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DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO 901 9th Avenue Greeley, Colorado 80631 (970) 475-2400	
CONCERNING THE APPLICATION FOR AMENDMENT OF AN AUGMENTATION PLAN OF INDEPENDENCE WATER AND SANITATION DISTRICT, IN ELBERT COUNTY	**COURT USE ONLY**
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MOTION FOR SUMMARY JUDGMENT PURSUANT TO C.R.C.P. 56

Opposers, Franktown Citizens Coalition II, Inc. ("FCC II") and West Elbert County Well Users Association ("West Elbert"), hereby file this motion for summary judgment pursuant to C.R.C.P. 56 and in support thereof state as follows.

Certificate of Compliance: pursuant to C.R.C.P. 121 § 1-15(8), undersigned counsel for FCC II certifies that he has conferred with opposing counsel for Independence Water and Sanitation District ("Independence") and that Independence does not consent to the motion.

I. INTRODUCTION

Under the anti-speculation doctrine of Colorado water law, Independence Water and Sanitation District ("Independence") must make a threshold showing that it has a specific plan and intent to use water for the new augmented uses and places of use claimed in its application filed in this case. Independence, however, has admitted that it does not have any plan or intent to use water off the Subject Property, as defined below, and that it does not have any plan or intent to use water for any of the new claimed uses other than 0.84 acre-feet per year of commercial and municipal use at the "homestead" site located on the Subject Property. The undisputed facts in this case thus prove that Independence cannot make the required threshold showing of non-speculative use to obtain its requested amendment to its plan for augmentation.

Because Independence cannot make this threshold showing, FCC II and West Elbert request that this court enter summary judgment to: (1) dismiss Independence's claim to amend its plan for augmentation to allow use of the Upper Dawson Water off the Subject Property; and (2) dismiss Independence's claim to amend its plan for augmentation to add new types of uses other than fire protection use and the use of 0.84 acre-feet per year for commercial and municipal use at the homestead site located on the Subject Property.

II. BACKGROUND

a. Background Regarding the Application Filed in this Case.

This case involves Independence's application to amend an existing plan for augmentation that allows Independence to withdraw up to 75 acre-feet of water per year from the Upper Dawson aquifer (the "Upper Dawson Water") for irrigation and in-house use. Exhibit A, Ruling of the Referee, at ¶¶ 5.1, 7. Use of the Upper Dawson Water was limited to use on the Subject Property, which is described as "1,102 acres of land located in all of Section 15, and the W1/2 and SW1/4 SE1/4 of Section 14, Township 7 South, Range 65 West of the 6th P.M." *Id*. at ¶¶ 5, 5.1.

The plan for augmentation was approved in Case No. 06CW59, in which this court also adjudicated a determination of Independence's predecessor-in-interest's right to certain quantities of water in several of the Denver Basin aquifers that underlie the Subject Property. Exhibit B, 06CW59 decree at 2-4.

In the current application, Independence seeks to amend the plan for augmentation to allow the Upper Dawson Water to be used for several new types of use: domestic, municipal, industrial, commercial, stock watering, fire protection, and exchange and augmentation uses. Exhibit A at ¶ 7. The application also requests to amend the place of use under the plan for augmentation to allow use of the Upper Dawson Water anywhere off the Subject Property. *Id*.

b. Background Regarding Not Nontributary Groundwater.

The Upper Dawson aquifer is one of the Denver Basin aquifers, which includes four aquifers that stretch from Greeley to Colorado Springs and descend in the following order by depth: the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers. *Colo. Ground Water Comm'n v. North Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 72-73 (Colo. 2003). The Dawson aquifer includes both the Upper Dawson and Lower Dawson aquifers. *Rules and Regulations Applying Exclusively to the Withdrawal of Ground Water from the Dawson, Denver, Arapahoe And Laramie-Fox Hills Aquifers in the Denver Basin*, 2 CCR 402-6-4.A.

