Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	
Appeal from the District Court Water Division 1, 2019CW3220	
Opposers-Appellants: Franktown Citizens Coalition II, Inc. and West Elbert County Well Users Association, **v.** **Applicant-Appellee:** Independence Water and Sanitation District and Cordillera Corporation **and** **Appellees:** State Engineer and Division 1 Engineer	**▲COURT USE ONLY▲** Supreme Court Case No. 2023SA154
Attorney for Opposers-Appellants Franktown Citizens Coalition II, Inc. and West Elbert County Well Users Association: John D. Buchanan, #45191 Law Firm of John D. Buchanan LLC PO Box 140207 Edgewater, CO 80214 720-413-2773 john@jdbuchananlaw.com	

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

The brief contains 5,111 words, which does not exceed the 5,700-word limit.

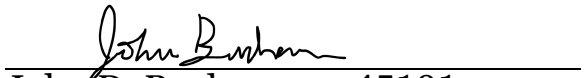
The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the Appellee must provide a separate heading before the discussion of the issue, a statement indicating whether Appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Law Firm of John D. Buchanan LLC



John D. Buchanan, #45191

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Opposers-Appellants, Franktown Citizens Coalition II, Inc., and West Elbert County Well Users Association (together, the "Opposers") hereby file this reply brief.

I. SUMMARY OF THE ARGUMENT

Independence's answer brief does not provide any legitimate support for its claims that water courts should be prohibited from considering the anti-speculation doctrine when adjudicating a plan for augmentation for withdrawals of not-nontributary groundwater. Most of the brief focuses on the ruling in *East Cherry Creek* that water courts cannot apply the doctrine when adjudicating determinations of groundwater. To make this argument, Independence relies on arguments that are simply unrelated to plans for augmentation. Independence also argues that plans for augmentation are limited to analysis of injury to other water users, and that the doctrine cannot be applied to the adjudication of such plans.

These arguments are unsupported by existing Colorado law. This Court's precedents on augmentation plans and the anti-speculation doctrine prove that such plans are not limited to a simple injury analysis, and that the anti-speculation doctrine advances fundamental concepts of Colorado water law and has always been applied to water use projects such as plans for augmentation.

Independence has shown by its discovery responses, its position on Opposers' motion for summary judgment in the water court, and in its brief

in this appeal, that it does not have a non-speculative need for the uses that Opposers request to have removed from the Final Decree[1]. Therefore, if this Court determines that water courts are not prohibited from applying the anti-speculation doctrine to plans for augmentation, those speculative types and places of use must be removed from the Final Decree.

II. ARGUMENT

A. The anti-speculation doctrine applies to plans for augmentation for withdrawals of not-nontributary groundwater.

Plans for augmentation are water projects that involve a complex analysis of the timing, location, and amount of stream depletions and the delivery of substitute water supplies to compensate for such depletions. *E.g.*, *State Engineer v. Castle Meadows, Inc.*, 856 P.2d 496, 506-07 (Colo. 1993). The statutes governing such plans require specific and detailed information about the proposed project. C.R.S. §§ 37-92-302(2)(a), -305(8). As discussed below, water courts' adjudication of plans for augmentation is not limited to the question of injury, and the anti-speculation doctrine is necessary to ensure that such plans are consistent with fundamental principles of Colorado water law.

In *Coors Brewing Co. v. City of Denver*, 420 P.3d 977, 982 (Colo. 2018), the water court denied an application to amend several plans for

[1] This reply brief uses the same definitions for any capitalized, defined terms from the opening brief.

augmentation and ruled that the applicant needed to file applications for new appropriations of water rights. *Id.* On appeal, the applicant argued, like Independence, that plans for augmentation are limited to an analysis of injury to other water users, and that upon a showing of non-injury the water court must approve the amended plan for augmentation. *Id.* at 985; Resp. Br. at 23-24. This Court, however, held that plans for augmentation are not limited to the question of injury and that such "abbreviated proceeding[s]" would unnecessarily preclude opposing parties from challenging augmentation plans under, among other things, the anti-speculation doctrine. *Id.*

