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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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REPLY TO MOTION FOR SUMMARY JUDGMENT

Opposers, Franktown Citizens Coalition II, Inc. ("FCC II") and West Elbert County Well Users Association ("West Elbert"), hereby file this response to their motion for summary judgment ("Motion") and in support thereof state as follows. The defined terms used in the Motion have the same meaning in this reply, unless otherwise noted.

I. INTRODUCTION

Independence's response does not assert that any disputed issues of material fact exist that would preclude the court from entering summary judgement on the Motion. Independence does not assert that it can make a threshold showing of non-speculative beneficial use for the

types and places of use it seeks to add to its plan for augmentation. Independence also does not claim that the anti-speculation doctrine does not apply to the type of groundwater involved in its application. Instead, the only disputed issue in this motion is whether the water court or the State Engineer should apply the anti-speculation doctrine.

The legislature created a limited exception to the general rule that the water court applies the anti-speculation doctrine, but this exception applies only to applications for determinations of nontributary groundwater. Independence now seeks to expand this limited exception to include a different kind of application – a plan for augmentation – and a different classification of groundwater – not nontributary groundwater. It is the legislature, however, not the courts that have the authority to expand this limited exception to the anti-speculation doctrine.

Because the anti-speculation doctrine applies to the application and type of water at issue in this case, and because Independence cannot make the necessary threshold showing of non-speculative need for the new types and places of use that Independence seeks to add to its existing plan for augmentation, this court should 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. ARGUMENT

a. A deficiency in service of the Motion is not a basis to deny the Motion.

Independence asks the court to deny the Motion because it was served only on the parties represented by counsel and not on the *pro se* parties, but Independence cites no authority for its assertion that denial of the Motion is a proper remedy.

When a pleading is not served on a party, the court should allow the service to be completed unless the substantial rights of other litigants would be prejudiced. *Gould & Preisner, Inc. v. Dist. Court*, 369 P.2d 554, 556 (Colo. 1962)(holding that "there was ample time prior to the date set for trial" to serve an answer to a complaint and counterclaim). In this case, the deadline for filing motions under C.R.C.P. 56 is February 6, 2023. There is ample time to ensure

that all parties are properly served and have the full 21 days to file a response brief as allowed in C.R.C.P. 121 § 1-15(b).

Under C.R.C.P. 5(b)(2)(D), service may be made by "other electronic means" if consented to in writing by the party being served. Designation of an email address in a filing effects consent in writing for service using the designated email address. *Id*. FCC II has served the motion and exhibits using the email address for all parties that provided an email address in their statement of opposition, and via first class U.S. mail to all *pro se* parties that did not provide an email address, as of October 31, 2022. Exhibit A, Certificate of Service.

Accordingly, if the court believes that all *pro se* parties should be served with the motion and given the opportunity to file a response brief, FCC II and West Elbert request that the court wait until November 21, 2022, after the twenty-one-day period to file a response brief has ended, before entering an order on the Motion.

In the alternative, under C.R.C.P. 5(c), when there is an "unusually large number" of parties in a case, the court may order, upon motion or of its own initiative, that service of pleadings of defendants and replies thereto need not be made as between the defendants." C.R.C.P. 5(a) similarly states that pleadings subsequent to the original complaint must be served "unless the court otherwise orders because of numerous defendants." Due to the large number of opposing parties in this case,[1] the court may order that FCC II and West Elbert are not required to serve the Motion on the *pro se* opposers in this case. FCC II and West Elbert would request the court consider this alternative given the significant number of opposers to this Application.[2]

b. Independence did not assert that it made a threshold showing of non-speculative beneficial use or that there are any disputed issues of material fact that would preclude summary judgment.

Independence did not assert in its response that it made a threshold showing of non-speculative beneficial use for the new types and places of use it seeks to add to its plan for

[1] The court's minute order dated October 21, 2021, states that parties who do not file comments to the referee's ruling by December 3, 2021, "will not be able to participate at trial." Although Independence filed a notice purporting to list the opposers who had complied with the minute order, the court has not ordered that any party is in default and does not need to be served with pleadings. Accordingly, there are still approximately 349 *pro se* opposing parties in this case.

[2] This alternative is reasonable given that none of the *pro se* parties appear to support the Application. It is likely that the numerous *pro se* parties would either support the Motion or take no position.

augmentation, nor did Independence allege there are disputed issues of material fact that would preclude summary judgment on this issue. This court may therefore enter summary judgment as requested in the Motion.

Independence raised an issue with only one of the undisputed facts listed in the Motion. Although FCC II and West Elbert are not certain what that issue is, Independence appears to disagree with some aspect of the characterization in the Motion of FCC II's request for admission regarding contracts with other parties to use the Upper Dawson Water. Regardless of what Independence is claiming with respect to the discovery request, the important point is that Independence did not claim, and has not disclosed the existence of, any contracts or other agreements with third parties who will use the Upper Dawson Water.

