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August 14, 2020

John Cowan
Division 1 Water Referee
Weld County Courthouse
P.O. Box 2038
Greeley, CO 80632

Re: Case No. 19CW3220 - FCC II Comments to Proposed Decree

Dear Referee Cowan:

On behalf of the Franktown Citizens Coalition II ("FCC II"), I am submitting the following comments to the revised proposed decree in Case No. 19CW3220, the response to objector comments ("Response"), and the Engineering Report drafted by Jehn Water Consultants, all filed by the applicant, Independence Water and Sanitation District ("Applicant"), on June 15, 2020 ("Proposed Decree").

In summary, Applicant has failed to address many of the issues raised in FCC II's initial comments, has not provided sufficient terms and conditions to ensure that the amended augmentation will prevent injury to other water right owners, and has proposed adding new replacement water sources that were not included in the published notice of the application. **Accordingly, FCC II renews its request that the Referee deny all the requested changes to the augmentation plan and dismiss the application**.

1. **Failure to Provide Notice of New, Proposed Replacement Water Sources.** The Proposed Decree includes two new types of replacement water sources, which were not included in the original application or noticed in the published resume.

   The application filed in this case states that Applicant sought only to change the decreed types of uses that are augmented and to allow augmentation of use both on and off the Subject Property as defined in the application. The application states that, other than these changes to the types and locations of augmented uses, "No other provisions of the original decree will be changed."

The augmentation plan originally decreed in Case No. 06CW59 relies solely on return flows from pumping of the 75 acre-feet of Upper Dawson water that is being augmented. *See* paragraph 10.D, 06CW59 Decree. *See also* Applicant's Engineering Report at pdf p. 7 ("The original plan used return flows from the use of the augmented Upper Dawson ground water as the replacement source"). When Opposers noted that the proposed new uses and off-property use of the Upper Dawson water may not produce adequate return flows to replace all stream depletions, applicants admitted this was true and a "legitimate concern," and that the new and off-site uses "may be more consumptive or may generate return flow in different locations." *See* Applicant's Response to Objector Comments, Response No. 9 at p. 5.

To address this issue, Applicant revised the Proposed Decree to include two new types of replacement water sources. First, Applicant proposes to use return flows from "onsite wastewater treatment or via the Independence wastewater treatment system" from pumping not only the 75 acre-feet of Upper Dawson water, but also "any [other] reusable source." *See* Proposed Decree at paragraph 8. According to Applicant's Engineering Report at pdf p. 4-5, these return flows will come from nontributary Denver and Arapahoe aquifer water. Second, the Proposed Decree states in paragraph 8 that, "If the accounting does not show adequate wastewater discharged so as to replace depletions, Applicant shall pump and release nontributary groundwater in the amount needed to replace all depletions." *See* Proposed Decree at paragraph 8. Neither of these replacement water sources were included in the original augmentation plan decreed in Case No. 06CW59.

Because Applicant did not provide notice of these proposed new sources of replacement water, Applicant must amend and republish the application. *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 25 (Colo. 1996)(Application must provide sufficient notice of a claim by putting a reader on inquiry notice of the claim's nature, scope, and impact); *In re Midway Ranches Prop. Owners' Ass'n, Inc.*, 938 P.2d 515, 524 (Colo. 1997)(sufficient notice of the claims in an application is necessary to give courts jurisdiction to consider the application).

Applicant's failure to include notice of the proposed new replacement water sources renders the published notice insufficient. The Referee should not allow Applicant to simply remove the new replacement water sources from the Proposed Decree to avoid amending and republishing the application, because as cited above, Applicant admits that relying on return flows from pumping of the 75 acre-feet of Upper Dawson water is insufficient to prevent injury under its current plan. Instead, the application should be dismissed, or Applicant must amend the application and republish notice.

2. **Location of Return flows**. As discussed in FCC II's Engineering Report, although Applicant states that well depletions will accrue to Cherry Creek, there are no streams within or near the Subject Property that flow into Cherry Creek. The two creeks that are influenced by runoff from the Subject Property are Running Creek and Coal Creek. Running Creek flows to Box Elder Creek and then to the South Platte near Watkins. Coal Creek flows to Sand Creek and empties into the South Platte near Commerce City.