If adjudication of plans for augmentation was limited to analysis of injury and did not permit consideration of the anti-speculation doctrine, that would create a loophole that would allow water users to obtain water use rights for speculative purposes. For example, instead of applying for a conditional water right that is subject to the anti-speculation doctrine, a water user could simply adjudicate a plan for augmentation that would allow diversions of water out-of-priority by replacing its depletions and preventing injury – exactly what the applicants in *Coors Brewing* attempted. If there was no requirement to prove a non-speculative need for the use of water claimed in an application for augmentation plans, that would also allow applicants like Independence to adjudicate broad plans for augmentation,

unconstrained by actual need for the uses of water allowed by the plan. This issue is discussed more fully in section II.C below.

The opinion in *Coors Brewing* is consistent with this Court's precedent on the anti-speculation doctrine. Although the doctrine was initially created by the courts as a limitation on conditional tributary water rights, each time speculation is raised in the context of a new classification of water or new type of water court claim this Court has determined the doctrine should be applied, other than the one, narrow exception for determinations of groundwater created by the legislature and recognized in *East Cherry Creek Valley Water and Sanitation Dist. v. Rangeview Metro Dist.*, 109 P.3d 154 (Colo. 2005).

For example, *Jaeger v. Colorado Ground Water Commission*, 746 P.2d 515, 516 (Colo. 1987), involved a new appropriation of designated, rather than tributary, groundwater. Appropriations of the type of designated groundwater at issue in *Jaeger* are administered under the modified prior appropriation system. The applicant thus argued that the case law and resulting statute that first established the anti-speculation doctrine did not apply in designated basins, and that the principles underlying the doctrine were inconsistent with the modified prior appropriation system. *Id.* at 519-20. The Court held that the doctrine did apply, noting that the statute governing appropriations of designated groundwater required applicants to specify the beneficial uses and the quantity of water applied for, and that

C.R.S. § 37-90-102 affirms that the appropriation of designated groundwater must be "devoted to beneficial use in reasonable amounts." *Id.* at 520-21.

Similarly, C.R.S. § 37-90-102, regarding water allocated on the basis of overlying land ownership rather than the modified priority system, "shall be devoted to beneficial use in amounts based upon conservation of the resource and protection of vested water rights." In addition, C.R.S. § 37-92-305(8), and other sections discussed further below, require applicants to supply specific details about their proposed augmentation plans, including the proposed beneficial uses and the quantity of water that will be withdrawn and augmented.

In *Front Range Resources, LLC v. Colo. Ground Water Comm'n*, 415 P.3d 807, 811-12, fn. 4 (Colo. 2018), this Court held that the anti-speculation doctrine applies to applications for replacement plans for designated groundwater rights, at least to the extent that such plans involve new appropriations or changes to well permits. Although the applicant argued that the replacement plan did not constitute a change of its water rights, the Court noted that the proposed plan fit within the definition of a change of water right, which includes changes in place and type of use. *Id.* at 812.

The definition of a replacement plan for designated groundwater rights is nearly identical to the definition of plans for augmentation. *Compare* C.R.S. § 37-90-103(12.7) (defining replacement plans) *with* C.R.S. § 37-92-103(9) (defining plans for augmentation). The amendment that

Independence requested for its augmentation plan changes the types and places of use of the Upper Dawson Water that were approved under the original plan for augmentation, and includes a new type of use – municipal use – that was not approved in the original determination of groundwater in the 06CW59 Decree. CF, p #1860.

In *Colo. Ground Water Comm'n v. North Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 67 (Colo.2003), this Court held that the anti-speculation doctrine applies to applications for determinations of Denver Basin groundwater within designated basins. The applicant in that case argued, as Independence does in this appeal, that the anti-speculation doctrine was not relevant to Denver Basin groundwater because such water is allocated based on overlying land ownership rather than by appropriation. *Id.* at 80; Resp. Br. at 14-15, 23. This Court disagreed, stating that although such water is allocated based on overlying land ownership, to prohibit the Commission from applying the doctrine would "disregard[] the goal of conservation and the public nature of this resource." *Id.* The Court also noted that water in the Denver Basin aquifers is nonrenewable and that "it would be logically inconsistent to apply this conservation doctrine to waters that are seasonably replenishable [i.e., tributary waters] but not to waters that are finite and exhaustible." *Id.* This reasoning applies equally to Denver Basin aquifers located outside the political boundaries of designated basins.