Water in the Denver Basin aquifers is divided into two administrative categories: (1) nontributary groundwater, defined as water located outside of designated basins that, when withdrawn continuously for one hundred years, will not deplete the flow of a natural stream at an annual rate greater than 0.1% of the annual rate of withdrawal, C.R.S. § 37-90-103(10.5); and (2) "not nontributary" groundwater, defined conversely as water in the Denver Basin aquifers located outside of designated basins that, when withdrawn continuously for one-hundred years, will deplete the flow of a natural stream at an annual rate greater than 0.1% of the annual rate of withdrawal. *Id*. at § 103(10.7).

The right to use both nontributary and not nontributary groundwater is allocated based on overlying land ownership, rather than under the prior appropriation system used for tributary groundwater. *North Kiowa-Bijou,* 77 P.3d at 73-74. Landowners whose property overlies the Denver Basin aquifers are granted an inchoate right to use the water in the Denver Basin aquifers underlying their property. *East Cherry Creek Valley Water and Sanitation Dist. v. Rangeview Metro Dist.*, 109 P.3d 154, 157 (Colo. 2005). A landowner may convert this inchoate right into a vested right if the landowner obtains a decree from the water court determining their rights to the

water or, for nontributary water only, if the landowner obtains a well permit from the State Engineer and constructs a well. *Id*.

The second method of obtaining a well permit and constructing a well, without obtaining a water court decree, only applies to nontributary water because one must obtain a water-court-decreed augmentation plan in order to withdraw not nontributary groundwater. C.R.S. § 37-90-137(9)(c.5)(I)(A). The State Engineer will not issue a permit for not nontributary water until the applicant has a court-approved plan for augmentation. Exhibit C, Policy Memorandum 94-3.

For not nontributary groundwater located in the Dawson aquifer specifically, including the Upper Dawson Water at issue in this case, the plan for augmentation "must provide for the replacement of actual out-of-priority depletions to the stream caused by withdrawals from the wells and must meet all other statutory criteria for the plans." C.R.S. § 37-90-137(9)(c.5)(I)(B). The requirements for augmentation plans for not nontributary groundwater in aquifers other than the Dawson aquifer are more lenient and depend on how far from a surface stream the well used to withdraw the water is located. *Id*. at § 137(9)(c.5)(I)(C).

III. UNDISPUTED FACTS

FCC II filed interrogatories asking Independence to describe its planned use of the Upper Dawson Water for the new types of use requested in this application, except for fire protection use, and for Independence's planned use of the water off the Subject Property. Independence responded as follows:

Domestic Use: Independence stated that it "currently has no specific plans for domestic use" of the "AUGMENTED WATER [defined as the Upper Dawson Water]. Exhibit D, Independence Response to Discovery Requests at 1, 6. Independence further stated that it "may need to put the AUGMENTED WATER to domestic use to satisfy its future water obligations." *Id*. (emphasis added).

Industrial Use: Independence stated that it "currently has no specific plans for industrial use of the AUGMENTED WATER." *Id*. at 7. Independence further stated that it "may need to put the AUGMENTED WATER to industrial use to satisfy its future water obligations." *Id*. (emphasis added).

Augmentation Use: The 06CW59 decree allows the return flows from the initial in-house and irrigation use of the Upper Dawson Water to be used to augment stream depletions caused by withdrawing the Upper Dawson Water. *See* Ex. A at 4-5, para. 10.C-10.D. Therefore in its interrogatory, FCC II asked Independence to describe its planned use of water for augmentation other than the use of return flows for augmentation that was already authorized in the 06CW59 decree. Independence stated that it "currently has no specific plans for augmentation use of the AUGMENTED WATER, other than use in the plan for augmentation approved in the 06CW59 DECREE." Exhibit D at 9. Independence further stated that it "may need to put the AUGMENTED WATER to augmentation use to satisfy its future water obligations." *Id*. (emphasis added).

