

Exhibit A to FCC II Protest to Referee's Ruling

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DATE FILED: May 87, 2020 11:23 AM
FILING ID: 6801780533885
CASE NUMBER: 2019CW3220

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May 7, 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 proposed decree in Case No. 19CW3220 filed by the applicant, Independence Water and Sanitation District ("Applicant"), on March 31, 2020 ("Proposed Decree").

In summary, Applicant has totally failed to provide any evidence necessary to satisfy its burden to prove that its requested changes to the existing augmentation plan will not cause injury to other water users. **Accordingly, FCC II requests that the Referee deny all the requested changes and dismiss the application.**

1. **General Comment.** Applicant failed to provide any engineering or hydrogeologic analysis, or any other evidence whatsoever, to support its requested amendments to the augmentation plan adjudicated in Case No. 06CW59. The requested amendments include augmentation of several new types of uses and authorization to use water off the "Subject Property" as defined in paragraph four of the Proposed Decree. The existing augmentation plan and Proposed Decree include consumptive use factors only for irrigation and inhouse use; there are no consumptive use factors for the new requested uses. In addition, the existing augmentation plan relies on return flows from use of water on the Subject Property to augment well depletions.

The requested amendments to the existing augmentation plan require, at the very least, that Applicant provide evidence to establish the percentage of return flows from the new requested uses that would be available to augment well depletions and evidence to establish how return flows from use of the water off the Subject Property would accrue to

affected stream systems. Opposers cannot make informed decisions about the potential injury from the proposed amendments without this critical information. Applicant has not even identified where it intends to use water off the Subject Property.

This failure to provide any supporting evidence appears to be a disingenuous attempt by Applicant to provide such evidence with its responses to opposers' decree comments, thereby depriving opposers of the chance to review and comment on such evidence. Due to this complete lack of supporting evidence, the Referee should deny this application in full. If the referee does allow Applicant to provide new supporting evidence with its responses, FCC II requests that opposers be given at least 120 days to retain expert witnesses to review and comment on any such new evidence.

2. **Proposed Decree Paragraph 4 – Ownership of Water Rights.** Applicant alleges that it owns “a portion of the Upper Dawson rights and plan for augmentation and has an option to purchase the remainder.” Applicant should provide documentation to support this claim and identify which portion of these water rights it owns. Moreover, the existing augmentation plan and Proposed Decree both require reservation of 7,500 acre-feet of water from the Laramie Fox-Hills aquifer, adjudicated in Case No. 06CW59, to replace post-pumping depletions. Applicant must also provide documentation that it owns this Laramie Fox-Hills water.
3. **Proposed Decree Paragraph 5 – Reuse and Successive Use.** Applicant requests that the augmented uses of water be amended to include reuse and successive use. The augmentation plan, however, relies on return flows to replace out-of-priority depletions. Applicant has not provided any description of how it would reuse and successively water under this plan and still have water available to replace depletions. Accordingly, reuse and successive use of water should be denied.
4. **Proposed Decree Paragraph 5 – Other New Requested Uses.** Applicant requests that the augmented uses of the water rights be expanded to include domestic, industrial, commercial, irrigation, stock watering, fire protection, exchange and augmentation. Applicant has not provided any estimate of the consumptive use that would result from these new uses and the amount of water that would be available as return flows to augment out-of-priority depletions, nor any evidence supporting such estimates of consumptive use. Regarding augmentation use, any such use should be limited to augmentation of out-of-priority depletions under this plan for augmentation. It is also unclear whether domestic use would constitute a different use than the existing inhouse use, or if this is redundant. Accordingly, these new uses should be denied.
5. **Proposed Decree Paragraph 5 – Off Property Use of Water.** Applicant requests authorization to use water off the Subject Property. Applicant has not provided any explanation of where this water would be used and for what uses or how water used off the Subject Property will return to affected stream systems in the necessary amounts, times, and locations to prevent injury to tributary water rights. Accordingly, use of water off the Subject Property should be denied.