In *High Plains A & M, LLC v. Southeastern Colorado Water Conservancy District*, 120 P.3d 710, 714 (Colo. 2005), this Court again held that the anti-speculation doctrine applies to a new type of water court application: changing the use of tributary water rights. The Court's analysis again focused on the fact that all water in the state is a public resource; that use of this resource requires placing "a specific amount of that water to an actual beneficial use at an identified location within Colorado;" and that the applicant's "interest in the appropriation for an actual beneficial use is a prerequisite for maintaining the application and obtaining a decree." *Id.* at 718-19. That reasoning also applies to applications for plans for augmentation, which require applicants to identify the specific quantities of water that will be used for specific beneficial uses at specific locations. *E.g.* C.R.S. § 37-92-305(8).

In *Centennial Water and Sanitation Dist. v. City and County of Broomfield*, 256 P.3d 677, 685-86 (Colo. 2011), this Court held that an applicant for a conditional, appropriative right of exchange must make a showing of non-speculative intent to acquire and use each water right proposed as a source of substitute supply, and that it would be insufficient to show only that the project as a whole is non-speculative, as the applicant urged. *Id.* The Court made this ruling even though there is no specific statutory requirement that applicants must prove that each specific source of substitute supply is non-speculative.

Lastly, in *East Cherry Creek*, this court determined that the anti-speculation doctrine applies to nontributary groundwater, although there is no statute that expressly applies the doctrine to this type of water. 109 P.3d at 158. The Court noted that use of the water is "subject to legislatively authorized or imposed limitations for preventing waste, promoting beneficial use, and requiring reasonable conservation of such ground water." *Id.* at 157. The Court, however, ruled that in one specific context – applications for determinations of nontributary groundwater – the legislature had expressly permitted applications for "future use" of the water and thus only the State Engineer would apply the doctrine when reviewing well permit applications. *Id.* at 158; *see also* Op. Br. at 11-19 (discussing the exception to the anti-speculation doctrine recognized in *East Cheyenne* and why it is inapplicable to Independence's application).

The above cases mirror many of the circumstances in this appeal and illustrate why the anti-speculation doctrine is not so limited as Independence claims. The applicants in those cases typically argued, like Independence, that the anti-speculation doctrine should apply only to conditional appropriations of tributary water rights. This Court rejected such arguments by focusing on the fact that the use of this important public resource – regardless of whether it is classified as tributary or nontributary, designated, Denver Basin, etc. – is circumscribed by the requirements of conservation, beneficial use, and non-waste. Although plans for augmentation allow use of

water to be made outside of the priority system, *Empire Lodge Homeowners Ass'n v. Moyer*, 39 P.3d 1139, 1155 (Colo. 2001), these important principles of water law still apply.

A plan for augmentation is defined as a "detailed program to increase the supply of water available for beneficial use" so that the applicant may divert water out-of-priority. C.R.S. § 37-92-103(9). An applicant must provide a "complete statement" of the proposed plan for augmentation to allow the water court to evaluate the "use or proposed use of water" and the amount, timing, and location of both the depletions that will result from the use of water and the augmentation water that will be delivered to replace those depletions. C.R.S. § 37-92-305(8); *see also Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.*, 195 P.3d 674, 684 (Colo. 2008).

Under C.R.S. § 37-92-302(2)(a), water courts must provide standard forms for water court applications. The application form for plans for augmentation must include, "among other things," a legal description of the location of diversion, a description of the source of water, and the amount of water claimed. *Id.* The water court form also requires applicants to list the proposed pumping rate and to provide information regarding the proposed replacement water sources. Colorado Judicial Branch website, https://www.courts.state.co.us/Forms/PDF/JDF%20301W.pdf. Applicants must also prove that their augmentation water supplies will be of a sufficient

quality to allow the water users to whom the augmentation water is provided to continue their existing beneficial uses. C.R.S. § 37-92-305(5).

