subsequent storage in either Barr Lake or Milton Reservoir, and to later release the water for irrigation use by shareholders. FRICO claims a 15 cfs conditional flow right through Diversion 1, with a conditional volumetric limit of 3,200 ac-ft per year.

Diversion 2 is located at the junction of Beebe Seep Canal and the Bowles Seep Canal, and the seepage water diverted at this location will be used for irrigation of shareholder lands located down the canal. FRICO claims 9.9 cfs absolute and 20.1 cfs conditional, for a total of 30 cfs. FRICO owns and operates the Bowles Seep Canal.

Diversion 3 is located on the Beebe Seep Canal at the headgate of the East Neres Seep Canal, where FRICO intends to divert water for use by shareholders along the East Neres Canal. FRICO claims 25 cfs absolute and 20 cfs conditional, for a total of 45 cfs at Diversion 3. FRICO owns and operates the East Neres Seep Canal.

Finally, Diversion 4 is located at the inlet of Milton Reservoir and FRICO claims that 52 cfs has been made absolute, with an absolute yearly volumetric limit of 3,777 ac-ft. FRICO also claims a conditional right of an additional 28 cfs and 1,233 ac-ft of storage, for a total claim of 80 cfs and 5,000 ac-ft of storage per year in Milton Reservoir.

FRICO acknowledges that seepage water accrues to the Beebe Seep Canal at times when the water would not be in priority for FRICO to divert and use. FRICO entered into a partial stipulation with the State and Division Engineers (“Engineers”) that involves several alternative methods that FRICO can account for these out-of-priority seepage inflows (which the parties referred to with the acronym “OOPSI” or “OPP” water during trial and in their closing briefs), and for the Engineers to ensure that FRICO does not use the out-of-priority seepage inflow water. EAU does not believe the stipulation between FRICO and the Engineers adequately addresses the risk of FRICO using seepage water out-of-priority, and EAU seeks additional decree provisions to protect against injury. EAU also

requests additional provisions in the decree to ensure that FRICO does not divert ECCV's water located in the Beebe Seep Canal system that ECCV applies to its recharge obligations for well pumping.

## II. GENERAL FINDINGS APPLICABLE TO THIS ORDER

The Court enters the following general findings that apply to the findings made and conclusions reached in other parts of this order:

- A. FRICO and EAU are embroiled in pending litigation in several cases in Water Division One involving water in the Beebe Draw area, which includes the water at issue in this case. Although invited to do so by EAU, the Court will not be addressing in this order whether FRICO's use of other sources of water is lawful or not. The focus of this case, as set forth in FRICO's application for water rights, are FRICO's claims to appropriate water seeping from Barr Lake and the natural runoff, drainage, waste, return flows, and seepage water arising in, flowing into, accumulating in, and accruing to the Beebe Seep Canal system.
- B. The Court received testimony from FRICO's expert witness, Ms. Thompson, and EAU's expert witness, Mr. Bliss. Both are very qualified and experienced engineers. Based on the totality of the evidence presented in this case, the Court finds Ms. Thompson's testimony more persuasive than Mr. Bliss' testimony, with a few exceptions related to estimates of water availability made by Ms. Thompson that were higher than the data presented at trial. The Court finds her overall approach to calculate the amounts of seepage and other sources of inflow water was reasonable and produced reliable results, including the mass-balance approach she used prior to the installation of measuring devices for the Bowles Seep Canal and the East Neres Canal. The Court further finds that Ms. Thompson conducted extensive research of the records pertaining to water availability, storage in various structures, and use of water by FRICO shareholders. Mr. Bliss and EAU attorneys often focused on minute details in an

attempt to discount or discredit Ms. Thompson's overall analyses, causing both Mr. Bliss and EAU in this particular case to lose sight of the bigger picture at times. The Court recognizes that these parties are engaged in highly contested legal matters and each party is motivated to gather every available drop of water for their clients; however, the Court simply was not persuaded by the majority of the evidence and arguments presented by EAU in this action.

- C. This case and United Water's application to appropriate the same sources of water resulted in a race between FRICO and EAU to be the first to obtain rights to the seepage water. As a result, FRICO was pressed to gather data during a condensed time period to support certain of its claims at trial. There were several instances, as explained in more detail in later sections of this order, when Ms. Thompson provided an estimate of available water that exceeded the amount of water actually measured and recorded in the field. These are the instances, as mentioned in the previous paragraph, when the Court will not adopt Ms. Thompson's opinions; instead, the Court will rely on the data that was presented at trial.