Applicant has not provided any explanation of how it will deliver any of its replacement water to Cherry Creek.

3. **Lack of Terms and Conditions Related to Use of Nontributary Water as a Replacement Source.** Once the application is amended and republished, Applicant's proposal to "pump and release nontributary groundwater" to replace depletions that cannot be replaced through wastewater return flows is too vague and needs additional terms and conditions to prevent injury to other water users. Applicant must identify exactly which sources and water rights will be used and must provide evidence to the court that Applicant owns such water rights and will be able to physically withdraw a sufficient quantity of water from the proposed aquifers, and that such water is of suitable quality to meet the requirements of senior appropriators pursuant to C.R.S. § 37-92-305. Applicant must also be required to provide accounting to establish how much water has been pumped; the associated amount of out-of-priority depletion to each stream system; the amount, timing, and location of any replacement water delivered via wastewater treatment facility; whether the water being used for replacement is from water rights that are decreed for such use; and how much replacement water is needed from the nontributary replacement water sources.

   Applicant must also provide details about how it will deliver water from the nontributary sources to the affected streams when it is needed to replace depletions. If Applicant needs to drill wells into nontributary aquifers and construct a pipeline to the affected streams, this will require that Applicant obtain permits and easements and will require a considerable amount of time and money. Without the necessary infrastructure in place, Applicant will not be able to immediately provide such water to affected streams if and when it realizes that return flows from pumping the 75 acre-feet of water will be inadequate to augment its out-of-priority depletions. As discussed in FCC II's engineering report, drilling deep wells into these aquifers and constructing pipelines to the affected streams will be expensive and time consuming.

   Applicant also has not provided any details regarding what "onsite" wastewater treatment is as opposed to the Independence wastewater treatment system. This could refer to septic tanks (although neither the Proposed Decree nor engineering report refer specifically to septic tanks), or wastewater treatment plants located at the undefined off-Subject Property locations where Applicant requests use of the Upper Dawson water. Either way, due to the lack of details regarding Applicant's plan, there is no guarantee that return flows will accrue to the streams that will be depleted by pumping under this augmentation plan.

4. **Applicant's Expert Report Conflicts with the Proposed Decree.** Under Paragraph 8 of the Proposed Decree, Applicant states that replacement water will be provided "via onsite wastewater treatment or via the Independence wastewater treatment system." Applicant's Response at pdf page five also states that Independence will dedicate return flow from irrigation as a replacement water source. The Proposed Decree does not mention use of irrigation return flows from the Independence Development. Applicant's

engineering report at pdf page six, however, concludes that "Irrigation return flows are more than adequate to meet the augmentation requirement of this plan and will be dedicated to the plan."

Because the opinion in the engineering report of non-injury is based on an irrigation return flow source that is not included in the Proposed Decree, the Referee should disregard the conclusions in the report.

Moreover, in order to determine the amount of replacement water that is delivered to affected streams from irrigation return flows, the Proposed Decree would need to include a way to calculate or measure the amount of return flows that will accrue from irrigation, especially because the size of the irrigated area will change as homes are developed and sold in the Independence Development. There are currently no such terms and conditions in the Proposed Decree to determine the amount, timing, or location of irrigation return flows.

5. **Applicant Has Not Satisfied the Anti-Speculation Doctrine**. Applicant argues in its Response that anti-speculation does not apply to this application under *East Cherry Creek Valley WSD v. Rangeview Metro. Dist.*, 109 P.3d 104 (Colo. 2005). That case, however, applies only to determinations of Denver Basin water rights. This application does not involve a determination of water rights, which was accomplished in Case No. 06CW59.

   Instead, this case involves an application for an augmentation plan to cover the water rights already decreed in Case No. 06CW59. Applicant has not offered any authority for its argument that the anti-speculation doctrine does not apply to water court consideration of augmentation plans.