Exchange Use: Similar to augmentation use, the 06CW59 decree implicitly allows the return flows from the initial in-house and irrigation use of the Upper Dawson Water to be exchanged for the stream depletions caused by withdrawing the Upper Dawson Water. *See* Exhibit B at p. 4-5, para. 10.C-10.D. Therefore in its interrogatory, FCC II asked Independence to describe its planned exchange use of the Upper Dawson Water other than the use that was already authorized in the 06CW59 decree. Independence responded that it "currently has no specific plans for exchange use of the AUGMENTED WATER." Exhibit D at 10. Independence further stated that it "may need to put the AUGMENTED WATER to exchange use to satisfy its future water obligations." *Id*. (emphasis added).

Stock Watering Use: Independence stated that it "currently has no specific plans for stock watering use of the AUGMENTED WATER." *Id*. at 11. Independence further stated that it "may need to put the AUGMENTED WATER to stock watering use to satisfy its future water obligations." *Id*. (emphasis added).

Use of Water Off the Subject Property: Independence stated that it "currently has no specific plans for use of the AUGMENTED WATER at any location other than the SUBJECT PROPERTY." *Id*. at 12. Independence further stated that it "may need to put the AUGMENTED WATER to use off the SUBJECT PROPERTY to satisfy its future water obligations." *Id*. (emphasis added).

Commercial Use: Independence stated that its "current total estimated annual amount of commercial use is 0.84 acre-feet per year, which is based on the estimated potable use in the homestead." *Id*. at 8. Exhibit J attached to Independence's response to the interrogatories states that use of water at the homestead will be for "maintaining the original homestead to be used as a community area." Exhibit E, Independence Water Supply Plan at 1 (pdf p. 4). Independence further stated that it "may also need use of AUGMENTED WATER for commercial use to satisfy its future water obligations." Exhibit D at 8 (emphasis added).

Municipal Use: Independence stated that its "current total estimated annual amount" of municipal use is 8.43 acre-feet of water per year. This amount includes the same 0.84 acre-feet per year of use at the homestead that Independence also claims as the basis for its requested commercial use, and 7.59 acre-feet per year for "irrigation of a community garden, medians, and buffer zones." *Id*. at 5. Independence further stated that it "may also need to use AUGMENTED WATER for municipal purposes to satisfy its future water obligations." *Id*. (emphasis added).

Contracts for Sale or Lease of Water: FCC II filed a request for admission asking Independence to admit that it does not have any contracts or other agreements for the sale, lease, or use of the Upper Dawson Water for the new types and places of use requested in this application. Independence responded that "the only contract or other agreement for the sale, lease, or use" of the Upper Dawson Water is its agreement with CB Independence Holding Company, LLC. *Id*. at 17. This agreement is not related to the use of the Upper Dawson Water. It only granted Independence an option to purchase up to 13.5 acre-feet per year of the 75 acre-feet total of the Upper Dawson Water (plus 13.5 acre-feet of water in the Laramie Fox Hills aquifer). Independence thus admits it does not have any firm contracts to sell or lease the Upper Dawson Water to other end users for the new types and places of use requested in this application.

IV. STANDARD OF REVIEW

Under C.R.C.P 56(c), summary judgment may be entered "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pueblo W. Metropolitan District v. Se. Colo. Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984). A genuine issue of material fact cannot be raised solely by means of argument. *Sullivan v. Davis*, 474 P.2d 218, 221 (Colo. 1970). Under C.R.C.P. 56(d), the court may grant a partial summary

judgment as to material facts existing without substantial controversy and reserve disputed facts for subsequent proceedings." *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).

V. ARGUMENT

a. The anti-speculation doctrine applies to the use of not nontributary water, including the Upper Dawson Water at issue in this case.

All water within Colorado is a public resource, and no person may own this public resource. *North Kiowa-Bijou*, 77 P.3d at 78. A water right thus does not grant ownership of water; instead, it grants the right to use water under applicable provisions of law. *Id*. One such provision of law is the anti-speculation doctrine.