### III. LEGAL STANDARDS

#### A. Absolute Water Right Claims.

An "appropriation" of water occurs when a specified portion of waters of the state have been applied to a beneficial use. C.R.S. §37-92-103(3)(a). Water is "diverted" when it is removed from its natural course or location, or by controlling water in its natural course or location, by means of a device or structure, such as a ditch, canal, or reservoir. C.R.S. §37-92-103(7). "Beneficial use" is defined as the use of "that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation was lawfully made." C.R.S. §37-92-103(4). The court may issue a decree for a water right "to the extent that the waters [claimed in the

application] have been diverted, stored, or otherwise captured, possessed, and controlled and have been applied to beneficial use ....” C.R.S. §37-92-305(9)(a).

B. Conditional Water Rights Claims

A conditional water right is defined as “a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.” C.R.S. § 37-92-103(6). A conditional water right “reserves an applicant’s position in the priority system while the applicant takes the necessary steps (such as obtaining financing, complying with regulatory and access requirements, and completing engineering, etc.) to put the appropriated water to beneficial use.” *Vermillion Ranch Ltd. P’ship v. Raftopolous Bros.*, 307 P.3d 1056, 1064 (Colo. 2013) (citing *City of Black Hawk v. City of Central*, 97 P.3d 951, 956 (Colo. 2004)).

The water court may only recognize a conditional water right and issue a decree if the applicant establishes that the water can and will be diverted, stored, or otherwise captured or possessed, the water will be beneficially used, and the project can and will be completed with diligence within a reasonable period of time. C.R.S. § 37-92-305(9)(b). To obtain a conditional water right, an applicant must demonstrate that: (1) it has taken a “first step,” including an intent to appropriate the water and an overt act manifesting such intent; (2) its intent is not based upon a speculative sale of water to be appropriated; and (3) a substantial probability exists that it “can and will” complete the application with diligence and within a reasonable time. *Id.* (citing *City of Aurora v. ACJ P’ship*, 209 P.3d 1076, 1083 (Colo. 2009); *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 314 (Colo. 2007) (*Pagosa I*)).

A basic tenet of Colorado water law holds that the right to appropriate does not include the right to speculate. *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979). The anti-speculation doctrine states that no appropriation shall be “based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation.” C.R.S. § 37-92-103(3)(a). The appropriator must

have “a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.” *Id.* § -103(3)(a)(II).

Accordingly, an applicant for a conditional water right must “substantiate a need for the claimed water’ by showing a sufficient ‘relationship with those who are to put the water to a beneficial use.’” *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794, 799 (Colo. 2011) (quoting *Rocky Mountain Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383, 388 (Colo. 1982)). “[T]he concept of ‘need’ has historically been integral, even if not always emphasized, to the limitation of an appropriation to uses, and amounts, for which the purported appropriator’s existing water rights are insufficient.” *Upper Yampa*, 249 P.3d at 799. “[A] purported appropriator’s existing water rights cannot be considered ‘insufficient’ merely because they are inadequate to cover speculative sales or transfers entered into by the appropriator.” *Id.* at 800. “An applicant for a conditional water right must, therefore, demonstrate that it needs the amount of water it claims; and where the applicant relies on contractual obligations to demonstrate that its existing water rights are inadequate to satisfy its needs, it must prove the existence of a specific plan and intent to put the contracted-for amount of water to a beneficial use . . . .” *Id.*

#### IV. ANALYSIS

##### A. *FRICO’s Absolute Water Rights Claims*

The Court finds that FRICO diverted seepage water and placed the water to beneficial use for the Bowles Seep Canal and East Neres Canal claims, in the amounts set forth in this section. Although EAU challenges FRICO’s claims that water was placed to beneficial use because Ms. Thompson did not observe the shareholders using the water, FRICO accounting confirms that water was delivered to shareholders in the amounts the shareholder requested, and a portion of the water delivered to shareholders was the seepage water diverted in priority. In a water-short system such as FRICO’s, when a farmer requests water there is a reasonable inference that the farmer applied the full amount of

water delivered to the farmer's fields. As testified to at trial, FRICO ditch riders and other FRICO shareholders keep close tabs on the amount of water delivered to shareholders and they monitor how the water is being used. This practice of oversight by ditch riders and other shareholders adds to the circumstantial evidence that FRICO shareholders beneficially used the seepage water diverted in priority to the Bowles Seep and East Neres canals.

FRICO proved that it diverted 1.1 cfs of seepage water at the Bowles Seep Canal on July 25, 2011, which shall be the priority date for the absolute claim for seepage water to the Bowles Seep Canal, and FRICO diverted 9.9 cfs at the Bowles Seep Canal on July 30, 2011, and 9.9 cfs shall be the amount of FRICO's absolute water right for seepage water at the Bowles Seep Canal.

The evidence presented at trial also established that FRICO diverted 4.2 cfs of seepage water at the East Neres Canal on July 2, 2011, which shall serve as FRICO's appropriation date, and a total amount of 25 cfs of seepage accruals on July 28, 2015, which shall be the amount of FRICO's absolute right to seepage water accruing to the East Neres Canal.