Independence included its own list of undisputed material facts in its response. Although FCC II and West Elbert do not dispute these facts for the purpose of the Motion, there is one alleged fact that requires clarification. Independence claims in paragraph V.vi that it "has not requested to change the decreed uses" of the Upper Dawson Water that were approved in the 06CW59 Decree. That statement is incorrect with respect to the requested municipal use. The 06CW59 Decree did not approve municipal use in its determination of the nontributary and not nontributary water rights, *see* Ex. B to the Motion at ¶ 6, nor did it approve municipal use of the Upper Dawson Water in the plan for augmentation, *see id*. at ¶ 10.C. Accordingly, contrary to its statement in the response, Independence needs to change the decreed use of the Upper Dawson Water to municipal use in order to add municipal use to the plan for augmentation. This is not a disputed or material fact for the purpose of the Motion, however.

More importantly, this statement, like much of Independence's arguments in the response, is misleading. FCC II and West Elbert are not asserting in this Motion that Independence has applied to change the decreed uses of the Upper Dawson Water. Instead, the Motion is premised on the fact that, when an applicant seeks adjudication of a plan for augmentation for not nontributary groundwater, or to amend a plan for augmentation to add new types and places of use, the applicant must make a threshold showing of non-speculative need for the types and places of use that are requested in the plan for augmentation.

c. Independence's argument that the water court cannot apply the anti-speculation doctrine in this case would expand a limited exception created by the legislature only for determinations of nontributary groundwater.

The general rule for all non-designated basin water rights is that the water court, not the State Engineer, applies the anti-speculation doctrine to determine if an applicant has made a threshold showing of non-speculative need for the water claimed in an application. *See, e.g., Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979) (water court applied the anti-speculation doctrine for appropriation of conditional water rights); *High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist.* 120 P.3d 710 (Colo. 2005)(water court applied the anti-speculation doctrine for application to change water rights); *Centennial Water and Sanitation Dist. v. City and County of Broomfield*, 256 P.3d 677 (Colo. 2011)(water court applied the anti-speculation doctrine for evaluation of replacement water sources for exchange right).

As discussed in *East Cherry Creek*, the legislature created a limited exception to this general rule in C.R.S. § 37-90-137(6) by stating that applicants could obtain a determination from the water court to vest their rights in the nontributary groundwater underlying their property either for current or future uses, and that the anti-speculation doctrine would be applied by the State Engineer rather than the water court for this one specific type of application and classification of groundwater. There is nothing in the statute, in *East Cherry Creek*, or any other provision of Colorado law that allows applications for plans for augmentation for not nontributary groundwater rights to be commenced at any time and for speculative uses.

"Exceptions to the general laws should be narrowly construed. The legislature, not the court, should expand these exceptions if desirable." *City of Aurora v. Colorado State Engineer*, 105 P.3d 608 (Colo. 2005)(internal citations omitted). By its own terms, C.R.S. § 37-90-137(6) applies only to "rights to nontributary groundwater," which may be "commenced at any time and may include a determination of the right to such water for existing and future uses" (emphasis added). The legislature has the sole authority to expand this limited exception to the anti-speculation doctrine and has not yet chosen to do so, and this court should not sanction Independence's attempt to expand the exception in this case.

Moreover, as discussed in the Motion, the *East Cherry Creek* Court's explanation of why determinations of nontributary groundwater are not subject to the anti-speculation doctrine further confirms why water courts should apply the doctrine for other applications, including the amendment to the plan for augmentation Independence seeks in this case. Motion at 9-12. Another factor that supports analysis of the doctrine by the water court instead of the State Engineer is that application of the doctrine typically involves a complex application of legal principles to specific facts to determine whether an applicant has the requisite specific plan and intent to use a specific amount of water for specific types of use. Anti-speculation is an often-litigated aspect of Colorado water law, resulting in numerous appeals to the Colorado Supreme Court. This type of analysis belongs in the water court, with a water judge that can take evidence, find facts and apply them to the law, and where opposing parties can contest the allegations made by an applicant to ensure that both sides of the issue are considered.

d. Independence's arguments that the water court cannot apply the anti-speculation doctrine do not apply to the class of groundwater or the type of application at issue in this case.

Because Independence hopes to fit its current application into the limited exception to the anti-speculation doctrine for determinations of nontributary groundwater, Independence spends much of its brief ignoring the differences between nontributary and not nontributary groundwater, and between determinations of groundwater rights and adjudications of plans for augmentation, or arguing that the differences are unimportant.

For example, Independence argues that a plan for augmentation for not nontributary groundwater is simply "a component" of a determination of available groundwater and, therefore, an application for a plan for augmentation should be included within the limited exception to the anti-speculation doctrine. This argument is wholly without merit. It is possible for water users to apply for and obtain a determination of not nontributary groundwater without applying for or obtaining a plan for augmentation. This is clear from the 06CW59 Decree, which determined that 288.3 acre-feet of water per year was available for withdrawal from the Upper Dawson aquifer, but only included a plan for augmentation for 75 acre-feet per year of the Upper Dawson Water, stating that "[t]he remaining amount of decreed Upper Dawson aquifer

groundwater will not be withdrawn until such time as an augmentation plan for withdrawal of that water has been approved by this court in a separate decree." The applicants in the 06CW59 Decree also did not request all the types and places of use approved in the determination of the Upper Dawson Water be included in the plan for augmentation; instead, the applicants limited their claims for augmentation of the Upper Dawson Water to specific uses and only on the Subject Property. Independence now claims it is entitled to amend this plan for augmentation to add numerous additional types of use anywhere in the State without having to prove it actually has a non-speculative need to add such types and places of use to the plan for augmentation.

