

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	
<p>Appeal from the District Court Water Division 1, Honorable Todd L. Taylor, Case No. 17CW3043</p>	
<p>Concerning the Application for Water Rights of Front Range Feedlots, LLC in Larimer County</p> <p>Opposers-Appellants: Kevin G. Rein, State Engineer, and Corey DeAngelis, Division Engineer for Water Division 1</p> <p>v.</p> <p>Applicant-Appellee: Front Range Feedlots, LLC and</p> <p>Opposers-Appellees: The Colorado Division of Parks and Wildlife and the Parks and Wildlife Commission; the Northern Colorado Water Conservancy District; the Arapahoe County Water and Wastewater Authority; the East Cherry Creek Valley Water and Sanitation District; the Cache La Poudre Water Users Association; the Ogilvy Irrigating and Land Company; and the New Cache La Poudre Irrigating Company</p>	<p>▲ COURT USE ONLY ▲</p> <p>Supreme Court Case No:</p> <p>2021SA_____</p>
<p>Attorneys for State and Division Engineers: PHILIP J. WEISER, Attorney General PAUL L. BENINGTON First Assistant Attorney General* Attorney Reg. # 33079* WILLIAM D. DAVIDSON, Assistant Attorney General* Attorney Reg. # 49099* Water Resources Unit Natural Resources and Environment Section Colorado Attorney General's Office 1300 Broadway, 7th Floor Denver, CO 80203 Telephone: (720) 508-6309</p>	

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STATE AND DIVISION ENGINEERS' NOTICE OF APPEAL

The State Engineer and Division Engineer for Water Division 1 (“Engineers”), by and through the Attorney General and the undersigned Assistant Attorneys General, file the following Notice of Appeal pursuant to C.A.R. 3:

I. Nature of the Case.

A. Nature of the controversy.

This case concerns a water court application filed by Applicant-Appellee, Front Range Feedlots, LLC (“Front Range”), requesting water rights for Horton Well Nos. 1 and 2 (“Horton Wells”) and a plan for augmentation. Such a plan allows lawful use of the Horton Wells by replacing out-of-priority well depletions to surface streams to prevent injury to vested water rights. Prior to filing the application, Front Range unlawfully used the Horton Wells for approximately thirty years. During this case, Front Range continued using the Horton Wells under temporary substitute water supply plans approved by the State

Engineer. Front Range’s past unlawful use and recent lawful use of the Horton Wells will continue to deplete surface streams for decades. No factual dispute exists as to presumed ongoing injury from any unreplaced out-of-priority depletions to the over-appropriated stream system.

After expert disclosures, Front Range located a less expensive source of water and ceased using the Horton Wells. Front Range then filed an opposed motion to withdraw its application, including its augmentation plan claim. The controversy is whether the water court properly granted the withdrawal when Front Range’s use of the Horton Wells is causing undisputed, ongoing injury to vested water rights, and Front Range has shown the ability to remedy or prevent that injury.

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

The Engineers appeal the water court’s Order Granting Applicant’s Motion to Withdraw Application entered in Case No. 17CW3043 on March 10, 2021 (“Order”). Appx. A, Order.

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

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

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

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

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

C.R.C.P. 54(b) is inapplicable to the water court’s final Order.

E. The date the order was entered.

The water court entered its Order on March 10, 2021, which was electronically served on the parties that same day via the Colorado Courts E-Filing system.

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

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

G. Motions for post-trial relief.

No motions for post-trial relief were filed.

H. Denials of motions for post-trial relief.

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

I. No extensions to file notice of appeal.

No extensions to file a notice of appeal were requested.

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

A. Whether the water court abused its discretion by granting Front Range's motion to withdraw its application based on clearly erroneous factual and legal premises.

B. Whether the water court erred by holding that the Engineers' interest in preventing injury to water users is not a legal interest that could be legally prejudiced by the withdrawal of Front Range's application.

C. Whether the water court erred by finding that allowing Front Range to withdraw its application on the condition that Front Range not use the Horton Wells unless the Horton Wells are included in a plan for augmentation or a

substitute water supply plan would restore the parties to the positions they were in before Front Range filed its application.

- D.** Whether the water court erred in holding that it lacks the authority or discretion in this case to require Front Range to remedy or prevent undisputed, ongoing injury to vested water rights.
- E.** Whether the water court erred by finding that the water court, rather than the State Engineer, approved Front Range's substitute water supply plans.
- F.** Whether the water court erred by failing to determine that the special statutory procedures applicable to water court applications preclude dismissal under C.R.C.P. 41(a)(2) when there is undisputed, ongoing injury to vested water rights and the applicant has shown the ability to remedy or prevent the injury.