As shown on Map B on page 4 of this order, the East Neres Canal is located downstream from many of the FRICO shareholders receiving water in the Barr Lake Division, as shown on Map C on page 5. The same can be said for shareholders receiving seepage water accruals through diversions from the Bowles Seep Canal. This does not mean that the seepage water must be viewed as only benefiting a handful of FRICO shareholders, as argued by EAU. Although upstream shareholders won't be able to directly receive the seepage water accruing to the Bowles Seep or East Neres canals, those shareholders nevertheless will benefit from this additional water being available in the FRICO system. The entire FRICO system experiences a shortage of water, and therefore additional water entering the system at the middle and lower end of the FRICO delivery system means that less water is needed to flow from Barr Lake or Milton Reservoir to those shareholders, resulting in more water being available for application by the upstream

shareholders.

The Court finds that FRICO also proved the Milton Reservoir absolute claim of 3,777 ac-ft, which was diverted and placed to beneficial use by FRICO in 2015. The priority date for the absolute storage right will be May 11, 2015. The Court further finds that FRICO proved a flow rate of 50 cfs of water was diverted by FRICO at the Milton Reservoir Inlet. The priority date for the absolute rights for storage and flow rate at the Milton Reservoir Inlet will be May 11, 2015.

Water year 2015 was a very wet year with very few calls being placed on the South Platte River. EAU presented evidence that FRICO elected not to divert water under its 1909 water right to storage in Milton Reservoir, even though that water right would have been in priority for all but a handful of days in 2015; instead, FRICO chose to store the seepage water accruing at the Milton Inlet and EAU asserts that FRICO may not hoard water rights to the detriment of other water users, when FRICO's 1909 senior Milton Reservoir storage water right was in priority but not utilized. EAU cites to the rulings in *Upper Eagle Regional Water Auth. v. Wolfe*, 371 P.3d 681 (Colo. 2016) and *Upper Yampa Water Conserv. Dist. v. Wolfe*, 255 P.3d 1108 (Colo. 2011), which involved claims for conditional water rights, for the proposition that a water user must prove the need for the water before any water right may be approved. EAU argues that FRICO is intentionally manipulating the priority system to the disadvantage of EAU and other prospective appropriators of the seepage water in Beebe Draw.

The Court disagrees with EAU in this instance. Although Milton Reservoir typically fills each year, there are occasions when FRICO is unable to fill the reservoir with its existing sources. FRICO holds a single-fill right in Milton Reservoir and it certainly benefits FRICO to ensure the reservoir fills each year. There is not enough water in Milton Reservoir, even when filled to capacity, to provide enough water for the crops grown on the 14,000 acres in the Milton Reservoir division. There may be times when FRICO chooses to apply the 2015 seepage right decreed in this case to storage in Milton Reservoir and the reservoir fills to capacity early in the year. This may result in 3,777 ac-ft of water that

FRICO would otherwise be entitled to divert under its 1909 Milton Reservoir storage right remaining in the South Platte River for use by other water users. Thus, water will not be wasted if FRICO uses the 2015 Milton Reservoir seepage right.

The Court further finds that FRICO may benefit operationally by having the option of using the seepage water accruing to Milton Reservoir. There may be times when maintenance or repairs are needed to the Platte Valley Canal and water cannot physically be transported under the 1909 water right. The seepage right, when in priority, would allow FRICO to store water in Milton Reservoir when water from the 1909 right was not available.

And finally, if the 2015 Milton Reservoir seepage water right is not in priority or FRICO elects not to divert that water, the water remains part of the South Platte River system and it is subject to use by other water users within the priority system. FRICO's partial agreement with the Engineers, as discussed further in Section IV(D) below, sets forth requirements for FRICO to account for out-of-priority diversions of seepage water. The provisions of the partial agreement will be incorporated into the final decree and will prevent injury to other water users.

*B. FRICO's Conditional Water Right Claims*

After filing the application in this case and through negotiations with several of the parties, FRICO adjusted its appropriation dates for all conditional water rights sought in this case to April 18, 2016, which is the date the application was filed. FRICO had initially listed earlier appropriation dates for three of the four conditional water rights. EAU argues that FRICO should be required to prove the appropriation dates originally listed in the application, rather than FRICO's agreement with other opposing parties to use the date the application was filed as the appropriation dates. FRICO believes this argument is simply an attempt by EAU to have the application dismissed so United Water's claims to this water can move up a rung on the priority ladder. FRICO requests the Court to rule that C.R.C.P. 15(b) applies here, in that EAU knew prior to trial that FRICO would be using

April 16, 2016 as a priority date for all of its conditional water right claims, and by not raising this issue until its closing brief, that EAU impliedly consented to this issue being tried.