The anti-speculation doctrine was created to prevent speculators from hoarding the state's public water resources to the detriment of bona fide water users who would put the water to actual, beneficial use. *Colo. River Water Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568-569 (Colo. 1979). The doctrine thus helps to "encourage full utilization of water resources by making water available to those with a genuine, immediate use for the water." *Front Range Res., LLC v. Colo. Ground Water Comm'n*, 415 P.3d 807 (Colo. 2018)(emphasis removed).

The doctrine was codified in C.R.S. § 37-92-103(3)(a), which states that, to acquire the right to use water, an appropriator must have "a specific plan and intent" to use a "specific quantity of water for specific beneficial uses" on land or facilities in which the appropriator has an interest or a reasonable expectation of procuring such interest. Moreover, an appropriation cannot be based on a speculative sale or transfer of the water. *Id*. If an appropriator intends to transfer the water that is claimed in an application, they must have firm contracts in place with the ultimate end users of the water, who themselves must have a specific plan and intent to use a specific quantity of water for specific beneficial uses. *Vidler*, 594 P.2d at 568; *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794, 799-800 (Colo. 2011). In sum, "a person who intends to hold the [water use] right only to sell it or dispose of it for profit in the future, rather than acquire it for the purpose of applying water to an identified beneficial use, is not entitled to a determination of a water use right." *North Kiowa-Bijou*, 77 P.3d at 79.

Beneficial use of water 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 is lawfully made." *Id.* at 78 n.34; C.R.S. § 37-92-103(4). The anti-speculation doctrine coupled with the definition of beneficial use ensures that one may only acquire the right to use the specific amount of water actually needed to serve specific, identifiable uses on an applicant's own land and facilities, or those of a third party with which the applicant has a firm contract.

The anti-speculation doctrine was initially applied to tributary water. The Colorado Supreme Court has since held that the doctrine also applies to Denver Basin groundwater both within designated basins, *North Kiowa-Bijou*, 77 P.3d at 79-80, and outside of designated basins, *East Cherry Creek* 109 P.3d at 158. "Even though Denver Basin ground water is managed differently from waters of the natural stream [i.e., tributary water], the Groundwater Management Act mirrors the anti-speculation, beneficial use, [and] non-waste precepts of Colorado water law." *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n*, 956 P.2d 1260, 1271 (Colo. 1998).

b. Applications for a plan for augmentation for not-nontributary groundwater, including applications to amend such plans for augmentation, require a threshold showing of non-speculative, beneficial use.

Throughout this application, Independence has taken the incorrect position that the court in *East Cherry Creek* held that the anti-speculation doctrine does not apply to applications to adjudicate a plan for augmentation for not-nontributary groundwater rights, and instead only the State Engineer may apply the doctrine when issuing well permits for the withdrawal of such water. The *East Cherry Creek* opinion, however, did not involve or refer to not nontributary groundwater or plans of augmentation. Instead, the court held that the anti-speculation doctrine does not apply to water court <u>determinations</u> of <u>nontributary</u> groundwater. In fact, as discussed below, the court's analysis confirms that, to obtain a plan for augmentation that allows the use of not nontributary groundwater, an applicant must make a threshold showing of a non-speculative, beneficial use of water.

In *East Cherry Creek*, the applicant Rangeview Metropolitan District had previously obtained a decree determining its water rights in the nontributary Arapahoe aquifer. 109 P.3d at 155-56. The decree included terms and conditions on the use of the water that were more restrictive than what the legislature adopted in Senate Bill 5, which was passed after the decree

was entered. Rangeview thus applied for a change of water rights[1] so that the prior determination of its water rights would be made consistent with the more expansive terms in Senate Bill 5. *Id*. at 159-60. The water court and Colorado Supreme Court held that the anti-speculation doctrine did not apply to water court determinations of nontributary groundwater rights but instead would be applied by the State Engineer when issuing well permits to withdraw and use nontributary groundwater. *Id*. at 159. Accordingly, the applicant in *East Cherry Creek* was not required to make the threshold showing of non-speculative, beneficial use to obtain a determination of its nontributary water. *Id*. at 159.