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

No trial or hearing was held, and no evidence was taken before the water court.

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

Not applicable.

V. Counsel for the parties.

A. Counsel for the Engineers:

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VI. Appendix containing Orders of the Court.

The following orders of the Water Court are attached:

Appendix A: Order Granting Applicant's Motion to Withdraw
Application, dated March 10, 2021.

RESPECTFULLY SUBMITTED this 27th day of April, 2021.

PHILIP J. WEISER
Attorney General
E-filed pursuant to C.A.R. 30.

/s/ William D. Davidson

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

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of April, 2021, I caused a true and correct copy of the foregoing **STATE AND DIVISION ENGINEERS' NOTICE OF APPEAL** to be served electronically via CO Courts E-filing or by U.S. Mail, First Class, postage pre-paid to each of the following:

Party Name	Party Type	Attorney Name
Division 1 Engineer	Division Engineer	Division 1 Water Engineer (State of Colorado DWR Division 1) Paul L Benington (CO Attorney General) William D Davidson (CO Attorney General)
Arapahoe County Water and Wastewater Authority	Opposer	Brian M Nazarenus (Nazarenus Stack and Wombacher LLC) Sheela S Stack (Nazarenus Stack and Wombacher LLC) Stacy Louise Brownhill (Nazarenus Stack and Wombacher LLC) William Doran Wombacher (Nazarenus Stack and Wombacher LLC)
Cache La Poudre Water Users Association	Opposer	Daniel Kenneth Brown (Fischer Brown Bartlett and Gunn PC)
CO Div of Parks and Wildlife and Parks and Wildlife Commission	Opposer	Elizabeth M Joyce (CO Attorney General)
East Cherry Creek Valley Water and Sanitation District	Opposer	Brian M Nazarenus (Nazarenus Stack and Wombacher LLC) Sheela S Stack (Nazarenus Stack and Wombacher LLC) Stacy Louise Brownhill (Nazarenus Stack and Wombacher LLC) William Doran Wombacher (Nazarenus Stack and Wombacher LLC)
Front Range Feedlots, LLC	Applicant	David Phillip Jones (Lawrence Custer Grasmick Jones and Donovan, LLP)

Party Name	Party Type	Attorney Name
		Wesley Sage Knoll (Lawrence Custer Grasmick Jones and Donovan, LLP)
New Cache La Poudre Irrigating Company	Opposer	Daniel Kenneth Brown (Fischer Brown Bartlett and Gunn PC)
State Engineer	State Engineer	Colorado Division Of Water Resources (State of Colorado - Division of Water Resources) Paul L Benington (CO Attorney General) William D Davidson (CO Attorney General)
State Engineer And Water Div 1 Engineer	Opposer	Paul L Benington (CO Attorney General) William D Davidson (CO Attorney General)
Northern Colorado Water Conservancy District	Opposer	Douglas M Sinor (Trout Raley) Mirko Luke Kruse (Trout Raley)
Ogilvy Irrigating And Land Company	Opposer	Daniel Kenneth Brown (Fischer Brown Bartlett and Gunn PC)
Clerk of the Division 1 Water Court	District Court	Kristina Treadway, Water Clerk

E-filed pursuant to C.A.R. 30.

/s/ Pauline Wilber

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DISTRICT COURT, WATER DIVISION 1, COLORADO 901 9 th Avenue, P.O. Box 2038, Greeley, CO 80632 (970) 475-2400	DATE FILED: April 10, 2017 CASE NUMBER: 2017CW3043
Concerning the Application for Water Rights of: Front Range Feedlots, LLC In Larimer County.	▲ COURT USE ONLY ▲
	Case No. 2017 CW 3043 Division 4
Order Granting Applicant's Motion to Withdraw Application	

The applicant, Front Range Feedlots, LLC, seeks to withdraw its application for underground water rights and approval of an augmentation plan related to two wells, Horton Well No. 1 and Horton Well No. 2, which Front Range was using to support livestock feeding operations. Two of the opposers, Arapahoe County Water and Wastewater Authority and East Cherry Creek Valley Water and Sanitation, do not object to Front Range's motion, but two opposers, the State and Division Engineers and the Northern Colorado Water Conservancy District, object. The remaining opposers take no position.

