DISTRICT COURT, WATER DIVISION NO. 3, STATE OF COLORADO Alamosa County Courthouse 702 4th St., Alamosa, CO 81101 _____ IN THE MATTER OF THE RIO GRANDE WATER CONSERVATION DISTRICT, IN ALAMOSA COUNTY, COLORADO, AND CONCERNING THE OFFICE OF THE STATE ENGINEER'S APPROVAL OF THE PLAN OF WATER MANAGEMENT FOR SPECIAL IMPROVEMENT DISTRICT NO. 1 OF THE RIO GRANDE WATER CONSERVATION DISTRICT	 ▲ COURT USE ONLY▲
	Case Nos. 2006CV64 and 2007CW52 Div.: 1

ORDER DENYING MOTION FOR A DETERMINATION THAT THE 2012 ANNUAL REPLACEMENT PLAN IS NOT IN EFFECT AND FOR AN ORDER THAT THE STATE ENGINEER CURTAIL ALL SUBDISTRICT WELL PUMPING

THIS MATTER is before the court on the Objectors' *Motion for a Determination that the 2012 Annual Replacement Plan is Not In Effect and For an Order That the State Engineer Curtail All Subdistrict Well Pumping.* Objectors are the San Antonio, Los Pinos and Conejos River Acequia Preservation Association, Save Our Senior Water Rights, LLC, Richard H. Ramstetter, Peter D. Atkins, and the Costilla Ditch Company. The Supporters, the Rio Grande Water Conservation District, the Rio Grande Water Users Association, the Conejos Water Conservancy District, the State and Division Engineers, Farming Technology Corporation, Mountain Coast Enterprises, LLC, Ernest and Virginia Myers, Sam Investments, Inc., Skyview

Cooling Company, Inc., and Wijaya Colorado, filed a response opposing the motion and the Objectors filed a reply. The court has considered these pleadings as well as all matters of record herein.

I. Background and Procedure

In a decree dated May 27, 2010 ("Decree"), this court approved an amended plan ("Amended Plan") for water management adopted by Special Improvement Subdistrict No. 1. of the Rio Grande Water Conservation District ("Subdistrict"). In the Decree this court approved the Amended Plan with added terms and conditions to provide more detail for public notice and comment in the process of the development of the annual replacement plan as well as to address the replacement of injurious stream depletions resulting from ongoing and past Subdistrict well pumping that will have future impact. The Colorado Supreme Court affirmed this judgment and decree holding that "Subdistrict No. 1's Plan as decreed complies with the special statutory provisions applicable to its development and implementation." *San Antonio, Los Pinos and Conejos River Acequia Preservation Ass'n v. Special Improvement Dist. No. 1 of Rio Grande Water Conservation Dist.*, 270 P.3d 927, 935 (Colo. 2011) ("*Subdistrict"*). In its decision, the Supreme Court affirmed this Court's determination that the Amended Plan was sufficiently comprehensive and detailed to meet the requirements of C.R.S. § 37-48-126 and that, in accordance with C.R.S. § 37-92-501(4), the plan, as decreed, was "designed to permit the continued use of underground water consistent with preventing material injury to senior surface water rights." *Id.* at 945.

Although the water management regime imposed by the Amended Plan is comprehensive, the Amended Plan is not self-executing. The Amended Plan requires the Subdistrict to prepare an annual replacement plan ("ARP"), *see* Decree at ¶¶ 63 – 76, and to

obtain the State Engineer's approval of the ARP, *see* Decree at ¶ 362. Furthermore, as this Court discussed in the Decree, the statute provides the water court with broad retained jurisdiction "over the water management plan for the purpose of ensuring the plan is operated, and injury is prevented, in conformity with the terms of the court's decree approving the water management plan". Decree at ¶352 (*citing* C.R.S. § 37-92-501(4)(c)). This language grants the court broad oversight powers and "authorizes the Court to reconsider, enforce and require alteration or even termination of a plan if it fails to prevent injury or is not operated in accordance with the terms of the Court's decree and the plan itself." *Id.* In the Decree, the Court specifically retained jurisdiction to review challenges to the State and Division Engineers' actions with respect to the Subdistrict's ARP. Decree, Terms and Conditions of Approval at ¶ 16.

