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2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="4">

▲COURT USE ONLY▲

Supreme Court Case No. 2023SA154</td></tr>
<tr><td>Appeal from the District Court
Water Division 1, 2019CW3220</td></tr>
<tr><td>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</td></tr>
<tr><td>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</td></tr>
<tr><td colspan="2" align="center">OPENING BRIEF</td></tr>
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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 6,454 words, which does not exceed the 9,500-word limit.

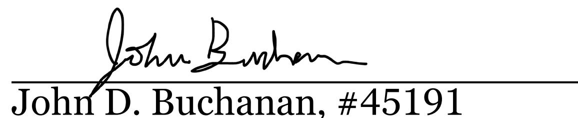
The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

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 opening brief.

I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the water court erred as a matter of law in holding that the court cannot apply the anti-speculation doctrine in a proceeding to amend a plan for augmentation to augment depletions caused by the withdrawal of not-nontributary groundwater.

II. NATURE OF THE CASE

This appeal involves the application by Independence Water and Sanitation District ("Independence") to amend a plan for augmentation for withdrawals of "not nontributary" groundwater, as such water is defined in C.R.S. § 37-90-103(10.7) (for clarity, this classification of groundwater will be hyphenated as "not-nontributary" groundwater). CF, p #3. In a prior water court application filed in Case No. 2006CW59, Independence's predecessor-in-interest requested (1) a determination of rights to groundwater in nontributary and not-nontributary aquifers underlying 1,012 acres of land in Elbert County ("Subject Property"), and (2) a plan for augmentation to augment withdrawals of not-nontributary groundwater. CF, p #1859-60, 1862. The aquifers involved are the Denver Basin aquifers, which are deep aquifers underlying approximately 6,700 square miles in a kidney-shaped region stretching from Greeley on the north, Colorado

Springs on the south, the front-range hogback on the west, and Limon on the east. *Colo. Ground Water Comm'n v. North Kiowa-Bijou Ground Water Mgmt. Dist.*, 77 P.3d 62, 72 (Colo. 2003).

The District Court, Water Division 1 ("Water Court") entered a decree ("06CW59 Decree") determining rights to certain quantities of nontributary groundwater from the Lower Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers, and to withdraw 28,830 acre-feet of not-nontributary groundwater in the Upper Dawson aquifer (paragraph 5 of the 06CW59 Decree states the average annual amount of withdrawal is 288.3 acre-feet based on a 100-year aquifer life, as required in C.R.S. § 37-90-137(4)(b)(I)). CF, p #1860-61. The decree approved multiple uses for the water, stating: "The 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." CF, p #1860.

Regarding the plan for augmentation to withdraw not-nontributary groundwater, the decree approved augmentation of up to 75 acre-feet of water per year from the not-nontributary Upper Dawson aquifer, and limited the use of the water to inhouse and irrigation use on the Subject Property (the 75 acre-feet of annual withdrawals is referred to herein as "Upper Dawson Water"). CF, p #1862.

Approximately 13 years after entry of the 06CW59 Decree, Independence filed the application at issue here, Case No. 2019CW3220, requesting approval to amend the plan for augmentation by adding the following types of use for the Upper Dawson Water: municipal, domestic, industrial, commercial, irrigation, stock watering, fire protection, exchange, and augmentation. CF, p #3-4. Independence also sought to amend the approved place of use of the Upper Dawson Water so that Independence could export the water off the Subject Property, with no limit on where the water could be used. *Id.*

Opposers Franktown Citizens Coalition II and West Elbert County Well Users Association filed statements of opposition. CF, p #190-93, 337-339. Opposers represent members of the community in the area surrounding the Subject Property who own property rights and vested water rights in the Denver Basin aquifers. CF, p #191, 337. Opposers noted in the statements of opposition that Independence must show it has a non-speculative use for its proposed changes to the plan for augmentation. CF, p # 192, 338.