The court grants Front Range's motion and declines to impose the additional conditions requested by the Engineers and Northern Colorado Water, for the following reasons.

The Engineers request that the court deny Front Range's motion to withdraw its application and instead require Front Range to obtain an augmentation decree. The Engineers want the court to order Front Range to replace any out-of-priority depletions made from Front Range's wells that still affect the river. In the alternative, if the court allows Front Range to withdraw

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its application, the Engineers request the court to impose a condition that Front Range must stop all diversions through the two wells until further order of the court. Front Range does not object to this condition and says it stopped using the two wells at the end of June 2020, when it began relying on a newly-developed local water supply.

Northern Colorado Water also requests that the court impose a condition on Front Range: should any owner of the two wells file an application in the future seeking water rights or approval of an augmentation plan, any decree must require the replacement of all depletions still affecting the stream caused by the wells from past pumping.

Front Range has been under a cease-and-desist order issued by the Division Engineer in August 2016, which is why Front Range does not object to the court imposing a condition that Front Range curtail using the wells. This condition would stop any future out-of-priority depletions. But Front Range objects to any condition that would require the replacement of past out-of-priority depletions. Front Range argues that the Engineers and Northern Colorado Water are only entitled to be restored to the position they were in before Front Range submitted its application, but are not entitled to be put in a better position. Because the cease-and-desist order did not require replacement of prior depletions, only curtailment, Front Range contends that replacement would be a benefit to the Engineers and Northern Colorado Water, not a remedy, and would unfairly penalize Front Range for withdrawing its application. The court agrees.

Front Range invoked Uniform Water Court Rule 5(b) in support of its motion, but C.R.C.P. 41(a)(2) also applies to voluntary dismissals of water court applications. *See In re Water Rights of Hines Highlands Ltd.*, 929 P.2d 718, 728

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(Colo. 1996); *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 381 (Colo. 1994) (“Rule 5(b) contains no indication that C.R.C.P. 41 is not fully applicable to water cases.”). And under C.R.C.P. 41(a)(2), a plaintiff’s request for a voluntary dismissal “generally should be granted unless a dismissal would result in *legal prejudice* to the defendant.” *Powers v. Prof'l Rodeo Cowboys Ass'n*, 832 P.2d 1099, 1102 (Colo. App. 1992) (emphasis added).

The parties have not addressed what the term, *legal prejudice*, means in this context. But Colorado case law provides a framework for analyzing whether a party will suffer legal prejudice as the result of a voluntary dismissal:

In determining whether legal prejudice would result, a court should consider the following factors:

- (1) the duplicative expense of a second litigation[;]
- (2) the extent to which the current suit has progressed, including the effort and expenses incurred by defendant in preparing for trial[;]
- (3) the adequacy of plaintiff’s explanation for the need to dismiss[;]
- (4) the plaintiff’s diligence in bringing the motion to dismiss[; and]
- (5) any “undue vexatiousness” on plaintiff’s part.

Sinclair Transp. Co. v. Sandberg, 2014 COA 75M, ¶ 29 (quoting *Powers*, 832 P.2d at 1103).

Consistent with this framework, one federal appellate court – in a case involving water rights – recognized that, “[a]lthough case law does not articulate a precise definition of ‘legal prejudice,’ the cases focus on the rights

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and defenses available to a defendant in future litigation.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). That court also concluded “legal prejudice is just that – prejudice to some legal interest, some legal claim, some legal argument.” *Id.*

Another important principle to bear in mind is that a plaintiff gaining a tactical advantage or a defendant losing one does not constitute plain legal prejudice. *See Templeton v. Nedlloyd Lines*, 901 F.2d 1273, 1276 (5th Cir. 1990); *Wright & Miller*, 9 *Fed. Prac. & Proc.* § 2364 (4th ed. 2020) (“it is well established that it is not a bar to a Rule 41(a)(2) dismissal that the plaintiff may obtain some tactical advantage thereby”).

Thus, in deciding whether Front Range’s request to withdraw its application should be denied, the court must first determine if the Engineers will suffer legal prejudice and, if so, whether that prejudice either justifies (1) requiring Front Range to obtain a decree of augmentation or (2) imposing the conditions on the withdrawal that Front Range objects to in order to remediate the prejudice.