The Subdistrict submitted its proposed 2012 Annual Replacement Plan ("2012 ARP") to the State Engineer on April 13, 2012. The State Engineer approved the 2012 ARP on May 1, 2012. The Objectors timely protested and invoked this Court's retained jurisdiction to review the 2012 ARP. The Court set a trial on the merits of the 2012 ARP for October 29, 2012. The Objectors filed the current motion seeking a determination, as a matter of law, that the 2012 Plan is not in effect and therefore that the State Engineer is required to curtail pumping by all wells included in the Subdistrict.

II. Standard of Decision

The court may decide a question as a matter of law if there are no genuine issues of material fact. C.R.C.P. 56(h). This procedure allows "the court to address issues of law that are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have an impact upon the manner in which the litigation proceeds." *Bd. Of County Comm'rs v. United States,* 891 P.2d 952, 63 n.14 (Colo. 1995). The purpose of the rule is 'to save time and expense

and simplify trial." *Joens v. Feiger, Collison & Killmer*, 903 P.2d 27, 33 (Colo. App. 1994) *rev'd on other grounds* 926 P.2d 1244 (Colo. 1996).

III. Analysis

Objectors filed the current motion seeking an order of the court requiring the State Engineer to curtail all Subdistrict well pumping immediately because the 2012 ARP is tantamount to water rules and regulations and water rules and regulations cannot become effective until all objections to such rules are determined. Specifically, the motion asks the court to find, as a matter of law, 1) that the State Engineer's approval of the 2012 Plan is not effective and the 2012 Plan is not in effect; 2) that Section 501(4)(c) does not shield Subdistrict Well pumping from curtailment when an annual replacement plan is not in effect; 3) that the State Engineer has the obligation to curtail all well pumping that will result in injurious out-of-priority depletions; and 4) that the State Engineer must immediately curtail all Subdistrict Well pumping. In response, the Supporters argue that the ARP is not equivalent to rules and regulations proposed by the State Engineer but rather "is a means of implementation of an approved water management plan that has already gone through full judicial review." The Supporters point out that requiring a review of the type Objectors are proposing, prior to the ARP going into effect, would make it impossible to implement the Subdistrict's approved water management plan. Finally, Supporters argue that the court should analyze this issue as it would a request for a preliminary injunction and find that the motion should be denied to preserve the status quo until after a trial on the merits can take place this fall. The court generally agrees with the Supporters.

The Objectors argue that the Court should review the 2012 ARP in the same way as the Court reviewed the Amended Plan because the annual replacement plan is part and parcel of the

Amended Plan. Objectors claim that the actual operation of the Amended Plan and injury to senior water rights was not addressed in the Amended Plan or the litigation concerning its approval and so must be addressed now. *Reply in Support of Motion for a Determination that the 2012 Annual Replacement Plan is not in Effect and for an Order that the State Engineer Curtail All Subdistrict Well Pumping* ("Reply") at 6. As the Objectors see it, the 2012 ARP is an extension or completion of the Amended Plan which the Subdistrict and Supporters prematurely requested approval of and litigated in a "piecemeal" fashion. *Id.* at 7. This argument is the logical extension of the Objectors' previous argument, already rejected by this Court and the Supreme Court, that the Amended Plan should not have been approved because it did not contain all of the detail now present in the 2012 ARP. *See* Decree at ¶105; *Subdistrict*, 270 P.3d at 945.