6. **Proposed Decree Paragraph 5 – Annual Amount of Withdrawal.** Applicant requests that the annual withdrawals of water remain at 75 acre-feet per year as adjudicated in the 06CW59 Decree based on a 100-year aquifer life. However, the Elbert County Subdivision Regulations, dated February 1, 2019, Article XII(F)(1), attached to these comments, require a 300-year aquifer lifespan. Accordingly, any decree entered in this case should restrict annual withdrawals to 25 acre-feet per year (7,500 acre-feet total amount augmented divided by 300 years).
7. **Proposed Decree Paragraph 7 – Replacement During Pumping.** Applicant has not provided estimates of the gross and consumptive water use amounts for the new requested uses and, therefore, cannot claim that there will be sufficient return flows available to replace out-of-priority depletions. Note that Applicant admits in this paragraph that, with respect to the new requested water uses, “more consumptive uses are possible.” Applicant has not provided any description of what it believes is a “normal mix of uses,” and what the resulting consumptive use and return flow amounts would be from the “normal mix of uses.” Applicant’s proposed solution to this problem is also unacceptable. Applicant proposes to demonstrate to the Division Engineer “from time to time” that the amount of return flow is sufficient, or to dedicate return flows from the “Independence wastewater treatment plant.” In order to obtain a decree amending the existing augmentation plan, Applicant must demonstrate to the court now, in this proceeding, that it has sufficient return flows that will be dedicated to this plan in an amount to prevent injury to tributary water rights. Applicant has totally failed to do so.

In addition, to the extent Applicant wants to use return flows from the Independence wastewater treatment plant, Applicant must provide documentation regarding this facility including, but not limited to, whether it has been constructed, where it is located, where its effluent will be delivered, what water rights will be used to generate replacement water under this augmentation plan, and whether those water rights will be physically and legally available for use as a replacement supply under this augmentation plan. Applicant also has not provided any proof that the wastewater treatment plan return flows will be of suitable quality to meet the requirements of senior appropriators pursuant to C.R.S. § 37-92-305. For this reason, the use of wastewater treatment plant return flows should not be authorized as a replacement water source in the Proposed Decree.

8. **Proposed Decree Paragraph 8 – Replacement of Post Pumping Depletions.** Because Applicant seeks to amend the augmentation plan adjudicated in 06CW59, all aspects of the plan are open and subject to revision. The provisions to replace post-pumping depletions in the existing augmentation plan are inadequate. Applicant must provide a plan for how it will get water from the Laramie Fox-Hills aquifer to affected streams, including if necessary a pipeline route and easements or public rights-of-way for such pipeline. There must be a bonding requirement to ensure that funding is available to construct a well into the deep Laramie Fox-Hills aquifer and to construct a pipeline and other necessary infrastructure to deliver water to where it will work as a replacement supply in the plan for augmentation. Applicant must provide an estimate of such costs

and a plan for constructing the necessary infrastructure. Such construction must occur in time to begin replacing post-pumping depletions immediately after Applicant ceases withdrawals of Upper Dawson water. The decree should also include a covenant running with the Subject Property that would require construction of a well and pipeline and conveyance of water to affected streams to ensure replacement of out-of-priority post-pumping depletions.