It is true that the statutes governing plans for augmentation do not expressly state that an applicant must make a threshold of showing of non-speculative use. As discussed in the cases cited above, the doctrine has been applied in several other contexts in which there is no statute that expressly requires a threshold showing of non-speculative use. Moreover, Independence's claim that only the State Engineer may apply the anti-speculation doctrine is largely based on C.R.S. § 37-90-137(1), *see* Resp. Br. at 18-19, which does not expressly state that a threshold showing of non-speculative use is required for well permit applicants. Instead, the statute requires certain information be included in well permit applications, including the aquifer from which water will be diverted, the proposed beneficial use, the location of the proposed well, the average annual amount of water applied to be diverted and the proposed maximum pumping rate. As cited above, the statutes and case law governing plans for augmentation require applicants to provide this same information and more.

In sum, it is clear under *Coors Brewing*, and in the cases in which this Court applied the anti-speculation doctrine to new classifications of water and new types of water court applications, that plans for augmentation require a specific plan and intent to place specific quantities of water to specific beneficial uses and, therefore, an applicant must make a threshold

showing of a non-speculative need for the proposed types and places of use that will be augmented under the plan.

When adjudicating a plan for augmentation, the applicant has the initial burden to establish a prima facie case that the application will not cause injury; if that is met, the burden shifts to opposing parties to provide contrary evidence. *Buffalo Park* 195 P.3d at 684-85. If the water court determines the plan would cause injury, then the applicant and opposers must propose terms and conditions to prevent such injury. C.R.S. § 37-92-305(3)(a). It would be incongruous and illogical to require this level of participation by other water users – including review of the application and supporting engineering and computer modelling, presentation of evidence to contradict an applicant's claims, and proposing specific terms and conditions for operation of a plan – without allowing opposing parties to object on the basis that the proposed project is speculative and that the applicant does not have an actual plan and intent to place the water to the beneficial uses that are requested under the proposed project.

Independence also appears to imply in its brief that there is some relevance to the fact that this case involves an amendment to a plan for augmentation, and not the initial plan itself. Independence does not provide any specific reason or citation to existing law to support its argument that amendments to a plan for augmentation should be treated differently under the anti-speculation doctrine. Colorado law does not distinguish between

applications for plans for augmentation and applications to amend such plans. *Coors Brewing*, 420 P.3d at 984, fn. 1. In *Coors Brewing*, this Court held that the procedure for amending plans for augmentation "must, at a minimum, comply with the requirements of both subsections 37-92-305(3), (5), and (8) and our case precedents." *Id.* Like plans for augmentation, there is nothing in Colorado law that excludes applications to amend a plan for augmentation from scrutiny under the anti-speculation doctrine.

B. *East Cherry Creek* does not prohibit the water court from applying the anti-speculation doctrine.

Independence incorrectly states that Opposers "rely on East Cherry Creek to impose a requirement for a threshold showing of non-speculative beneficial use for [not-nontributary] Denver Basin augmentation plans." In reality, Opposers point out that the exception to the anti-speculation doctrine recognized in *East Cherry Creek* does not apply to the specific type of application at issue in this case. Independence, on the other hand, relies on this narrow exception, and argues that it should be expanded to include a new type of water court claim that was not relevant to or discussed in *East Cherry Creek*.

Independence makes this argument by muddling the differences between nontributary and not-nontributary groundwater and between determinations of groundwater and plans for augmentation. In fact, Independence goes so far as stating that nontributary and not-nontributary groundwater "are treated the same, but for the requirement of a Water Court

approved augmentation plan." Resp. Br. at 8 (emphasis added). This difference is particularly relevant when a water court is adjudicating a plan for augmentation. Although Independence claims that Opposers are attempting to "force" priority administration on the use of not-nontributary water, Resp. Br. at 14, it was the legislature that determined withdrawals of this "partially tributary" water impacts flows in surface streams. C.R.S. § 37-90-137(9). It was the legislature that created the hybrid system for not-nontributary groundwater that requires augmentation of depletions to prevent injury to tributary water users. *Id*.