During the Water Court proceeding, Opposers served discovery requests on Independence requesting details about its specific plans for the Upper Dawson Water, such as whether Independence had a current need for the requested new types and places of use. CF, p # 1871, 1875-1882, 1887-1889. Independence generally responded that it "currently has no specific plans" to use the water for the new types and places of use, except for 0.84

acre-foot per year of water Independence claimed it needed for commercial and municipal use on the Subject Property.[1] *Id*. Independence further stated it "may" need to use the Upper Dawson Water in the future for the new types and places of use. *Id*. Accordingly, although Independence applied to amend its plan for augmentation to authorize up to 75 acre-feet of water per year for multiple uses anywhere in the state of Colorado, it admittedly did not have any current need for the new types and places of use, other than a small fraction of the water that would be used on the Subject Property.

After receiving Independence's discovery responses, Opposers filed a motion for summary judgment alleging that Independence's request to add the new types and places of use, other than fire protection use and the use of 0.84 acre-foot per year for municipal and commercial use on the Subject Property, violated the anti-speculation doctrine and should be dismissed from the application. CF, p #1834-35.

In its response to the motion, Independence did not argue that it had a non-speculative need for the new types and places of use requested in the application; instead it argued, and the Water Court determined as a matter of law, that the anti-speculation doctrine did not apply to the application. CF, p #1909-1929, 2013. Based on its determination of law, the Water Court

[1] Independence claimed a total of 8.43 acre-feet per year for municipal use, although 7.59 acre-feet per year was claimed for irrigation on the Subject Property. CF, p #1875-76. The 06CW59 Decree, however, already authorized augmentation of the use of the Upper Dawson Water for irrigation on the Subject Property. CF, p #1862.

denied the motion for summary judgment. *Id.* at 2013. Following denial of the motion, Opposers and Independence stipulated to entry of the final decree, except for the issues raised in Opposers' motion for summary judgment. CF, p #2054-55, 2070-71. The Water Court approved the stipulations and entered them as an order of the court. CF, p #2083-84. With all opposers in the case either dismissed or having stipulated to entry of the decree, the Water Court entered its final decree without holding any further proceedings or trial ("Final Decree"). CF, p #2106. The Final Decree amended the plan for augmentation to add all the new uses and places of use requested by Independence, and included the Water Court's determination of law that the anti-speculation doctrine did not apply to the application. CF, p #2107, 2111.

Opposers now appeal the Water Court's approval in the Final Decree to amend the plan for augmentation to add Independence's speculative claims for the new types and places of use, other than use of the water for fire protection and use of 0.84 acre-feet per year for municipal and commercial use on the Subject Property.

III. SUMMARY OF THE ARGUMENT

This appeal involves one discrete, relatively straightforward issue: whether water courts may apply the anti-speculation doctrine when reviewing plans for augmentation, or amendments of such plans, for the withdrawal of not-nontributary groundwater.

The parties to this appeal, and the Water Court, agree that the doctrine applies generally to the withdrawal and use of not-nontributary groundwater. The Water Court, however, determined that it was prohibited from applying the doctrine, and that only the State Engineer may apply the doctrine when he reviews permits for withdrawal of not-nontributary groundwater after a water court approves a plan for augmentation. The Water Court's determination of law was based on a misunderstanding of a limited exception to the anti-speculation doctrine that this Court recognized in its opinion in *East Cherry Creek Valley Water and Sanitation Dist. v. Rangeview Metro Dist.*, 109 P.3d 154 (Colo. 2005).

In *East Cherry Creek*, this Court interpreted a legislative scheme concerning a different classification of groundwater: nontributary groundwater, as opposed to not-nontributary groundwater; and a different type of water court claim: determinations of groundwater, as opposed to applications for plans for augmentation. The Water Court appears to have confused these different types of groundwater and water court claims, and also to have decided, with little elaboration, to expand the limited exception to the doctrine that the legislature created. The Water Court does not have authority to expand this exception to the anti-speculation doctrine, and the cursory reasons cited by the Water Court in support of its decision do not apply to the type of groundwater and water court claim at issue here.

The anti-speculation doctrine is an important tool that water courts, administrative agencies, and other water users can utilize to prevent speculation in the important public resource that is Colorado's water supplies, and also to reduce the need to review and oppose complicated water court applications that must be rooted in an applicant's actual, current need for the water.