9. **Proposed Decree Paragraph 8 – Water Quality of L-FH Aquifer.** Under C.R.S. § 37-92-305, Applicant must prove that its replacement water sources will be of suitable quality to meet the requirements of senior appropriators. The Laramie-Fox Hills has the worst water quality of all Denver Basin aquifers. Bacteria, working with the heat in the water caused by the depth of the aquifer, and minerals from the confining layer of coal, form noxious compounds like hydrogen sulfates and sulfides, methane, chlorine, fluoride and nitrites, all exceeding EPA standards. Manganese, selenium and iron are also found in large quantities. Sulfur dioxide in the water is considered flammable and poisonous, with a maximum allowable level of 250 mg. per liter (EPA). Levels hundreds of times that have been found in various Laramie-Fox Hills wells. Robson and Banta (1995) describe “putrid odor and little value for most uses.” The process of cleaning this water is more difficult than with any other Denver Basin aquifer, involving treatment with acids and dilution with water from other aquifers. Applicant has not provided any evidence regarding the quality of Laramie-Fox Hills water underlying its property or the methods it would use to treat the water to a suitable quality.
10. **Proposed Decree Paragraph 9 – Injury to Other Denver Basin Groundwater Users.** Pumping of water under this decree will create a cone of depression that may cause water located under property owned by persons other than Applicant to flow under and into the Subject Property. This would result in injury to adjudicated Denver Basin water rights adjacent to the Subject Property. The decree should require setbacks of one-half mile from the edge of the Subject Property for any wells constructed under this augmentation plan.
11. **Proposed Decree Paragraph 10 – Claim of Injury.** Opposers in this case include parties with vested, adjudicated Denver Basin ground water rights who claim that injury would result from this application. Accordingly, this paragraph should be removed.
12. **Proposed Decree Paragraph 11 – Injury.** Applicant has not provided any evidence to support its claim that the amended plan for augmentation will not injuriously affect other water right owners, and this paragraph should be removed.
13. **Proposed Decree Paragraphs 14-15, 22.** Contrary to Applicant’s claims in these paragraphs and for the reasons discussed herein, the application in this case does not meet the requirements of Colorado law and should be denied.

14. **Proposed Decree Paragraph 18.** Applicant agrees with the statement in this paragraph that “this amended plan for augmentation will cause material injury to the rights of” other water users (emphasis added).
15. **Proposed Decree Paragraph 19 – Anti-speculation Doctrine.** Applicant cites a case that states the anti-speculation doctrine does not apply to adjudications of Denver Basin groundwater. This application, however, is not an adjudication of Denver Basin groundwater – it is an application to amend an augmentation plan. Applicant must therefore provide documentation that it has a non-speculative plan to place specific amounts of water to each new requested type and location of use and provide contracts for use of any water that Applicant itself will not use. Applicant has not provided any such evidence. For this reason, the application should be denied.
16. **Proposed Decree Paragraph 21 – Definition of Water Rights.** Applicant’s statement that “water rights” are limited to surface water or tributary ground water is incorrect and this paragraph should be removed. *See, e.g., 37-90-137(4)(c)*, which refers to “vested nontributary groundwater rights.”
17. **Proposed Decree Paragraph 25 – Retained Jurisdiction.** The court must retain jurisdiction over this application for a sufficient period of time after the 100-year period in which the Upper Dawson water may be withdrawn to ensure that the augmentation plan adequately protects other water rights from injury during the post-pumping period. Because the depletions continue to increase during the post-pumping period, FCC II requests the court retain jurisdiction for at least 10 years after pumping ceases.
18. **06CW59 Decree Paragraph 10.F.** Any decree entered in this case should expressly remove paragraph 10.F from the 06CW59 decree, which allows Applicant to avoid its responsibility to replace post-pumping depletions under certain conditions. Applicant must be required to replace all out-of-priority depletions, whether during or after the 100-year period when pumping is allowed.
19. **06CW59 Decree Paragraph 10.E – Substitution of Post-Pumping Replacement Sources.** To the extent applicant wants to use sources other than the 75 acre-feet per year of Laramie Fox-Hills water approved in the 06CW59 decree, applicant must propose a procedure for adding other augmentation sources that is consistent with C.R.S. § 37-92-305(8)(c). This procedure must include the filing of a new application with the water court.
20. **Accounting Forms.** Any decree entered in this case must require Applicant to maintain accounting that includes the timing, location and amount of depletions to each affected surface stream, the amount and source of replacement water supplies, the administrative calls on affected surface streams, and the volume of diversions associated with each approved type of use. Applicant should develop accounting forms and provide them as an exhibit to the decree. Applicant must provide the completed accounting forms to the Division Engineer and opposers in this case on at least a monthly basis.

Referee Cowan
May 7, 2020
Page 6

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 D. BUCHANAN