The Court agrees with FRICO that EAU, at the very least, impliedly consented to FRICO using April 16, 2016 as the priority date for its conditional water rights claims, based on pretrial negotiations between FRICO and the opposing parties. Moreover, FRICO listed April 16, 2016 as the priority date for one of the four conditional water rights claims in the application (the Beebe Seep Canal Pump Station). The Court further finds that FRICO's request to use April 18, 2016 as the appropriation date for all four of the conditional water rights, which is a date later in time than dates FRICO initially included in the application for three of the four conditional water rights claims, will not injure any party to this action or any other water users.

FRICO has shown that it can and will place seepage water accruing in priority to the Beebe Seep Canal system and Milton Reservoir to beneficial use for irrigation use by shareholders. As referenced previously in this order, water supplies currently available to FRICO shareholders are insufficient to meet the full crop irrigation requirements even if the Court approves the full amount of water claimed by FRICO in the present application.

FRICO has also proven that it will complete the necessary steps to construct the Beebe Seep Canal Pump Station (Diversion 1) within a reasonable time after the conditional water right is approved. FRICO has available revenue to construct this pump station. The structures necessary to divert water for the conditional water rights at the other three diversion points already exist.

The Court will next address the amount of water FRICO has shown is available for diversion under the conditional water rights claims at each of the four proposed diversion points.

FRICO's conditional water rights for the four diversion stations along the Beebe Seep Canal are subject to calls from senior surface water rights in the Beebe Draw and the Powell Spillway on the South Platte River. FRICO obtained information from the State

Engineer’s South Platte River Call database to determine the number of days between 2007 and 2015 that water would have been available for diversion by FRICO at the four proposed Beebe Seep Canal diversion points, because there were no calls from senior water right users on these days. The number of days water was available for diversion during this nine-year study period is contained in Table 2.

**Table 2: Days Water Available for Diversion**

Year	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Total
2007	0	7	10	7	0	6	31	15	0	0	7	0	83
2008	0	14	21	0	0	0	2	0	0	3	0	0	40
2009	0	10	0	0	0	7	5	29	10	8	7	31	107
2010	30	31	31	10	27	27	31	27	0	4	0	8	226
2011	0	0	29	28	15	0	16	30	31	9	15	31	204
2012	30	31	31	29	26	0	0	0	0	0	0	0	147
2013	0	0	0	0	0	0	0	0	0	0	19	31	50
2014	6	30	31	28	31	21	20	30	6	20	30	31	284
2015	30	31	31	28	31	21	31	30	31	8	15	31	318
<b>Average</b>	<b>11</b>	<b>17</b>	<b>20</b>	<b>14</b>	<b>14</b>	<b>9</b>	<b>15</b>	<b>18</b>	<b>9</b>	<b>6</b>	<b>10</b>	<b>18</b>	<b>162</b>

FRICO also determined the amount of water physically available at the Beebe Seep Canal Pump Station (Diversion 1) during the study period of 2007-2015, which averaged 3,165 ac-ft per year. FRICO then calculated the amount of water that was both physically and legally available for diversion during the study period, which averaged 1,474 ac-ft, as shown in Table 3.

**Table 3: Water Physically and Legally Available at Beebe Canal Pump Station (ac-ft)**

Year	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Total
2007	0	42	68	53	0	60	307	149	0	0	69	0	747
2008	0	106	160	0	0	0	19	0	0	18	0	0	303
2009	0	93	0	0	0	77	45	261	90	72	63	225	927
2010	211	259	288	96	250	255	367	283	0	42	0	35	2,085
2011	0	0	371	358	192	0	166	232	236	69	104	221	1,949
2012	253	269	277	269	241	0	0	0	0	0	0	0	1,309
2013	0	0	0	0	0	0	0	0	0	0	112	310	422
2014	50	261	334	277	302	201	239	368	81	201	257	150	2,721
2015	129	194	314	273	314	217	320	336	353	87	75	193	2,805
<b>Average</b>	<b>71</b>	<b>136</b>	<b>201</b>	<b>147</b>	<b>144</b>	<b>90</b>	<b>162</b>	<b>181</b>	<b>85</b>	<b>54</b>	<b>76</b>	<b>126</b>	<b>1,474</b>

FRICO plans to deliver water back into Barr Lake from the Beebe Seep Canal Pump, so there must be available space in Barr Lake for storage of this water. FRICO reviewed the accounting forms for Barr Lake between 2007 and 2015 to determine how much available storage space existed each month over the study period. FRICO calculated the amount of water legally and physically available at the Beebe Seep Canal Pump Station when there was available storage space in Barr Lake, which averaged 1,228 ac-ft per year over the study period. These calculations are shown in Table 4.