In fact, however, neither this Court nor the Colorado Supreme Court found the Amended Plan to be defective or lacking in sufficient detail to be approved as a water management plan. The Supreme Court called the Amended Plan "[c]omprehensive and detailed" and said it contained "sufficient content and procedures for approval in pursuit of the statutory purposes, including protection against material injury to adjudicated senior surface rights and achievement of sustainable water levels in San Luis Valley aquifers." *Id.*, 270 P.3d at 941. In approving the Amended Plan, this Court explained that SB 04-222 did not "require that a plan of water management contain the same specificity as would be necessary to allow the Court to grant a decreed water right. Rather . . . the General Assembly has specifically chosen not to require that kind of detail in the plan so long as the plan provides a framework for the ongoing determination of injury and the remedy for that injury. . ." Decree at ¶285. As the Court said in its ruling after the first trial, when the Court sent the Plan back to the Subdistrict for further revision: "Administration of the Plan will change on an annual basis depending upon the hydrologic

conditions and the amount of injurious depletions calculated to occur to surface water streams as the result of Subdistrict well pumping. The Plan's operation must be calibrated annually to reflect actual operating conditions." *Findings of Fact, Conclusions of Law and Order* ("2009 Order") dated February 18, 2009, at ¶208; *see also* the paragraphs of the Decree cited in the *Supporters' Response to Objectors' Motion for a Determination that the 2012 Annual Replacement Plan is Not in Effect and for an Order that the State Engineer Curtail All Subdistrict Well Pumping* ("Response") at 7-9. As the Supreme Court explained: "[t]he Plan's appendices provide the detail for yearly operations of the Plan through the device of an annual replacement plan." 270 P.3d at 943. If either this Court or the Supreme Court had thought the Amended Plan was not complete until the annual replacement plan was prepared, neither would have approved the plan. Thus, the 2012 ARP is not a part, extension or completion of the Amended Plan but rather is a tool the Subdistrict and the Division Engineer will use to make the best possible prediction of annual stream depletions and provide the method by which, during the current year, those stream depletions will be replaced, in time, amount and location to prevent injury. *See id.* at 948.

Since the 2012 ARP is not an extension of the Amended Plan, the prior determinations of this Court and the Supreme Court that the water court must "judge a ground water management plan by the same standards as rules and regulations promulgated by the State Engineer," *Subdistrict*, 270 P.3d at 940, does not answer the question of how the 2012 ARP should be reviewed. Accordingly, Supporters are not judicially estopped from claiming the annual replacement plan should be reviewed under a different standard or using different procedures than the standard and procedures the court would use to review water rules and regulations or a plan of water management.

Furthermore, the reasoning behind this Court's decision that the Amended Plan should be judged by the same standards as rules and regulations promulgated by the State Engineer leads to the conclusion that the Court should treat review of the 2012 ARP differently. Both this Court and the Supreme Court relied upon the plain meaning of the relevant statutes to determine that the standards and procedures the court should use to review the Subdistrict's Amended Plan of Water Management are the same as the procedures a water court would use to review challenges to a rule or regulation of the State Engineer. *Order Re Standard of Review, Burden of Proof and Order of Presentation at Trial* at 10-11(4-8-2008), *Subdistrict*, 270 P.3d at 939. As both courts noted, C.R.S. § 37-92-501(4)(c) provides that "judicial review of [the State Engineer's approval of the ground water management plan] shall be pursuant to paragraph (a) of subsection (3) of this section." Subsection (3)(a) provides that "[a]ny person desiring to protest a proposed rule and regulation may do so in the same manner as provided in section 37-92-304 for the protest of a ruling of a referee . . . ." From this language, both courts concluded that the court must judge the ground water management plan by the same standards as it would judge rules and regulations promulgated by the State Engineer. *Id.*

In the same statute, however, the General Assembly specifically provided for review of the *operation*, as opposed to the *creation*, of a water management plan by way of the water court's retained jurisdiction:

> The water judge shall retain jurisdiction over the water management plan for the purpose of ensuring the plan is operated, and injury is prevented, in conformity with the terms of the court's decree approving the water management plan.

C.R.S. § 37-92-501(4)(c). The General Assembly could have provided that the water court's exercise of retained jurisdiction would also be pursuant to subsection (3)(a) of the statute but it chose not to do so. The court's role in construing the meaning or scope of a statute is to give

effect to the intent of the legislature. *Lakeview Assocs. v. Maes*, 907 P.2d 580, 584 (Colo. 1995). To do so the court must first examine the language of the statute, itself. And the language of this statute plainly says that the water court's review of the operation of a water management plan is pursuant to the court's retained jurisdiction rather than according to the procedures for review of proposed rules and regulations.