As another example, Independence states that its plan for augmentation should not be subject to the anti-speculation doctrine because not-nontributary groundwater is allocated based on overlying land ownership, not on the prior appropriation doctrine. Resp. Br. at 11-13. That is irrelevant to this appeal, because the determination that vested Independence's water rights in the aquifers underlying the Subject Property was already completed in the 06CW59 Decree and is not at issue in this case. Moreover, as discussed above, allocation of a water right through the prior appropriation system is not necessary for the anti-speculation doctrine to apply. Independence acknowledges that the doctrine applies to not-nontributary groundwater, and the only dispute here is whether the water court can apply it when adjudicating plans for augmentation.

One of the main reasons the *East Cherry Creek* Court ruled that the water court could not apply the anti-speculation doctrine when adjudicating a determination of groundwater is that, by assigning different responsibilities to the State Engineer and water courts, the legislature "created a clear demarcation between the determination of available water underlying particular lands and the regulation of its withdrawal and use." *East Cherry Creek*, 109 P.3d at 158. That is true for nontributary groundwater, in which only a well permit issued by the State Engineer is necessary to withdraw and use the water.

There is no such clear demarcation in the context of augmentation plans for not-nontributary groundwater, which as discussed above, are "detailed programs" that require specific information regarding the claimed beneficial uses to be made under the plan, and the terms and conditions under which the water may be withdrawn and the replacement water will be delivered to prevent injury to other water users. Unlike determinations of groundwater, when a plan for augmentation is approved, the State Engineer's responsibility is to administer the withdrawal and use of the not-nontributary water pursuant to the terms in the plan for augmentation, along with other applicable statutes regarding administration of water generally. *Empire Lodge*, 39 P.3d at 1147.

Independence's claim that the water court should be prohibited from applying the anti-speculation doctrine to plans for augmentation of not-

nontributary groundwater relies heavily on the statutes and reasoning cited in *East Cherry Creek* regarding a wholly different type of water court proceeding. The bulk of Independence's arguments simply do not apply to the plan for augmentation at issue in this appeal.

C. If the anti-speculation doctrine does not apply to plans for augmentation, there is nothing that limits the extent of claims that may be made in such cases.

Under Independence's theory of the anti-speculation doctrine, owners of land overlying not-nontributary groundwater would be entitled to adjudication of a plan for augmentation for all beneficial uses and places of use, regardless of whether the landowner actually has a non-speculative plan and intent to apply the water to such uses. The types and places of use that an applicant could claim would be limited only by the potential for injury to other water users. This is illustrated by Independence's argument that, if the anti-speculation doctrine is applied to plans for augmentation, a new water court application would be needed every time a water user changes their plan for use of the water. Resp. Br. at 31-32.

According to this theory, adjudications of plans for augmentation would be untethered from any requirement that the applicant must have an actual need for the uses requested in the plan. Such adjudications would be unconstrained by the foundational principles underlying Colorado water law that gave rise to the anti-speculation doctrine, such as the requirement that the use of water must prevent waste, promote beneficial use, protect other

vested water rights, and help conserve the state's finite groundwater resources. C.R.S. § 37-90-102; *East Cherry Creek*, 109 P.3d at 157.

Because the anti-speculation doctrine does not limit water court determinations of groundwater, such determinations typically include every beneficial use and do not limit where in the state the water may be used. *E.g.*, CF, p #1860 (06CW59 Decree approves multitude of beneficial uses anywhere on and off the Subject Property). This is inconsistent with the requirements to apply for a plan for augmentation, which require specific information regarding the specific beneficial uses that will be made of the augmented water, and the resulting depletions that occur to surface streams and the terms necessary to prevent injury. C.R.S. §§ 37-92-302(2)(a), -305(8). Overlying landowners such as Independence are entitled to a determination of the amount of groundwater underlying their property, which protects from modification or termination by the legislature their inchoate right to extract and use such water. *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n*, 956 P.2d 1260, 1268 (Colo. 1998); *North Kiowa*, 77 P.3d at 72. That is the only right that is granted to landowners under the Ground Water Management Act. *Id.* Nothing in Colorado law entitles a landowner to cause depletions to surface streams by withdrawing not-nontributary groundwater and to adjudicate an augmentation plan to replace such depletions, unless the landowner has a non-speculative need for such a plan.