**Table 4: Available Water Limited by Available Storage Space in Barr Lake (ac-ft)**

Year	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Total
2007	0	42	68	53	0	0	0	0	0	0	69	0	232
2008	0	106	160	0	0	0	19	0	0	18	0	0	303
2009	0	93	0	0	0	77	45	93	90	72	63	225	758
2010	211	259	288	96	250	255	367	204	0	42	0	35	2,006
2011	0	0	371	358	192	0	166	232	0	69	104	221	1,713
2012	253	269	0	269	241	0	0	0	0	0	0	0	1,032
2013	0	0	0	0	0	0	0	0	0	0	112	310	422
2014	50	261	0	0	302	201	239	37	81	201	257	150	1,779
2015	129	194	314	273	314	217	320	336	353	87	75	193	2,805
<b>Average</b>	<b>71</b>	<b>136</b>	<b>133</b>	<b>116</b>	<b>144</b>	<b>83</b>	<b>128</b>	<b>100</b>	<b>58</b>	<b>54</b>	<b>76</b>	<b>126</b>	<b>1,228</b>

The Court finds that FRICO has shown that water is legally and physically available at the location where the Beebe Seep Canal Pump Station will be constructed, and that there is available space in Barr Lake to store the water at various times during the year. Although the average available storage space in Barr Lake over the nine-year study period was 1,228 ac-ft, FRICO could have stored 2,805 ac-ft of water in 2015. On the other end of the spectrum, FRICO would have only been able to store 232 ac-ft of water in 2007, based on the available storage space that year.

FRICO has requested a conditional water right to store 3,200 ac-ft, based on the limited nine-year study period and FRICO's belief that there may have been years outside of the study period when more water was physically and legally available for diversion and could have been physically stored in Barr Lake. It would be speculative for the Court to agree with FRICO's estimate absent evidence to support this theory; therefore, the Court

will approve a conditional water right to FRICO at the Beebe Seep Canal Pump Station (Diversion 1) of 2,805 ac-ft, which was the maximum volume of water FRICO proved was legally and physically available for diversion and could have been stored in Barr Lake.

FRICO used two flumes on the Beebe Seep Canal to measure the amount of water flowing from the toe region of Barr Lake. One flume is located one mile downstream and FRICO measured a flow rate of 12 cfs at this location. The second flume is located two miles downstream and the flow rate was measured there at 15 cfs. FRICO requests the Court approve a conditional flow rate of 15 cfs.

The flumes used by FRICO to measure flow rate are located one and two miles downstream from Barr Lake. FRICO measured flow at 12 cfs at the flume located closer to where the Beebe Seep Canal Pump Station will be constructed, while the flow measured at flume located further downstream was 15 cfs. The logical conclusion is that water accrued to the canal between the two flumes from seepage or other water sources, rather than through the toe drain of Barr Lake, which is the source of water claimed by FRICO for Diversion 1 in this application. FRICO did not present any evidence to support a finding that the flow rate at the location of the pump station will be 15 cfs; however, there was evidence presented to show that a flow rate of 12 cfs will occur below Barr Lake. The Court approves a conditional flow rate to FRICO of up to 12 cfs at the Beebe Seep Canal Pump Station.

Diversion 2 is located at the junction of the Beebe Seep Canal and the Bowles Seep Canal. FRICO proved that it diverted and placed to beneficial use 9.9 cfs in the Bowles Seep Canal on July 30, 2011. In April 2016, FRICO measured flow in the Bowles Seep Canal during a free river period of 27 cfs at a flume located slightly downstream of the Bowles Seep Canal headgate.

Diversion 3 is located at the point where the East Neres Canal meets the Beebe Seep Canal. FRICO installed a flume in the East Neres Canal below the headgate leading into the East Neres Canal in 2015. Water flow measurements taken at that flume during free river conditions in April 2016 showed 43 cfs of seepage water entered the East Neres Canal.

Ms. Thompson spoke with a FRICO employee who reported to her that he observed more than 27 cfs in the Bowles Seep Canal and 43 cfs in the East Neres Canal in September 2013 after extreme rain events. Based on these statements, Ms. Thompson estimated that it is likely that 30 cfs of seepage water was flowing into the Bowles Seep Canal and 45 cfs of seepage flowed into the East Neres Canal in September 2013.

The Court notes that the September 2013 historical rainfall resulted in significant flooding over widespread areas of Weld County, although it is not known to what extent the Beebe Draw area was impacted by flooding. Nonetheless, the Court will rely on the measured seepage water flows from 2016 of 27 cfs for the Bowles Seep Canal and 43 cfs for the East Neres Canal, rather than the higher estimates provided by Ms. Thompson that were based on an employee's observations and visual estimates on flow rates. This results in a conditional water right of 17.1 cfs for the Bowles Seep Canal (27 cfs minus 9.9 cfs found to be absolute) and a conditional right of 18 cfs for the East Neres Canal (43 cfs minus 25 cfs found to be absolute).