The application in this case is a textbook example of the type of speculative application that the anti-speculation doctrine was designed to prevent. Independence does not claim to have any current need for the new types and places of use it seeks to add to its existing plan for augmentation. Instead, it argues that it is entitled to force the Water Court, water referee, State Engineer, and other water users to review and challenge the proposed terms and conditions that will allow Independence to withdraw not-nontributary groundwater, model the resulting depletions to surface streams, and estimate the amount, timing, and location of return flows available to replace any injurious stream depletions – among other necessary terms – even though Independence does not now, and may never, have an actual need for the requested changes to the plan for augmentation.

Because the anti-speculation doctrine mandates that applicants for a plan for augmentation for not-nontributary groundwater make a threshold showing of non-speculative beneficial use, and because Independence admits that it cannot meet this standard, this Court should reverse the Water

Court's determination of law and remand to modify the Final Decree accordingly.

IV. ARGUMENT

A. The Water Court must apply the anti-speculation doctrine to applications for plans for augmentation, or amendments of such plans, involving not-nontributary groundwater.

1. Standard of Review

The Water Court's conclusions of law are reviewed *de novo*. *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011). This issue was raised in Opposers' motion for summary judgment. CF, p #1834-35. The Water Court ruled on this issue in its *Order Denying Opposers' Motion for Summary Judgment Pursuant to C.R.C.P. 56* and in the Final Decree. CF, p #2107, 2111.

2. The anti-speculation doctrine applies to the withdrawal and use of not-nontributary groundwater.

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). All water in Colorado, including Denver Basin groundwater such as the Upper Dawson Water, is a public resource. *Chatfield East Well Co., Ltd. v.*

Chatfield East Property Owners Ass'n, 956 P.2d 1260, 1264 (Colo. 1998); *North Kiowa-Bijou*, 77 P.3d at 67.

The anti-speculation doctrine, as codified in C.R.S. § 37-92-103(3)(a), requires proof that an applicant has "a specific plan and intent" to use a "specific quantity of water for specific beneficial uses" and that the appropriation of water is not "based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation." Although the doctrine was initially developed for appropriations of tributary water, it has since been applied to the use of both nontributary and not-nontributary groundwater located outside of designated basins, such as the Upper Dawson Water. *Chatfield East*, 956 P.2d at 1271; *East Cherry Creek Valley Water and Sanitation Dist. v. Rangeview Metro Dist.*, 109 P.3d 154, 158 (Colo. 2005). In *Chatfield East*, which involved not-nontributary groundwater, this Court noted "[t]he General Assembly and the courts of this state have often reinforced the policy of keeping the public water resource available to those who can and will use it beneficially, as opposed to those who wish to speculate in its value and price." 956 P.2d at 1270.

Appropriation of rights to use surface water and tributary groundwater is subject to Colorado's constitutional prior appropriation system and the implementing statutes in the Water Right Determination and Administration Act, C.R.S. § 37-92-101 *et seq*. *Chatfield East*, 956 P.2d at

1265 n.2, 1268. The right to use such water is perfected through beneficial use of the water. *Id.* In contrast, the right to use nontributary and not-nontributary groundwater is distributed through a statutory system involving ownership of the land overlying the aquifer, as set forth in the Colorado Ground Water Management Act, C.R.S. § 37-90-104. *Id.* "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." *Id.* at 1271.

Application of the anti-speculation doctrine for nontributary and not-nontributary groundwater is important for several reasons. First, the water in these aquifers is a non-renewable resource and "the General Assembly recognized that new communities, individual homeowners, and other landowners may place heavy dependence on this finite resource." *Id.* at 1265, 1270. The legislature also recognized, however, that withdrawals of such water, especially not-nontributary groundwater, depletes the available supply of water in surface streams, and thus required judicially approved plans for augmentation to replace the depletions caused by such withdrawals. *Id.* at 1270; C.R.S. § 37-90-137(9)(c.5)(I)(A).

Although the Water Court, and Independence, recognized that the anti-speculation doctrine applies to the withdrawal and use of the Upper Dawson Water, the Water Court incorrectly held that it was prohibited from

applying the doctrine on the theory that only the State Engineer can apply the doctrine when issuing well permits. CF. p #2017-19. As discussed below, this is based on an incorrect understanding of the limited exception to the anti-speculation doctrine that this Court recognized in its opinion in *East Cherry Creek Valley Water and Sanitation Dist. v. Rangeview Metro Dist.* that applies to a different type of groundwater and a different type of water court claim.