Independence has already obtained a determination of its groundwater rights, and therefore has fully vested its property rights in the water underlying its land. The legislature has given landowners the right to control and use a specified amount of nontributary and not-nontributary groundwater, and the water court has already determined the specified amount of groundwater available to Independence. CF, p #1859-62. Any further adjudication of a plan for augmentation, which would allow Independence to deplete tributary water supplies and deliver replacement water sources to prevent injury, requires a threshold showing of non-speculative use before proceeding with such adjudication.

This is a very important issue in the community surrounding the Subject Property. Hundreds of statements of opposition were filed in this case by property owners that rely on the Upper Dawson aquifer for their domestic water source. *See generally*, CF, p #11-664 (statements of opposition describing concerns of opposing parties). The legislature has recognized that communities, individual homeowners, and other landowners heavily depend on the finite, nonrenewable water resource contained within the Denver Basin aquifers. *Chatfield East*, 956 P.2d at 1270. "As water levels are lowered and a particular aquifer becomes depleted in the area, the landowners may find it necessary to drill a replacement well deeper into the formation or proceed into another aquifer underlying the land," or may simply run out of water that is economically feasible to

withdraw. *Id*. Opposers do not object to the use of water for which Independence has alleged it has a non-speculative need. For the other, speculative uses, Independence must comply with Colorado law, and must not be granted a plan for augmentation unless and until Independence has an actual need for the additional claimed uses and places of use.

D. Independence has not claimed it can make a threshold showing of non-speculative use for the types and places of use that Opposers seek to have removed from the decree, and those speculative uses should thus be removed from the Final Decree.

Independence argues that it never expressly admitted that the uses Opposers seek to have removed from the Final Decree are speculative. The anti-speculation doctrine, however, does not require an express admission of speculative intent. The doctrine requires that applicants prove they have a specific plan and intent to use a specific quantity of water for specific beneficial uses. C.R.S. § 37-92-103(3)(a)(II). "[E]vidence of future needs and uses of water without contractual commitments to use any of the water [i]s insufficient to show the intent to put the water to beneficial use." *North Kiowa*, 77 P.3d at 79.

Independence's discovery responses prove that the types and places of use Opposers request to be removed from the Final Decree are speculative. Regarding these types and places of use, Independence stated that it "currently has no specific plans for" these uses, but that it may have a need for such uses at some undetermined point in the future "to satisfy its future

water obligations." CF, p #1877-83. In response to Opposers' motion in the Water Court that asked the court to remove these uses from the application under summary judgment, Independence did not argue that it had a non-speculative need for these requested types and places of use or that there were disputed issues of fact regarding Independence's non-speculative need. CF, p #1909-1929, 2013. Instead, Independence has consistently relied on its theory that the anti-speculation doctrine does not apply to its application. Accordingly, if this Court determines that the anti-speculation doctrine does apply, Independence has foregone its opportunity to make a threshold showing of non-speculative use, and this Court may amend the Final Decree to remove such speculative uses. *Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros.*, 307 P.3d 1056, 1058, 1072 (Colo. 2013).

Independence also argues that, as a quasi-governmental agency and municipal supplier, it must "be prepared for all current and future uses the Development may need." Resp. Br. at 3. The anti-speculation doctrine, however, allows some flexibility for governmental entities to adjudicate water applications for future needs so long as the claims are in line with the entity's reasonably anticipated future water requirements. *City of Thornton v. Bijou Irrigation*, 926 P.2d 1, 38 (Colo. 1996). This flexibility, however, "does not completely immunize municipal applicants from speculation challenges," and water courts must ensure that a governmental entity's claims are "consistent with the municipality's reasonably anticipated

requirements based on substantiated projections of future growth." *Id*. at 38-39. The Court expounded on this limited governmental planning exception in *Pagosa Area Water and Sanitation District v. Trout Unlimited*, 170 P.3d 307, 315 (Colo. 2007), where it noted that a governmental entity "does not have carte blanche to appropriate water for speculative purposes."