Diversion 4 is the inlet structure to Milton Reservoir (the "Milton Inlet"). The physical water holding capacity of Milton Reservoir is 21,695 ac-ft. As discussed in the previous section of this order, FRICO holds a single-fill water right in Milton Reservoir and there is no right to a refill. Even at full capacity, the water in Milton Reservoir is insufficient to meet the irrigation needs of the roughly 14,000 acres that are irrigated in the Milton Reservoir division. FRICO also relies on its direct flow rights through the Platte Valley Canal, but there remains a water shortage even when the direct flow rights are applied. It is of great benefit to FRICO and its shareholders for Milton Reservoir to fill every year, which is why FRICO seeks to add seepage water as a source to ensure that Milton Reservoir fills every year.

FRICO calculated the amount of seepage water physically available at the Milton Inlet by measuring the total amount of water flowing into Milton Reservoir at the inlet and then subtracting the amount of water that was delivered from Barr Lake. The amount of water physically available during the 2009-2015 study period averaged 4,111 ac-ft per year.

After calculating the amount of seepage water physically available at the Milton Inlet, FRICO determined the amount of water that was both physically available and could have been diverted in priority, i.e. when the water was “legally available” for diversion based on the information contained in Table 2, located on page 18 of this order. There was an average of 2,827 ac-ft of water legally and physically available during the study period, as shown in Table 5 below. The highest volume of seepage water legally and physically available at the Milton Inlet during the study period was 4,563 ac-ft, which occurred in 2015.

**Table 5 Water Physically and Legally Available at Milton Reservoir Inlet (ac-ft)**

Year	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Total
2009	0	87	0	0	0	247	126	340	78	22	0	0	900
2010	0	42	383	248	521	679	673	549	0	0	0	37	3,132
2011	0	0	723	640	287	0	481	180	605	136	23	452	3,527
2012	538	13	791	657	339	0	0	0	0	0	0	0	2,338
2013	0	0	0	0	0	0	0	0	0	0	301	531	832
2014	74	670	850	643	638	60	470	110	75	211	135	559	4,494
2015	411	556	484	735	511	405	769	188	482	8	0	13	4,563
<b>Average</b>	<b>146</b>	<b>195</b>	<b>462</b>	<b>417</b>	<b>328</b>	<b>199</b>	<b>360</b>	<b>195</b>	<b>177</b>	<b>54</b>	<b>65</b>	<b>227</b>	<b>2,827</b>

FRICO then calculated the amount of storage space available in Milton Reservoir when water was physically and legally available at the Milton Inlet, which averaged 1,547 ac-ft over the 2009-2015 study period, as shown in Table 6.

**Table 6 Available Water Limited by Storage Space in Milton Reservoir (ac-ft)**

Year	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Total
2009	0	87	0	0	0	0	0	0	32	22	0	0	141
2010	0	42	383	248	32	0	0	0	0	0	0	37	742
2011	0	0	723	640	0	0	0	0	0	136	23	452	1,974
2012	538	13	791	657	0	0	0	0	0	0	0	0	1,999
2013	0	0	0	0	0	0	0	0	0	0	301	531	832
2014	74	670	850	643	0	0	0	0	0	211	135	559	3,142
2015	411	556	484	47	0	0	0	0	482	8	0	13	2,001
<b>Average</b>	<b>146</b>	<b>195</b>	<b>462</b>	<b>319</b>	<b>5</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>73</b>	<b>54</b>	<b>65</b>	<b>227</b>	<b>1,547</b>

The maximum amount of water that was legally and physically available that could

have been stored in Milton Reservoir during the study period was 3,142 ac-ft in 2014, and the minimum amount was 141 ac-ft in 2009.

As was requested for Barr Lake, FRICO seeks to increase the amount of the Milton Inlet (Diversion 4) conditional right to 5,000 ac-ft; however, FRICO did not provide facts to support that this amount of water will be legally and physically available for diversion and storage in the future. The Court finds that FRICO proved that 4,563 ac-ft was legally and physically available for diversion in Milton Reservoir in 2015. FRICO's conditional seepage water right at the Milton Reservoir Inlet (Diversion 4) is 786 ac-ft (4,563 ac-ft minus 3,777 ac-ft ruled absolute in this action).

The Court further finds that FRICO has measured a total flow rate of 80 cfs at the Milton Reservoir Inlet, which results in a conditional flow rate of 30 cfs for FRICO (80 cfs minus the 50 cfs that FRICO made absolute in this case).

The Court informs FRICO that it will be required to meet all legal requirements before these conditional seepage water rights can be made absolute, including proving FRICO's need for this conditional water right under the standards set forth in *Upper Eagle Regional Water Auth. v. Wolfe*, 371 P.3d 681 (Colo. 2016) and *Upper Yampa Water Conserv. Dist. v. Wolfe*, 255 P.3d 1108 (Colo. 2011).