3. The limited exception to the anti-speculation doctrine recognized in *East Cherry Creek* does not apply to the type of groundwater nor the type of water court claim at issue in this case.

Although there is no dispute that the anti-speculation doctrine applies to the withdrawal and use of Upper Dawson Water, the Water Court incorrectly held that it could not apply the doctrine in this case under a narrow exception to the doctrine recognized in *East Cherry Creek*. That exception, however, is based on this Court's interpretation of a statutory scheme that was the result of the legislature's intent to allow determinations of nontributary groundwater for existing and future uses. *East Cherry Creek* 109 P.3d at 158. The legislature did not include within this exception the type of groundwater or the type of claim at issue in this case, and the Water Court does not have authority to expand the limited exception created by the legislature.

a. The limited exception to the anti-speculation doctrine only applies to nontributary groundwater.

In *East Cherry Creek*, the applicant Rangeview Metropolitan District had previously obtained a decree determining its rights to water in a nontributary 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 ultimately adopted in legislation passed after the decree was entered. *Id.* at 156-157. Rangeview applied to amend the determination of its rights to the nontributary groundwater to make the decree terms consistent with the new legislation. *Id.* at 159-60. On appeal, this Court affirmed Water Court's conclusion that the anti-speculation doctrine does not apply to <u>determinations</u> of <u>nontributary</u> groundwater rights, and instead the doctrine 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 a threshold showing of non-speculative, beneficial use to obtain a determination of its nontributary water. *Id.*

The *East Cherry Creek* Court stated the main reason for its decision was the "clearly expressed legislative intent to permit adjudication for future uses without a corresponding obligation to develop them." *Id.* at 158. This intent is expressed in C.R.S. § 37-90-137(6), which states:

> "Rights to nontributary groundwater outside of designated groundwater basins may be determined in accordance with the procedures of sections 37-92-302 to 37-92-305. Such

> proceedings may be commenced at any time and may include a determination of the right to such water for existing and future uses."

Because the language allows determinations of water for "future" uses, the Court determined the legislature intended to allow applicants to obtain determinations of nontributary groundwater even if the applicant did not currently have a non-speculative use for the water. *Id.* at 158.

This exception to the anti-speculation doctrine, however, applies only to nontributary groundwater; it does <u>not</u> apply to <u>not-nontributary</u> groundwater, which is a separate classification of groundwater. Nontributary groundwater is defined in C.R.S. § 37-90-103(10.5) as water located outside of designated basins that, when withdrawn continuously for one hundred years, <u>will not</u> deplete the flow of a natural stream at an annual rate greater than 0.1% of the annual rate of withdrawal.

Not-nontributary groundwater is defined conversely in C.R.S. § 37-90-103(10.7) as water in the Denver Basin aquifers located outside of designated basins that, when withdrawn continuously for one-hundred years, <u>will</u> deplete the flow of a natural stream at an annual rate greater than 0.1% of the annual rate of withdrawal. Not-nontributary groundwater is thus defined as groundwater that does not meet the standard of nontributary groundwater and is therefore considered to be "partially tributary." *North Kiowa-Bijou*, 77 P.3d 62, 74 (Colo. 2003). Because the water is considered partially tributary, the main difference between nontributary and not-

nontributary groundwater is that judicial approval of plans for augmentation is required prior to the use of not-nontributary groundwater." C.R.S. § 37-90-137(9)(c.5)(I)(A). There is no such requirement to obtain approval of a plan for augmentation prior to the use of nontributary groundwater.

b. The limited exception to the anti-speculation doctrine only applies to claims for determinations of groundwater.

In addition to the fact that C.R.S. § 37-90-137(6) does not apply to not-nontributary groundwater, it also applies to one specific type of water court claim that is not at issue in this case: a determination of rights to groundwater. This type of claim is separate and distinct from a plan for augmentation and exists because rights in both nontributary and not-nontributary groundwater are appropriated differently from tributary water.