One of the main factors in the court's reasoning was the "clear demarcation" the legislature created between the water court's authority to make determinations of nontributary groundwater rights, which involves "the determination of available water underlying particular lands," and the State Engineer's regulation of the withdrawal and use of such water through issuance of well permits. *Id*. at 158. The Court further noted a "clearly expressed legislative intent" to allow landowners to obtain determinations to nontributary groundwater, and thereby vest the landowner's otherwise inchoate right to such water, without including a corresponding obligation to begin developing and using the water. *Id*.

Because the legislature expressly allowed landowners to adjudicate nontributary groundwater rights for future, unspecified uses, the court reasoned that the anti-speculation doctrine does not apply to determinations of nontributary groundwater "as a matter of legislative design." *Id*. Applying the anti-speculation doctrine to determinations would "thwart a clearly expressed legislative intent to permit adjudication for future uses without a corresponding obligation to develop them." The Court further stated that protection of other potential appropriators is unnecessary in a determination of water rights because only the overlying landowner was entitled to appropriate and use the water. *Id*.

The opinion in *East Cherry Creek* that the anti-speculation doctrine does not apply to determinations of nontributary groundwater is not relevant to applications for augmentation

[1] The water court concluded, and the Colorado Supreme Court agreed, that the application did not actually request a statutory change of water rights, but instead "complied with the procedural requirements for the adjudication of a use right to nontributary ground water." *East Cherry Creek* 109 P.3d at 160. The water court and Supreme Court thus treated the application as a determination of nontributary groundwater. *Id*.

plans, or amendments of such plans, involving not nontributary groundwater. *East Cherry Creek* involved only nontributary groundwater, and the opinion never mentioned not nontributary groundwater. More importantly, the application at issue in *East Cherry Creek* was a determination of nontributary groundwater, not a plan for augmentation as is at issue in this case. *Id*. at 160.

A water court determination of nontributary (or not nontributary) groundwater simply determines the amount of water in specific aquifers underlying the applicant's land, which causes the landowner's inchoate right in such water to vest. *Id*. at 157-58; *North Kiowa-Bijou* 77 P.3d at 71-72. In order to actually construct a well and use the water, the water user must obtain a well permit from the State Engineer for nontributary water or, for not nontributary water, a water-court-approved plan for augmentation and well permit. C.R.S. § 37-90-137(1), (9)(c.5)(I)(A).

Independence already obtained a water court determination for the Upper Dawson Water in the 06CW59 decree. Exhibit B at 2-4. The decree determined that the applicant was entitled to the withdrawal and use of 288.3 acre-feet per year of water from the Upper Dawson aquifer, plus certain quantities of water in the other aquifers, which water "will be used, reused, and successively used, for domestic, industrial, commercial, irrigation, stock watering, fire protection, and exchange and augmentation purposes, both on and off the Subject Property. *Id*. at ¶¶ 5-6.

In addition to this determination, which vested the applicant's rights in the groundwater underlying his property, the decree also approved a plan for augmentation for 75 acre-feet of the 288.3 total acre-feet per year of water in the Upper Dawson aquifer. The use of water under the plan for augmentation is limited to in-house and irrigation use on the Subject Property. *Id*. at 4-7. Independence now seeks approval of an amendment to this plan for augmentation that would allow it to use the Upper Dawson Water anywhere off the Subject Property and for several new types of uses that were not authorized in the plan for augmentation approved in the 06CW59 decree.

Due to the differences between the nontributary groundwater at issue in *East Cherry Creek* and the not nontributary groundwater at issue in this case, plus the differences between an application for a determination of groundwater at issue in *East Cherry Creek* and a plan for

augmentation at issue here, the court's reasoning in *East Cherry Creek* does not apply to the application in this case. Instead, the court's reasoning confirms that this court should apply the anti-speculation doctrine in this proceeding.