In *United Water & Sanitation Dist. v. Burlington Ditch Reservoir*, 476 P.3d 341, 348-49 (Colo. 2020), this Court reaffirmed that the governmental planning exception "does not apply where a government agency is acting in the capacity of a water supplier on the open market rather than as a governmental entity seeking to ensure future water supplies for its citizens." That restriction applies to Independence's claims in this case. Independence states that it needs water to "provide potable water service to a large residential development on the Subject Property, which may also include mixed-use commercial properties and a community center," Resp. Br. at 2. Independence's application, however, includes claims for uses such as industrial use and for locations off the Subject Property. CF, p #3-4. Independence has provided no evidence that it has obligations to provide water to its constituents for the types and places of use that Opposers request be removed from the Final Decree.

The amounts of water Independence claims it needs for in-house, irrigation, commercial, and municipal use on the Subject Property is already based on the needs of its development at "full build-out." At 1,804, 1,807-08.

Independence could have provided evidence of its reasonably anticipated future water requirements based on substantiated projections of future growth if it actually had a non-speculative need for these additional types and places of use to meet future water service obligations. Independence has not claimed that it needs additional water for its reasonably anticipated future water requirements or that its claims fit within the governmental planning exception. CF p #1889. Independence did not produce any documents or provide any further description of any future water needs, and did not attempt to prove that it has reasonably anticipated future water requirements based on substantiated projections of future growth. The vague response that Independence may need an indeterminate amount of water for future uses, including at any location in the state outside of the Subject Property, is insufficient to satisfy the anti-speculation doctrine, including under the governmental planning exception.

Independence chose to rely on its legal arguments that it does not have to make a threshold showing of non-speculative need for the new types and places of use of the Upper Dawson water that it seeks to add to its plan for augmentation. Any speculative uses should therefore be dismissed from the Final Decree.

III. CONCLUSION

For the reasons set forth above and in the Opening Brief, Opposers respectfully request that this Court:

(1) reverse the Water Court's determination of law and hold that applicants for plans for augmentation, or amendments to such plans, for not-nontributary groundwater must make a threshold showing of non-speculative, beneficial use; and

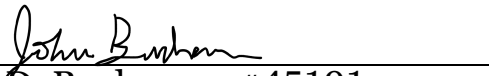
(2) modify paragraph seven of the findings of fact in the Final Decree to remove the approval of domestic, industrial, and stock watering use, to limit the municipal and commercial[2] use to a maximum of 0.84 acre-feet per year, and to remove the approval of use of the water off the Subject Property; and

(3) Vacate the conclusion of law in paragraph twenty-four of the Final Decree to the extent it states that the Water Court cannot apply the anti-speculation doctrine to plans for augmentation, or amendments to such plans, for withdrawals of not-nontributary groundwater.

[2] The opening brief erroneously stated that Independence claims a need for 0.84 acre-feet per year for municipal and industrial use; it should have stated municipal and commercial use, because Independence claimed in its discovery responses that it had a current need for 0.84 acre-feet of water for municipal use on the Subject Property, CF, p #1876, and that is what Opposers requested in the motion for summary judgment. CF, p #1847.

Respectfully submitted this 10th day of November, 2023.

Law Office of John. D. Buchanan LLC



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CERTIFICATE OF SERVICE
(23SA154)

I hereby certifythat the foregoing Reply Brief was served electronically on the following via CCE on this 15th day of September, 2023.

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Independence Water and Sanitation District	Eric Krisberg Trout Matthew Steven Poznanovic David S. Hayes Hayes Poznanovic Korver LLC Via CCE

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State Engineer	Colorado Division of Water Resources State of Colorado – Division of Water Resources Via CCE

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Tuyet Vu