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. *Chatfield East*, 956 P.2d at 1265 n.2, 1268. Landowners whose property overlies nontributary and not-nontributary aquifers are deemed to have an inchoate right to use the water in the aquifers underlying their property. *Id.* at 1268. 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.[2] *Id; East Cherry Creek*, 109 P.3d at 157. Landowners can therefore vest their rights to underlying nontributary groundwater, and also obtain a permit to withdraw and use the water from the State Engineer, without a water court ever being involved. That is not the case for not-nontributary groundwater, which requires a judicially approved plan for augmentation before it may be withdrawn. C.R.S. § 37-90-137(9)(c.5)(I)(A).

An application to determine rights to nontributary or not-nontributary groundwater is a specific type of claim that allows a landowner to convert inchoate groundwater rights to vested rights. *Bayou Land Co. v. Talley*, 924 P.2d 136, 149 (Colo. 1996); *Chatfield East*, 956 P.2d at 1268. A decree adjudicating a determination of groundwater rights "defines the annual amount of withdrawal to be allowed by the state engineer." *East Cherry Creek* 109 P.3d at 157 (citing C.R.S. §§ 37-90-137(4)(d) and 37-92-305(11). Because this inchoate right is a statutory right, "the legislature can modify or limit this inchoate right at any time before the water use right vests." *North Kiowa-Bijou*, 77 P.3d 62, 72.

[2] 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 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. CF, p #1870.

The requirement to obtain judicial approval of a plan for augmentation prior to the use of not-nontributary groundwater is set forth in C.R.S. § 37-90-137(9)(c.5)(I)(A)-(C). This requirement does not apply to the use of nontributary groundwater. *Id.* A plan for augmentation is defined in C.R.S. § 37-92-103(9) as a "detailed program…to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means." Although the legislature expressly allowed determinations of nontributary groundwater to be made for existing <u>and future uses</u> in C.R.S. § 37-90-137(6), that language was not applied to plans for augmentation for not-nontributary groundwater and was not included in C.R.S. § 37-90-137(9)(c.5)(I)(A)-(C).

C.R.S. § 37-92-203(1), which gives water courts jurisdiction over claims for determinations of groundwater and plans for augmentation, illustrates that these are separate claims. Water courts have jurisdiction over claims to adjudicate plans for augmentation through their general jurisdiction over "water matters" under C.R.S. § 37-92-203(1). *Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 541-42 (Colo. 1996). Conversely, this Court originally held that water courts lacked jurisdiction over claims for determinations of groundwater under C.R.S. § 37-92-203(1),

and the legislature later amended the statute to specifically add claims for determinations of groundwater. *State v. Southwestern Colo. Water Cons. Dist.*, 671 P.2d 1294, 1311 n. 25 (Colo. 1983).

Rule 3 of the Uniform Local Rules for all State Water Court Divisions ("Water Court Rules"), which contains rules for filing of applications in water court, also treats claims for determinations of groundwater and plans for augmentation separately. Water Court Rule 3(a), 3(b)(2)-(3), (4)(f). The standard form for filing an application for determination of Denver Basin groundwater does not include a claim for a plan for augmentation, which is set forth in a separate form.[3]

The water court rules allow for more than one claim to be incorporated into a single water court application, Water Court Rule 3(b)(1), and applicants for a determination of not-nontributary groundwater often, but not always, combine both claims in a single application. But, water courts will also determine rights to not-nontributary groundwater without including a plan for augmentation that allows for the withdrawal and use of such rights. For example, in *Simpson v. Yale Investments, Inc.*, 886 P.2d 689, 692 (Colo. 1994), the applicant originally obtained a decree determining its right to not-nontributary groundwater that did not include a

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[3] The water court form to apply for a determination of Denver Basin groundwater is available at the Colorado Judicial Branch website at https://www.courts.state.co.us/Forms/PDF/JDF%20308W.pdf. The water court form to apply for a plan for augmentation is available at https://www.courts.state.co.us/Forms/PDF/JDF%20301W.pdf.

plan for augmentation, and instead required water court approval of a plan for augmentation before the groundwater could be withdrawn.