C. *Division Engineer assessing carriage/transit losses in the Beebe Seep Canal*

In very simple terms, a "transit" or "carriage" loss, as these words are often interchangeably used, is an administrative tool used by the Division Engineer to account for natural losses through evaporation or seepage when water is transported from one location to another in a natural stream system. This tool allows the Division Engineer to determine the amount of water that must be released to the stream at the entry point to ensure the full amount of water needed at the delivery point is achieved. For example, if a water user is required to deliver 1 cfs of water at a certain point on the river as part of an augmentation plan and the water source is ten miles upstream from the delivery point, the Division Engineer will determine how much water is naturally lost over this ten mile

distance and require that the augmentation plan operator to place the 1 cfs plus the amount that is lost in transit to ensure that the full 1 cfs is delivered where required.

As testified to by Mr. DeAngelis, his office generally does not assess transit losses for water delivered in a private ditch. If a mutual ditch company holds a right to divert 10 cfs of water from the river to its ditch and 1 cfs is lost over the course of the ditch, the result is the ditch company's water right has a net yield of 9 cfs. This is simply part of the ditch company's operations and a portion of the water right is returned through seepage to river system.

The Beebe Seep Canal is a private ditch owned by FRICO and used to deliver water stored in Barr Lake to its shareholders. As such, the Division Engineer would not ordinarily assess carriage losses along the ditch, even though some amount of FRICO's water released from Barr Lake to the Beebe Seep Canal is lost through seepage and evaporation before deliveries are made to the shareholders. What FRICO did over decades of time was to release a certain amount of water from Barr Lake without calculating the amount of the Barr Lake water that was lost in transit, and then deliver to shareholders the balance of the released water from Barr Lake (after a portion of the water released from Barr Lake was lost in transit) plus seepage water that entered the Beebe Seep Canal. As learned through the evidence presented in this case, there were times when FRICO used out-of-priority seepage water to make up for carriage losses in the Beebe Seep Canal. That practice will come to a grinding halt through the partial agreement reached between FRICO and the Engineers in this case.

Now that FRICO will have a decree authorizing diversions of seepage water in priority, it will be important for FRICO to account for the amount of water released from Barr Lake and Milton Reservoirs for delivery to shareholders and then calculate the amount of transit losses. This will ensure that FRICO does not divert seepage water out-of-priority or divert ECCV's recharge water and will allow certainty that FRICO is delivering the correct amount of water released from storage to shareholders. This will also ensure that FRICO accurately accounts for the deliveries from FRICO's previous water rights and

the amount attributable to seepage water diverted in priority. This will assure that FRICO is not expanding the absolute or conditional rights decreed in this case, in the event there is seepage water available above the amounts decreed to FRICO, for other water users to appropriate. FRICO must work with the Division Engineer's Office to guarantee that FRICO's accounting is sufficient for proper administration of all of FRICO's Beebe Seep Canal system water rights by the Division Engineer.

D. Partial Stipulation between FRICO and State and Division Engineers dated March 4, 2019

After the completion of the first two and one-half days of trial, the parties requested and were granted a recess of the trial for one and one-half days to engage in further settlement discussions. These discussions, which included attorneys for EAU and Lower Latham, resulted in a partial stipulation between FRICO and the Engineers regarding FRICO's diversion of out-of-priority seepage water, and establishes procedures FRICO must follow to properly account for this water and to not use out-of-priority seepage water outside of the parameters of the stipulation. The stipulation provides several alternatives to FRICO, including: returning water diverted out-of-priority to the river without using the water; substituting the amount of water diverted out-of-priority with an equal amount of FRICO's senior water rights; to include the amount of out-of-priority seepage diversions to FRICO's "owe the river" account with the State and Division Engineers (which includes a "book over" provision, when applicable); or through releases of water from Milton Reservoir through the Gilmore Canal. The stipulation was filed with the Court on March 4, 2019 and approved as an order of the Court on March 6, 2019.

The Court finds the provisions of the March 4, 2019 stipulation remain appropriate and they are necessary to prevent injury to other water users. The stipulation shall be binding on FRICO and must be included in full in the proposed final decree prepared by FRICO (as opposed to a mere reference in the decree to the stipulation). The Court does not believe the additional terms and conditions proposed by EAU are necessary to prevent

injury to other water users.

*E. Administering the Beebe Seep Canal as a natural stream.*

The Court declines EAU's request for findings that the Beebe Seep Canal structure should be treated as a natural stream and administered by the State and Division Engineers accordingly. The Beebe Seep Canal is a personmade water delivery structure and not a natural stream; as such, the State and Division Engineers will administer that structure pursuant to the rules, regulations, and accounting principles applicable to similar structures, and not necessarily the rules and procedures pertaining to a natural stream. This does not mean, however, that the water infiltrating or intercepted by the Beebe Seep Canal are not waters of the state. These inflows are tributary water and are subject to administration as waters of the state under the priority system. The decree entered in this case quantifies the amount and priority date of seepage and inflow water in the Beebe Seep Canal system and Milton Reservoir that FRICO may divert for beneficial use.

