DISTRICT COURT, WATER DIVISION NO. 3 COLORADO Alamosa County Courthouse 702 4th Street, Alamosa, CO 81101 (719) 589-9107	DATE FILED: April 10, 2013
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 Numbers: 06CV64 and 07CW52 Ctrm/Div: 1
FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE	

1. This matter came before the Court for trial on the Objectors' invocation of this court's retained jurisdiction to review the State Engineer's approval of the 2012 Annual Replacement Plan ("2012 ARP") of Special Improvement District No. 1 of the Rio Grande Water Conservation District ("Subdistrict No. 1" or "Subdistrict") pursuant to the Plan of Water Management ("Amended Plan") this court approved in its Findings of Fact, Conclusions of Law, Judgment and Decree, Case Nos. 06CV64 & 07CW52 dated May 27, 2010 ("May 2010 Decree").

I. Parties and Procedural Background

A. Parties

2. The parties to this matter are the State Engineer; the Rio Grande Water Conservation District ("District"); the Rio Grande Water Users Association; the Conejos Water Conservancy District; Farming Technology Corporation; and the Skyview Parties (Mountain Coast Enterprises, LLC; Wijaya Colorado, LLC; Ernest Myers and Virginia Myers; Skyview Cooling Company, Inc.; and Sam Investment, Inc.) (collectively, the "Supporters") and the parties invoking this court's retained jurisdiction: 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 (collectively "Objectors").

B. Current Trial

3. This matter involves the latest chapter in two separate but related cases. Case No. 06CV64 involves objections to the Amended Plan as the official plan of the Subdistrict approved by the District board of directors pursuant to section 37-48-126(2), C.R.S. (2012). Case No. 07CW52 involves objections to the State Engineer's approval of the Amended Plan as a groundwater management plan pursuant to section 37-92-501(4)(c), C.R.S. (2012).

4. The State Engineer and the Supporters presented a joint case at trial. The State Engineer was represented by Assistant Attorneys General Mari Deminski and Preston Hartman. The District was represented by David Robbins and Peter Ampe. The Rio Grande Water Users Association was represented by William Paddock. The Conejos Water Conservancy District, Farming Technology Corporation and the Skyview Parties did not participate at trial, but indicated to the Court their support of the State Engineer, District and Rio Grande Water Users Association.

5. The San Antonio, Los Pinos and Conejos River Acequia Preservation Association and Save Our Senior Water Rights, LLC, were represented by Timothy Buchanan. Richard H. Ramstetter and Peter D. Atkins were represented by Stephane Atencio. The Costilla Ditch Company was represented by Erich Schwiesow. David Bradley appeared *pro se*.

6. Trial began on October 29, 2012 and lasted two days, including oral closing arguments. The Supporters presented three witnesses, Steve Vandiver, P.E., Allen Davey, P.E., and State Engineer Dick Wolfe, P.E. The Objectors presented no witnesses. The Court conducted the proceedings *de novo*. At trial the Court accepted into evidence the following exhibits: 124, 125, 126, 127, 128, 129, 151, 153, 154, S-100 and S-101. The Court has considered the evidence presented, the arguments of counsel, and all matters of record in this case and now makes the following findings and conclusions.

C. Prior History of this Case

7. There have been two previous trials in these cases. The first trial took place from October 27, 2008 to November 4, 2008 and is the subject of this Court's February 2009 Order. In that Order, the Court approved the basic concept and portions of the original Plan of Water Management, but referred the Plan back to the Subdistrict board of managers and the District board of directors for further consideration and amendment in accordance with the February 2009 Order.

8. After the Court's February 2009 Order, the Subdistrict board of managers developed the Amended Plan. The Amended Plan included the requirements that the Subdistrict develop an annual replacement plan ("ARP") to govern the operation and implementation of the Amended Plan and that the ARP be submitted to the State Engineer for approval. The Subdistrict board of managers adopted the Amended Plan, which was approved by the District board of directors and the State Engineer. Objectors again filed challenges to those approvals.

9. The Court held a second trial in these cases beginning September 28, 2009 and continuing through October 9, 2009. The Court upheld the Amended Plan, but imposed terms

and conditions requiring certain procedures and inclusion of certain data and other information in the ARP. May 2010 Decree at 133-136. Some of the Objectors challenged the Court's order by taking an appeal to the Colorado Supreme Court. The Supreme Court fully upheld the May 2010 Decree. *San Antonio, Los Pinos and Conejos River Acequia Preservation Ass'n v. Special Improvement District No. 1 of the Rio Grande Water Conservation District*, 270 P.3d 927 (Colo. 2011)("*Subdistrict*").

D. Procedural History Leading Up to The October Trial

1. Subdistrict and State Engineer Process

10. Under the terms of the Amended Plan and the May 2010 Decree, the Subdistrict must prepare an annual replacement plan which must be reviewed and approved by the State Engineer. *See* Decree at 124 (¶363); *Subdistrict*, 270 P.3d at 935. The Subdistrict completed the 2012 ARP through a process involving notice and public meetings with the Subdistrict No. 1 board of managers. Subdistrict staff completed a final draft of the 2012 ARP and made that plan available to the public. The board of managers considered and approved the plan at a noticed public meeting on April 3, 2012. The District's board of directors subsequently approved the plan.

11. On April 13, 2012, the District filed the 2012 ARP in this Court and submitted the 2012 ARP to the State Engineer for his review. The District posted the 2012 ARP and its appendices on the District's website. The Colorado Division of Water Resources ("DWR") posted relevant information, including the response functions, on its website at approximately the same time. The State Engineer provided notice of the submittal of the 2012 ARP to all subscribers to the Division No. 3 SWSP Notification List, the San Luis Valley Groundwater Rules Advisory Committee email list, and the initial ARP Notification List. The State Engineer posted the 2012 ARP, its appendices, and Subdistrict No. 1's response functions on DWR's website. Copies of the 2012 ARP were made available for review at the State and Division Engineers' offices.