Similarly, the 06CW59 Decree determined Independence's predecessor's right to 28,830 acre-feet per year of groundwater, with average annual withdrawals of 288.3 acre-feet, of not-nontributary groundwater underlying the Subject Property for multiple uses either on or off the Subject Property, but the plan for augmentation only approved withdrawals of 75 acre-feet of that water for irrigation and in-house use on the Subject Property. CF, p #1860-62. The decree states that the remaining 213.3 acre-feet of average annual withdrawal not included in the plan for augmentation "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." CF, p #1865.

In sum, the Court in *East Cherry Creek* recognized that the legislature intended to create a narrow exception to the anti-speculation doctrine by excluding a specific classification of groundwater, and a specific type of water court claim, from the anti-speculation doctrine. The application at issue in this case, however, concerns a different type of groundwater and a different type of water court claim, and therefore, the exception to the doctrine does not apply to Independence's application.

4. The water court does not have the authority to expand the limited exception to the anti-speculation doctrine.

The limited exception to the anti-speculation doctrine recognized in *East Cherry Creek* is an exception to the general rule that the doctrine "mandates a threshold showing of a proposed non-speculative, beneficial use before the development of a water project." *East Cherry Creek,* 109 P.3d at 158. "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). The statutory language in C.R.S. § 37-90-137(6) does not, on its face, apply to applications for augmentation plans, or to amend such plans, for not-nontributary groundwater. Because the statutory language is clear, courts must apply the plain and ordinary meaning of C.R.S. § 37-90-137(6). *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007).

The Water Court did not identify any reason why the exception to the anti-speculation doctrine should be expanded, and a review of the reasons supporting the decision in *East Cherry Creek* confirms that the exception should not be expanded.

The Water Court cited the statement in the *East Cherry Creek* opinion that applying the anti-speculation doctrine in this application would "thwart a clearly expressed legislative intent to permit adjudication for future uses." CF, p #2017. That concern is simply not applicable to this application. Independence's predecessor already obtained determination of rights to the

28,830 acre-feet of not-nontributary groundwater underlying the Subject Property, thereby vesting the right in that groundwater. CF, p #1860-61. That includes the "future uses" for which Independence admits it does not currently have a non-speculative need. *Id.*

The Water Court also noted that the legislature "created a clear demarcation between the determination of available water" and the regulation of its withdrawal and use. CF, p #2016 (*citing East Cherry Creek* 109 P.3d at 158). There is no such demarcation, however, in the regulation of not-nontributary groundwater. For the use of nontributary groundwater, no water court action is needed, and landowners can apply for and obtain a permit from the State Engineer without filing a water court application. *East Cherry Creek* 109 P.3d at 157. That is not the case for not-nontributary groundwater, which requires judicial approval of a plan for augmentation before the State Engineer will act on a well permit application and before the water may be withdrawn. C.R.S. § 37-90-137(9)(c.5)(I)(A); CF, p #1870.

Approval of a plan for augmentation inherently involves the regulation and use of not-nontributary groundwater. In reviewing plans for augmentation, water courts must determine the amount, timing, and location of depletions to surface streams that will be caused by withdrawals of not-nontributary groundwater. C.R.S. § 37-92-305(8); *State Engineer v. Castle Meadows, Inc.*, 856 P.2d 496, 506-07 (Colo. 1993). The water court must then determine and approve the amount, timing, and location of

augmentation water that will be provided under the plan to protect other water users from injury. *Id.* A plan for augmentation must be "sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water." *Id.*

Independence's plan for augmentation, and the amendment at issue in this case, contain the terms described above and more. The amendment incorporates updates made in February 2019 to the State of Colorado's Denver Basin groundwater model, which "resulted in higher depletion percentages" and associated increases in the amount of replacement water that would be required. Cf, p #2107. These updates, which help protect tributary water users from injury, would not have been incorporated into the plan if the original plan for augmentation covered all of the speculative, future uses Independence now seeks to add. The plan includes determinations of the amount of water that will be unconsumed through the initial use, and when and where that water will return to the stream system and be available to replace depletions under the plan. Cf, p #2108. The decree includes requirements for replacement of post-pumping depletions, when return flows from withdrawal of the water will no longer be available, and when the post-pumping replacements must begin. Cf, p #2108-09. Importantly, the decree states that, if applicant or its successors do not operate the plan for augmentation in compliance with the decree, the Division Engineer may order curtailment of well pumping. *Id.*

Such terms and conditions inherently relate to the regulation of the withdrawal and use of water, much more so than the simple vesting of rights to an amount of groundwater underlying a landowner's property. The Water Court's determinations regarding the effects that would occur from the withdrawal of the Upper Dawson Water and the terms and conditions that are placed on the use of the water to prevent injury to other water users are vital and necessary components of the regulation of the use of that water.