A plan for augmentation for not nontributary groundwater is an entirely separate and distinct proceeding from a determination of nontributary groundwater, and Independence's claim that a plan for augmentation is simply a "component" of a determination is an attempt to expand the limited exception to the anti-speculation doctrine to include applications for plans for augmentation in addition to applications for a determination of nontributary groundwater. *Compare* C.R.S. § 37-90-137(6)(describing determinations of available groundwater) *with* C.R.S. § 37-92-103(9)(describing plans for augmentation).

Independence similarly argues that nontributary and not nontributary groundwater are "allocated and adjudicated in the same manner." Resp. Br. at 9-13. This is both misleading and irrelevant. The adjudication of a determination of nontributary and not nontributary groundwater, which allocates the amount of such groundwater available to an applicant, is not at issue in this case or in the Motion. The issue raised by the Motion is whether the water court may apply the anti-speculation doctrine, or if only the State Engineer may do so under the limited exception to the doctrine created in C.R.S. § 37-90-137(6) and *East Cherry Creek*. There is one major difference between the two types of groundwater, however, because not nontributary groundwater requires a plan for augmentation, while nontributary groundwater does not. C.R.S. § 37-90-137(9)(c.5)(I)(A).

Another example of Independence's repeated conflation of the different types of applications and groundwater is when it quotes the statement in *East Cherry Creek* that "protection of potential appropriators is unnecessary" in the context of determinations of nontributary groundwater. Resp. Br. at 14. The statement in *East Cherry Creek* applies to

determinations of nontributary groundwater only. By contrast, protection of potential appropriators is necessary in the context of plans for augmentation for the "partially tributary" Upper Dawson Water; because it is considered partially tributary, withdrawals of not nontributary groundwater cause depletions to surface streams. C.R.S. § 37-90-103(10.7). These depletions must be augmented to prevent injury to other appropriators who would otherwise have a prior right to use of the water that is being depleted from a surface stream by the withdrawals of not nontributary groundwater. C.R.S. § 37-90-137(9)(c.5)(B).

e. Expanding the limited exception to the anti-speculation doctrine would be more burdensome for water users, courts, and the State Engineer.

Independence argues that its proposal would be more efficient because, if applicants for plans for augmentation were required to make a threshold showing of non-speculative need for the plan for augmentation, then a new water court application would be needed "every time [Independence's] plans change." Resp. Br. at 20.

One purpose of the anti-speculation doctrine is to prevent "nebulous and expansive" water court applications that do not provide specific details regarding the specific uses and locations of use for the water. *High Plains A & M,* 120 P.3d at 724. Applications like Independence's, that request multiple, broad categories of use with no limitation on the place of use, burden the courts and potential opposers that can be "extremely expensive to participants and consume many days of trial and appeal time." *Id*. at 722. The State Engineer is also required to participate in such applications by consulting with the water referee and filing a summary of the consultation, in addition to filing a statement of opposition and participating as an opposer when he chooses to do so. C.R.S. § 37-92-302(4). That is part of the reason why the anti-speculation doctrine exists to limit the amount of such applications, in addition to the important policy reasons described on page 7-8 of the Motion.

Moreover, the court in *East Cherry Creek* noted that a threshold showing of non-speculative need for water is required when the Commission adjudicates a determination of Denver Basin designated groundwater, even though the applicant must still file an application for a well permit, which also requires a showing of non-speculative need for the water, after the

applicant obtains the determination from the Commission. *East Cherry Creek*, 109 P.3d at 158-59. There is only one context – the limited exception for determinations of nontributary groundwater outside designated basins – where a threshold showing of non-speculative need for water is not required. Independence's application does not fit within this limited exception.

Although it may be more burdensome to Independence if it chooses to file a new application "every time" its plans change, it is less burdensome to other parties, the courts and water referees, and the State and Division Engineers Offices if speculative applications are weeded out via application of the anti-speculation doctrine.

III. CONCLUSION

FCC II and West Elbert request that this court enter summary judgment dismissing any use of the Upper Dawson Water off the Subject Property and dismissing all the new claimed types of use other than use of the water for fire protection 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 31st day of October, 2022.

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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 31st day of October, 2022, a true and correct copy of the foregoing REPLY TO MOTION FOR SUMMARY JUDGMENT was electronically served via CCE upon all attorneys of record in this case. A separate certificate of service will be filed once service is complete on the parties who are not represented by counsel.

Tuyet Vu