First, the clear demarcation created by the legislature between the water court's determination of nontributary groundwater and the State Engineer's regulation of the use of the water does not apply to not nontributary groundwater. Instead, the legislature required water court approval of a plan for augmentation prior to the use of any not nontributary groundwater. C.R.S. § 37-90-137(9)(c.5)(I)(A). The State Engineer will not issue well permits for not nontributary groundwater without a water-court-approved plan for augmentation. Exhibit C. Conversely, for the nontributary groundwater involved in *East Cherry Creek*, a landowner could withdraw and use the water by obtaining a well permit from the State Engineer without any involvement by the water court. *East Cherry Creek*, 109 P.3d at 157.

Unlike in a determination of groundwater, the water court's adjudication of a plan for augmentation inherently involves the regulation of the withdrawal and use of not nontributary water. For water in the Dawson Aquifer specifically, such as the water at issue in this case, such plans for augmentation must "provide for the replacement of actual out-of-priority depletions to the stream caused by withdrawals from the wells and must meet all other statutory criteria for the plans." C.R.S. § 37-90-137(9)(c.5)(I)(B). The water court must determine "the depletions from an applicant's use or proposed use of water, in quantity and in time, and the amount and timing of augmentation water that would be provided by the applicant" and whether the replacement water is of a suitable quality. C.R.S. § 37-92-305(5), (8)(a). Such findings go well beyond what occurs in a simple determination of nontributary water rights and require that the water court be involved in the regulation of the use of not nontributary water. Accordingly, there is no "clear demarcation" by the legislature between the water court's adjudication of a plan for augmentation for the withdrawal and use of not nontributary water and the State Engineer's issuance of well permits for such water.

Other factors relied on by the *East Cherry Creek* Court do not apply to applications for plans for augmentation for not nontributary water. The *East Cherry Creek* Court emphasized the fact that the legislature had expressly allowed determinations of nontributary groundwater rights

to be made for existing and future uses. 109 P.3d at 157; C.R.S. § 37-90-137(6). In contrast, the legislature has not expressly authorized water courts to approve plans for augmentation for future uses of not nontributary groundwater. The *East Cherry Creek* Court similarly noted that the anti-speculation doctrine does apply to determinations of Denver Basin groundwater by the Ground Water Commission in designated basins due to the "absence of any clear expression of legislative intent" to remove such applications from consideration under the anti-speculation doctrine.

The *East Cherry Creek* Court also reasoned that protection of other appropriators, whom the anti-speculation doctrine is designed to protect, was not a consideration for the water court when it determines rights to nontributary groundwater. Conversely, protection of other appropriators is an important aspect in an adjudication of a plan for augmentation. C.R.S. § 37-92-305(3)(plans for augmentation may not "injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right").

Perhaps most importantly, prohibiting the water court from applying the anti-speculation doctrine when it considers a plan for augmentation would waste the time and resources of the water court and other water users who participate as opposers in such applications. Water courts and opposing parties would have to participate in complicated applications for augmentation plans for uses that could be purely speculative and would thus not be permitted by the State Engineer under the anti-speculation doctrine. It would be very inefficient to allow water users to obtain plans for augmentation before deciding whether the uses requested in the plan for augmentation are speculative and therefore prohibited under Colorado law.

The determination of whether an applicant has a sufficiently specific plan and intent to use water, or a sufficiently firm contract to sell or lease water, involves a mixed question of law and fact that should be resolved by a water court rather than the State Engineer. *See Pagosa Area Water and Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774, 779 (Colo. 2009). The only instance when the State Engineer makes this determination is when issuing a well permit for nontributary groundwater under the decision in *East Cherry Creek*. In all other instances, the water court (or the Ground Water Commission in designated basins) applies the anti-speculation doctrine.

Because the court's reasoning in *East Cherry Creek* does not apply to applications for plans for augmentation for not nontributary water rights, and because the water court is the best forum for applying the anti-speculation doctrine, the water court in this application should apply the doctrine and require that Independence make a threshold showing that its requested uses and place of use of the water at issue in this case are not speculative.

c. Independence cannot make a threshold showing of non-speculative beneficial use for the new claimed uses and types of use other than 0.84 acre-feet per year for commercial and municipal use at the homestead site.