The Water Court dismisses the importance of plans for augmentation to the regulation and administration of both not-nontributary water and tributary water rights when it states that "[t]he only question for the court here is what changes must be made to the augmentation plan to avoid any injury resulting from out-of-priority depletions that Independence causes when using its not-nontributary Upper Dawson groundwater rights for those decreed purposes." CF, p #2018. Protection of injury to other appropriators is a fundamental component of the administration and regulation of water rights. *E.g.*, *Castle Meadows, Inc.*, 856 P.2d at 506-07 (discussing whether plan for augmentation for not-nontributary groundwater contained adequate terms to prevent injury). The *East Cherry Creek* Court stressed that, because nontributary groundwater is allocated based on land ownership, the protection of potential appropriators is unnecessary in the context of determinations of rights to nontributary water. 109 P.3d at 158. Because of this land-ownership based system of allocation, there are no other

potential appropriators who would be deprived of the use of water underlying a landowner's property even if the landowner gets a determination for future, speculative uses. In the context of plans for augmentation for not-nontributary groundwater, however, protection of other appropriators is an important and relevant consideration. *Castle Meadows, Inc.*, 856 P.2d at 506-07.

Moreover, applications for approval of plans for augmentation can be expensive and lengthy proceedings that consume the time and resources of the water courts, water referees, the State and Division Engineer, and other water users. When an application is filed, the State Engineer must consult with the water referee and file a summary report of the consultation, in addition to filing a statement of opposition and participating as an opposer when necessary. C.R.S. § 37-92-302(4). Other water users, such as Opposers, must review and, if necessary, challenge the factual and legal claims made by an applicant, which often requires retaining expert consultants to review groundwater modelling and the other engineering that supports the proposed plans. *See, e.g. Simpson v. Yale*, 886 P.2d at 692-93 (discussing history of plan for augmentation for not-nontributary groundwater that spanned eight years and multiple appeals). The anti-speculation doctrine is designed 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, which can be "extremely expensive to participants and

consume many days of trial and appeal time." *High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 722, 724 (Colo. 2005).

The Water Court also implied that review under the anti-speculation doctrine is unnecessary because the State Engineer will apply the doctrine before issuing a well permit. CF, p #2017. It is normal, however, for the State Engineer to review permit applications to ensure they comply with Colorado law, even after a water court has reviewed and approved an application. Under C.R.S. § 37-90-137(1)(b), all applications for well permits outside designated basins, including for tributary wells, must state the proposed use and the average annual amount of water that will be used. Under C.R.S. § 37-90-137(2)(b), the State Engineer may issue a well permit only if there is unappropriated water available for withdrawal and the vested water rights of others will not be materially injured. This is true even though applicants for conditional, tributary groundwater rights must satisfy the anti-speculation doctrine to obtain a water court adjudication of the groundwater right. *E.g.*, *Pagosa Area Water and Sanitation District v. Trout Unlimited,* 170 P.3d 307, 314 (Colo. 2007). For example, in *V Bar Ranch LLC v. Cotton*, 233 P.3d 1200, 1203 (Colo. 2010), this Court upheld the State Engineer's refusal to issue a well permit for use on certain land, even though the water court decree adjudicating the groundwater right did not expressly limit where the water could be used.