Since the Court is reviewing the 2012 ARP pursuant to its retained jurisdiction over the operation of the Amended Plan, rather than as a proposed rule or regulation, the Court is not required to, and should not, stay operation of the 2012 ARP until all challenges to it are resolved. The Objectors argue that *Simpson v. Bijou,* 69 P.3d 50 (Colo. 2003), requires the Court to stay operation of the 2012 ARP until challenges to it are resolved. In *Bijou* the State Engineer had promulgated "Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the South Platte River Basin, Colorado." The State Engineer argued that these rules and regulations became effective once they were published as required by C.R.S. § 37-92-501(2)(g) and that they should remain in effect, "regardless of whether protests are filed, subject to the power of the water court to issue a preliminary injunction to stay the effective date of the proposed rules when the prerequisites to such a stay are established." *Bijou*, 69 P.3d at 71. The Supreme Court rejected this argument because it found that the only adequate safeguard to protect against the State Engineer's unreasonable exercise of administrative discretion was to require the completion of the hearing procedures set forth in C.R.S. § 37-92-304 before the rules became effective. *Id.* at 72. The current case is different from *Bijou* because the Objectors have already had a full and fair opportunity to litigate the Amended Plan and the detailed components and framework of the ARP through both the trial court and the appellate court. *Subdistrict*, 270 P.3d at 943-44. The due process considerations present in *Bijou* are absent here and, thus, there

is no reason to stay operation of the Amended Plan while the court reviews the details of the 2012 ARP.

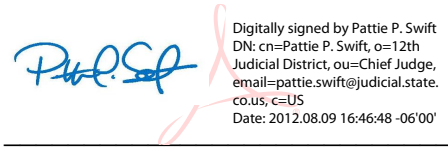
Furthermore, as a practical matter, a stay of the 2012 ARP until after the court resolves the challenges to it would frustrate the purpose of providing for review of the operation of the plan under the court's retained jurisdiction. This Court has approved, and the Colorado Supreme Court has affirmed, the contents, disclosures, formulas, and timelines of the annual replacement plan as set out in the Amended Plan and the Decree. It is the operation of the 2012 ARP and its conformity to the terms of the Amended Plan and Decree that this court must review. Both this Court's Decree and the Supreme Court's opinion are replete with references to the necessity to try out the Amended Plan to observe how it works and adjust it as necessary to accomplish the required goals of the plan. The purpose of retained jurisdiction is to allow time for the operation of the Amended Plan to test whether the Amended Plan, as put into practice by way of the annual replacement plan, will protect adjudicated senior surface water users against material injury. *Cf. Upper Eagle Regional Water Authority v. Wolfe*, 230 P.3d 1203, 1213 (Colo. 2010). The only way to do this is to operate the plan. Thus, since the Court is reviewing the 2012 ARP pursuant to the Court's retained jurisdiction over the Amended Plan, there is no legal reason why the Court should stay operation of the annual replacement plan until objections to it are resolved and, as a practical matter, it would be counter-productive to do so.

Because the court has determined that the 2012 ARP is in effect pending resolution of the objections to it, the Court does not reach the Objectors' arguments concerning the authority of the State Engineer to curtail all pumping of wells in the Subdistrict nor the Supporters' request that the Court apply either the State Administrative Procedures Act or the common law of preliminary injunctions to decide this motion.

IT IS THEREFORE ORDERED that the Objectors' *Motion for a Determination that the 2012 Annual Replacement Plan is Not in Effect and for an Order that the State Engineer Curtail All Subdistrict Well Pumping* is Denied.

DONE this _9th_ day of August, 2012.

BY THE COURT:



Pattie P. Swift
Water Judge
Water Division 3

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of the signature, service of the foregoing Order was made via LexisNexis File & Serve, or by U.S. Mail, first class postage prepaid, addressed as follows:

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