Based on Independence's responses to FCC II's discovery requests, it is undisputed that Independence cannot make a threshold showing of non-speculative, beneficial use for any of the new requested uses and place of use other than, potentially, commercial and municipal use of 0.84 acre-feet of water per year at the homestead located on the Subject Property. Accordingly, this court should enter summary judgment dismissing that portion of the augmentation plan allowing for the augmentation of all claimed types of use of the Upper Dawson Water other than use of the water for fire protection and, limiting the amendment to the augmentation plan to the use of 0.84 acre-feet of water per year for commercial and municipal use in the homestead located on the Subject Property.[2] Similarly, Independence admits it does not have any current plan or intent to use the water at any location other than on the Subject Property and, therefore, Independence does not have a non-speculative plan to use the water off the Subject Property, and this portion of its claim for an augmentation plan should also be dismissed.

Rather than claiming a current plan and intent to use water for the new types and places of use, Independence claims that it is "a quasi-municipal special district obligated to provide water service to its customers" and it may need the Upper Dawson Water to "satisfy its future water obligations." This allegation of possible future need for the water is insufficient to satisfy the anti-speculation doctrine. Although Colorado law recognizes that municipal water providers need flexibility to plan for future water needs, a municipality must prove the water it claims is

[2] FCC II and West Elbert reserve the right to challenge these uses on the basis of anti-speculation or any other basis at trial. Because Independence has at least alleged a current need of 0.84 acre-feet of water for commercial and municipal use at the homestead, FCC II and West Elbert are not asking the court to dismiss these claimed uses or fire protection use via summary judgment.

"necessary to satisfy reasonably anticipated requirements of the municipality, based on substantiated projections of its future growth." *Upper Yampa Water Conservancy Dist. v. Dequine Family L.L.C.*, 249 P.3d 794, 798-99 (Colo. 2011). Accordingly, Independence cannot establish a threshold showing of non-speculative, beneficial use by simply claiming it may need water in the future without providing evidence of its reasonably anticipated water requirements based on substantiated projections of future growth. Independence has not attempted to provide any such evidence in its disclosures or its responses to discovery.

Regarding Independence's claim for 7.59 acre-feet of water per year for municipal use that Independence states is limited to irrigation of a community garden, medians, and buffer zones on the Subject Property, this use can already be met by Independence's existing plan for augmentation. The 06CW59 decree already authorizes use of all 75 acre-feet of the Upper Dawson Water for irrigation use anywhere on the Subject Property. A claimed need for water that can already be met by an applicant's existing water rights cannot form the basis for a non-speculative claim to appropriate additional water. *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774, 787 (Colo. 2009) (finding evidence of claimed demand for water inadequate, in part, on grounds that the applicant's existing water rights could meet a portion of the claimed demand).

The undisputed facts in this case prove that Independence cannot make a threshold showing of non-speculative beneficial use of the Upper Dawson Water, other than use of the 0.84 acre-feet of water for municipal and commercial use in the homestead located on the Subject Property.

VI. CONCLUSION

FCC II and West Elbert request that this court enter summary judgment to: (1) dismiss Independence's claim to amend its plan for augmentation to allow use of the Upper Dawson Water off the Subject Property; and (2) dismiss Independence's claim to amend its plan for augmentation to add new types of uses other than fire protection use and the use of 0.84 acre-feet per year for commercial and municipal use at the homestead site located on the Subject Property.

Respectfully submitted this 26 day of September, 2021.

The Law Office of John D. Buchanan LLC

By: _____
John D. Buchanan
Attorney For Opposer, FCC II

Monson, Cummins & Shohet, LLC

By: _____ Signing on behalf of David Shohet
David M. Shohet
Attorneys for Opposer West Elbert

E-FILED PURSUANT TO C.R.C.P. 121
A printed or printable copy of this document with original, electronic, or scanned signatures is on file at the Law Offices of John D. Buchanan LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of September, 2022, a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT PURSUANT TO C.R.C.P. 56 was electronically served via CCE upon all attorneys of record in this case.

_____
Tuyet Vu