Moreover, the fact that the State Engineer will review well permit applications to ensure compliance with Colorado law does not justify the Water Court's refusal to apply the anti-speculation doctrine. Other water users do not get notice of well permit applications and cannot participate to ensure that an applicant's claims of non-speculative use are thoroughly and vigorously reviewed and challenged when necessary, as occurs in the water courts. In the context of determinations of nontributary groundwater, it makes sense that other water users do not need an opportunity to review and potentially challenge claims of a non-speculative need for water, because as noted in *East Cherry Creek*, there are no other potential appropriators for the water underlying a landowner's property. 109 P.3d at 158. Not-nontributary water, however, is considered "partially tributary" and the legislature has required plans for augmentation to prevent injury to tributary water right users, and it is important that such water users have the opportunity to participate in the anti-speculation analysis and protect their own vested water rights.

Ultimately, as this Court recognized in *East Cherry Creek*, the anti-speculation doctrine mandates a threshold showing of a non-speculative, beneficial use of water before the development of a water project. 109 P.3d at 158. The legislature has not excluded the type of groundwater nor the type of water court application at issue in this case. This Court should not sanction the Water Court's unauthorized expansion of the exception to the anti-

speculation doctrine, which would allow applicants to adjudicate plans for augmentation, for admittedly speculative uses, that may never actually be needed.

5. Independence admitted that the types and places of use it sought to add to the plan for augmentation were speculative, and those types and places of use should be removed from the decree.

Independence did not attempt to argue that it has a non-speculative need for any of the new uses or places of use that Independence sought to add to the plan for augmentation, other than use of 0.84 acre-feet per year for municipal and commercial use on the Subject Property. *See generally* Independence Response to Motion for Summary Judgment, CF, p #1909-1929. Instead, Independence simply argued that the anti-speculation doctrine does not apply and therefore Independence "is not required as part of this case to make a threshold showing, or disclose opinions, or otherwise offer evidence, regarding its future plans to put the NNT Upper Dawson Groundwater to beneficial use." CF, p #1914. The Water Court, similarly, did not find that any disputed issues of fact exist as to whether Independence could make a threshold showing of non-speculative use. CF, p #2013-2019. Independence's admission that it does not currently have a non-speculative need to use water off the Subject Property illustrates the frivolous and unnecessary nature of its application, which the anti-speculation doctrine was designed to prevent.

Opposers therefore ask this Court to dismiss Independence's claims to add to the plan for augmentation any use of water off the Subject Property and any use of water other than use on the Subject Property for fire protection and up to 0.84 acre-feet of water per year for municipal and commercial use. This Court should remand to the Water Court to (1) 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 industrial 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. *See Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros.* 307 P.3d 1056, 1058, 1072 (Colo. 2013) (reversing and vacating the water court's addition of specific types of use from a decree adjudicating water rights where the applicant did not satisfy the anti-speculation doctrine as to those uses); *see also* C.R.S. § 37-92-103(3)(a) (anti-speculation doctrine requires applicants to prove the specific quantity of water needed for specific beneficial uses). Paragraph twenty-four of the Final Decree appears to state that only the State Engineer may apply the anti-speculation doctrine (although this conclusion of law is limited to "judicial determination[s] of available nontributary groundwater outside of designated basins, which as discussed above, refers to a different type of groundwater and a different type of application than is at issue in this case). This conclusion of law should be vacated to clarify that

the Water Court does have jurisdiction over the claim to adjudicated a plan for augmentation for not-nontributary groundwater withdrawals.

V. CONCLUSION

For the foregoing reasons, 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 industrial 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.

Respectfully submitted this 15th day of September, 2023.

Law Office of John. D. Buchanan LLC

John D. Buchanan, #45191

ATTORNEY FOR OPPOSERS-APPELLANTS, Franktown Citizens Coalition II, Inc. and West Elbert County Well Users Association

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CERTIFICATE OF SERVICE
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I hereby certify that the foregoing Opening Brief was served electronically on the following via CCE on this 15th day of September, 2023.

Party	**Attorney and/or Mailing Address**
Cordillera Corporation	Emilie Blake Polley Christopher Dale Cummins Monson Cummins Shohet and Farr LLC Via CCE
Division 1 Engineer	Division 1 Water Engineer State of Colorado DWR Division 1 Via CCE
Independence Water and Sanitation District	Eric Krisberg Trout Matthew Steven Poznanovic David S. Hayes Hayes Poznanovic Korver LLC Via CCE
State Engineer	Colorado Division of Water Resources State of Colorado – Division of Water Resources Via CCE

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