The difficulty is that the Engineers do not assert any prejudice to *their legal interests* if Front Range is permitted to withdraw its application, but instead rely on presumed injury to *other water users* if Front Range is not required to replace its past out-of-priority depletions. But this type of prejudice is not what is contemplated by C.R.C.P. 41(a)(2). The Engineers do not allege legal prejudice from the filing and withdrawal of Front Range’s application, but instead rely on Front Range’s use of its wells – even though some of this use occurred before the application was filed. Granted, if permitted to withdraw its application, Front Range will not be required to replace these past out-of-priority depletions

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as a condition of an augmentation plan – but Front Range will also not receive a decreed water right to continue using the wells.

As to Northern Colorado Water, it requests that any future decree involving the two wells include a provision for replacing out-of-priority depletions from past pumping still affecting the river. Even if the court were persuaded, however, that it has the authority to impose this condition, the court would not exercise its discretion to impose it. Assuming a future application seeking approval of an augmentation plan for these wells is ever filed, the court would be required by § 37-92-305(8)(a), C.R.S. 2020, to consider any depletions still affecting the river. So, it's not clear that imposing this condition would provide a remedy that Northern Colorado Water does not already possess. Besides, depending on the timing of any future application, the out-of-priority depletions may not still be affecting the river, which means that the parties would still need to investigate this issue and the court would need to make a factual determination. So, it's not clear that imposing this condition would reduce the burden on Northern Colorado Water or any other opposer who decided to raise the issue.

Ultimately, the court concludes that the conditions contemplated by C.R.C.P. 41(a)(2) do not include awarding a defendant substantive relief. The Engineers and Northern Colorado Water seek conditions that would impose relief similar to what the court would provide in an augmentation decree – rather than a remedy for some form of legal prejudice caused by Front Range filing its application and then withdrawing it. The court is not persuaded it has the authority or the discretion to provide the relief sought by the Engineers and Northern Colorado Water as a condition of withdrawal.

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Front Range remains subject to the cease-and-desist order from August 2016. The Engineers' substitute water supply plan provides in paragraph 14 that, if either of the two wells "causes depletions that affect a senior surface water right at a location where ... the [plan] cannot provide replacement water, the well is subject to curtailment until arrangements are made to provide replacement water at a point which will preclude injury to the calling senior surface water right." The court approved this plan at the parties' request more than once and must assume that it was diligently implemented to prevent injury while the plan was in effect during this case. Thus, it is by no means clear that Front Range has obtained any advantage from filing its application. Even if Front Range has received a benefit to which it would not otherwise be entitled, this type of advantage does not qualify as the type of legal prejudice that the court is empowered to remedy in a condition of withdrawal.

A "court's focus when determining appropriate terms and conditions under C.R.C.P. 41(a)(2) is necessarily on a remedy for the defendant, not punishment of the plaintiff." *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 380 (Colo. 1994). The court's aim is therefore to put the Engineers and Northern Colorado Water in the same or similar situation they would have been in had Front Range never filed this case – but no better. If the court were to order that the two wells at issue here – whether owned by Front Range or a new owner – must replace out-of-priority depletions, then the Engineers and Northern Colorado Water would be put in a *better* position than if the case had never been filed. On the other hand, imposing a condition that Front Range curtail using the wells puts all the parties, including the Engineers and Northern Colorado Water, in the same or similar situation they would have been in had this case never been filed.

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Accordingly, the *Applicant's Motion to Withdraw Application* is GRANTED.

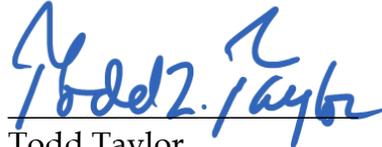
The application submitted in this case, as amended, which includes Front Range's claims for underground water rights for Horton Well No. 1 and Horton Well No. 2 and a proposed augmentation plan, is hereby ordered WITHDRAWN.

As a condition of withdrawal, the court orders that the Horton wells, originally decreed in Case No. W-2505, Water Division 1, shall not operate unless included in a court-approved augmentation plan, or as part of a lawfully-approved substitute water supply plan. Front Range, and any future owners of the Horton wells, must comply with the South Platte River Tributary Well Measurement Rules for operating the wells or for maintaining an inactive well.

The court expressly retains jurisdiction to enforce this order, but otherwise this case is hereby closed.

So Ordered:
March 10, 2021

BY THE COURT:

A handwritten signature in blue ink that reads "Todd Taylor". The signature is written in a cursive style with a horizontal line underneath the name.

Todd Taylor
Alternate Water Judge
Water Division 1