   This application makes clear why the anti-speculation doctrine should apply to this application to amend an augmentation plan. Applicant states in its Response that it is not planning to sell or lease water to the Serenity Pointe development, and has identified no other end users for its new claimed uses and locations of use. Without this information, Applicant cannot provide the information necessary to analyze its augmentation plan. For example, Applicant has not and cannot state what percent of water will be consumed by its new requested uses, where such use will occur, or where the water will be treated and where such treated water will be delivered to replace depletions to affected surface streams.

   Unless Applicant can prove that it will deliver replacement water of suitable quality in the necessary amount, times and locations to all affected streams, this application must be denied.

6. **Applicant Does Not Own all the Upper Dawson Water Involved in this Application**. The application requests changes of the types and location of use of all 75 acre-feet of Upper Dawson water that was included in the original augmentation plan decreed in Case No. 06CW59. According to the deed dated December 18, 2018, provided with

Applicant's Response, Applicant only owns 61.5 acre-feet of this water, and 61.5 acre-feet of the Laramie-Fox Hills aquifer water that must be reserved as a replacement water source. Applicant must either obtain consent from the owner of the other 13.5 acre-feet of Upper Dawson and Laramie-Fox Hills water or limit the amendment to 61.5 acre-feet of Upper Dawson water.

7. **Initial Comments Not Addressed by Applicant's Response and Proposed Decree**. Applicant's Response mostly focused on comments from pro se parties that Applicant believed were not relevant and did not need to be addressed in the Proposed Decree. Below is a list of comments from FCC II's original comments, dated May 7, 2020, that are not discussed above and were not addressed in the Proposed Decree, Response or Engineering Report:

    a. Comment No. 3: Applicant has not provided details about its proposed reuse and successive use of the 75 acre-feet of Upper Dawson water. This is important because return flows from the Upper Dawson water is one of the proposed replacement water sources.
    b. Comment No. 8: Applicant has not provided a plan regarding how it will deliver Laramie-Fox Hills water to replace post-pumping stream depletions.
    c. Comment No. 9: Applicant has not provided evidence that its replacement water sources will be of suitable water quality.
    d. Comment No. 10: Applicant did not respond to FCC II's concern that withdrawals under this augmentation plan could cause inflows of water underlying other properties to the Subject Property and has not addressed FCC II's request that setbacks of one-half mile from the edge of the Subject Property be required to withdraw the 75 acre-feet of Upper Dawson water.
    e. Comment No. 11: Applicant did not address the fact that, contrary to paragraph 11 of the Proposed Decree, opposers in this case include parties that own vested, adjudicated water rights.
    f. Comment No. 12 and 13: FCC II reasserts its statements that the augmentation plan is contrary to Colorado law and that Applicant has not proved that the augmentation plan will prevent injury to other water right owners.
    g. Comment No. 16: Applicant did not respond to FCC II's comment that paragraph 22 of the Proposed Decree provides an incorrect definition of water rights.
    h. Comment No. 17: Applicant did not respond to FCC II's comment that retained jurisdiction is still limited to five years after entry of decree, at which time the augmentation plan may not yet be in operation.
    i. Comment No. 18: Applicant did not respond to FCC II's comment that paragraph 10.F of the 06CW59 decree, now included as paragraph 9.1 of the Proposed Decree, is inappropriate and should be removed.
    j. Comment No. 19: Applicant did not respond to FCC II's comment that the Proposed Decree allows Applicant to substitute new, post-pumping replacement water sources without having to obtain approval from the water court.

k. Comment No. 20: Applicant did not respond to FCC II's comment that the Proposed Decree does not include accounting forms and does not list the information that must be included in the forms.

For the foregoing reasons, FCC II respectfully requests the Water Referee deny the application in full.

These comments are based on the information available to FCC II at this time. FCC II reserves the right to amend or provide additional comments in the future and as more information becomes available.

Sincerely,

BUCHANAN SPERLING & HOLLEMAN PC

John Buchanan

JOHN D. BUCHANAN