*F. EAU's request for a decree term authorizing EAU to place an administrative call on FRICO's surface water rights*

EAU requests that the Court include a provision in the decree that would authorize EAU to "call out" FRICO's surface rights in this case, if FRICO's diversion of the surface rights decreed in this case interfere with or reduce the amount of groundwater that is available at ECCV's Beebe Draw wells.

The Court will not address in this case, for several reasons, the question of whether a water right holder operating a groundwater well has the legal right to request the State and Division Engineer to place an administrative call on a surface water right that was decreed after the groundwater well was operated under a decreed augmentation plan.

First, this issue was not raised by FRICO in the application, by any opposing party in a statement of opposition, or by any party in a pretrial motion for determination of question of law. The subject was only briefly raised during the trial when FRICO's attorney

and EAU's expert witness, near the conclusion of cross-examination, engaged in the following colloquy:

Mr. Dischinger: Do the [ECCV] wells in [the ECCV decree] have a priority date?

Mr. Bliss: Yes, I believe they do.

Mr. Dischinger: What is that priority?

Mr. Bliss: It's a 2013 priority date.

Mr. Dischinger: So if FRICO is removing water under this 2016 water right, you can just call us out, right?

Mr. Bliss: Possibly, yes. Calls from wells are rare or — occurrence, or hasn't even — I don't know that it has happened yet.

The discussion between Mr. Dischinger and Mr. Bliss confirms that neither one of them was entirely certain whether the holder of a tributary groundwater right can call out a junior surface water right holder. This discussion occurred near the conclusion of the trial and after Division One Engineer Corey DeAngelis had already testified, so neither Mr. DeAngelis nor the Attorney General's Office was provided an opportunity during the trial to address this issue. The Attorney General's Office did submit a response brief to EAU's trial brief, raising a number of legal arguments why a groundwater well user cannot call out a surface water right in Water Division One; however, the Attorney General indicated that ECCV may contact the Division Engineer if it wishes to place a call on a junior surface water right and at that time the Division Engineer will determine whether such a call can be administered. The Court agrees with the Division Engineer that ECCV, FRICO, or any other water users affected by the Division Engineer's determination may seek review of the Engineer's decision in a separate proceeding.

G. *EAU's request for decree condition that these water rights be limited to existing shareholder headgates*

EAU requests that any rights decreed to FRICO in this case be limited to the locations of the farm headgates of existing shareholders. The Court denies this request. As

pointed out by FRICO in its reply brief, it operates a mutual ditch company and it is capable of delivering water to a shareholder owning lands anywhere under the FRICO system. A term proposed by EAU would prevent a shareholder from purchasing another farm in the area served by the FRICO division where the shareholder receives water and opting to receive that shareholder's water at the new farm, which the Court views as an unnecessary interference with FRICO's operations.

## V. JUDGMENT AND ORDER OF THE WATER COURT

- A. The Court incorporates the findings and conclusions set forth in Sections I through IV of this order.
- B. The Court grants FRICO conditional water rights at the Beebe Seep Canal Pump Station of 12 cfs and a 2,805 ac-ft volumetric limit, with a priority date of April 18, 2016.
- C. The Court grants FRICO an absolute water right for seepage and other inflow water accruing to the Bowles Seep Canal at a flow rate of 9.9 cfs with a priority date of July 25, 2011. FRICO is granted a conditional flow rate of 17.1 cfs at the Bowles Seep Canal, with a priority date of April 18, 2016.
- D. The Court grants FRICO an absolute water right for seepage and other inflow water accruing to the East Neres Canal at a flow rate of 25 cfs with a priority date of July 2, 2011. FRICO is granted a conditional flow rate of 18 cfs at the Bowles Seep Canal, with a priority date of April 18, 2016.
- E. The Court grants FRICO an absolute water right for seepage and other inflow water accruing at the Milton Reservoir Inlet for storage in Milton Reservoir at a flow rate of 50 cfs and a volumetric limit of 3,777 ac-ft, with a priority date of May 11, 2015.

FRICO is granted a conditional storage right of seepage water and inflows accruing to the Milton Reservoir Inlet of 786 ac-ft, and a conditional flow rate of 30 cfs, with priority dates for these two conditional water rights of April 18, 2016.

F. The Court requests FRICO to please circulate a revised proposed decree incorporating the findings in this order to opposing parties in redline format within the next 28 days. Opposing parties shall have 21 days thereafter to provide comments to FRICO on the proposed decree, which shall include any proposed revisions in redline format.

G. FRICO is to please provide a redline version of the proposed final decree containing FRICO's revisions and those of opposers (with an indication of which party made the proposed revisions), a clean copy of FRICO's proposed final decree, and all attachments FRICO would like to be made part of the decree within the next 70 days.

DATED: October 6, 2020.

BY THE COURT

  
James F. Hartmann  
Water Judge, Division One