12. State Engineer Dick Wolfe held a public hearing to receive comments on the 2012 ARP on April 19, 2012 in Alamosa, Colorado. The State Engineer accepted written comments on the 2012 ARP submitted by April 23, 2012. The State Engineer approved the 2012 ARP by letter dated May 1, 2012. This letter conditioned the State Engineer's approval of the ARP on the Subdistrict's compliance with fifteen additional requirements. On May 15, 2012, Objectors invoked this Court's retained jurisdiction by filing challenges to the 2012 ARP. With the concurrence of the parties, the Court set the case for a five-day trial beginning October 29, 2012.

2. Pre-trial Motions

13. During the months before trial, the parties filed various motions. Each motion and the Court's ruling on each motion, if any, are described here together rather than in chronological order.

14. On May 25, Objectors filed a *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 sought orders finding that: (1) the State Engineer's approval of the 2012 Plan was not effective and the 2012 Plan was not in effect; (2) Section 37-92-501(4)(c), C.R.S. does not shield Subdistrict Well pumping from curtailment when an annual replacement plan is not in effect; (3) the State Engineer is obligated to curtail all well pumping that would result in injurious out-of-priority depletions, such as Subdistrict Well pumping; and (4) the State Engineer must immediately curtail all Subdistrict Well pumping.

15. The Court denied Objectors' motion on August 9, 2012. The Court rejected Objectors' contention that the 2012 ARP was tantamount to water rules and regulations, which cannot become effective until all objections to such rules are resolved. August 9 Order at 8 – 9. Because the Amended Plan requires replacement plans on an annual basis, staying the 2012 ARP until challenges to it are resolved would render impossible the operation of the Amended Plan and judicial review thereof. August 9 Order at 9.

16. On June 11, 2012, the State Engineer and Supporters filed a general denial of the claims contained in Objectors' invocations of retained jurisdiction and a *Motion to Dismiss Challenges Raised in Objectors' Invocations of Retained Jurisdiction for Failure to State a Claim*. They sought dismissal of ten challenges to the 2012 ARP on the grounds that this Court and the Colorado Supreme Court had already decided these challenges and, therefore, the doctrine of issue preclusion barred re-litigation of these issues.

17. The Court partially granted and partially denied Supporters' motion. First, the Court ruled that the law of the case doctrine, not issue preclusion, barred Objectors from raising challenges that had been previously resolved by the May 2010 Decree, which was affirmed on appeal by the Colorado Supreme Court. August 10 Order at 4 – 5. Next, the Court examined each of the ten challenges, dismissing eight of them in whole or in part because the Amended Plan, the May 2010 Decree, or the Colorado Supreme Court had already directly addressed the issues raised by the challenges. August 10 Order at 5 – 15. The Court denied the motion to dismiss the other challenges.

18. At a status conference on August 13, 2012, Objectors Richard Ramstetter and Peter Atkins through counsel requested by oral motion that the Court enter a final judgment pursuant to Colo.R.Civ.P. 54(b) as to the portion of the Court's decision in its August 10 Order that dismissed eight of Objectors' challenges. All other Objectors joined the motion. The Court denied Objectors' motion on August 14, 2012. The Court ruled that it made sense to delay entry of a final judgment as to the eight dismissed challenges because it was likely that the Court would have to deal with similar legal issues at trial, and that Objectors had provided no reason justifying an immediate interlocutory appeal of the Court's dismissal of the eight challenges. August 14 Order at 2.

19. On July 30, 2012, certain Objectors filed a *Motion for Summary Judgment Regarding Augmentation Plan Wells*. Objectors sought an order that: (1) the Subdistrict and the State Engineer failed to comply with the requirements for wells that were part of augmentation plans; (2) the inclusion of wells with augmentation plans in the ARP violated the Amended Plan, the May 2010 Decree, and other applicable law; (3) the State Engineer's approval of the ARP was therefore not reasonable, was arbitrary and capricious, and was not supported by the data

included in the submittal of the ARP, and the State Engineer's approval should be reversed; and (4) the Court should not approve the ARP. The Court did not rule on Objectors' motion before trial. The Court's ruling on the issues raised by Objectors' motion is set out below.

20. On July 30, 2012, certain Objectors filed a *Motion for Summary Judgment Regarding Closed Basin Project Water*. Objectors sought an order that: (1) the use of water delivered from the Closed Basin Water Salvage Project for replacement of depletions under the ARP violates Colorado law and the United States and Colorado Constitutions; (2) the State Engineer's approval of the ARP was therefore not reasonable, was arbitrary and capricious, and was not supported by the data included in the submittal of the ARP, and the State Engineer's approval should be reversed; and (3) the Court should not approve the ARP. Objector Costilla Ditch Company filed a *Response in Support of Objectors' Motion for Summary Judgment Regarding Closed Basin Project Water.*

21. The Court denied Objectors' motion on October 4, 2012 because there were remaining disputed issues of material fact that needed to be determined before the Court could decide whether Closed Basin Project water was adequate and suitable to prevent injury to senior water rights pursuant to the Subdistrict's Plan. October 4 Order at 3. The Court made additional comments in the October 4, 2012, Order for the purpose of aiding the parties and counsel in understanding this Court's thinking. The Court's final conclusions of law on the Closed Basin Project, however, are contained in this ruling.

22. On September 19, 2012, certain Objectors filed a *Motion to Appoint a Special Master Pursuant to C.R.C.P. 53 and Compel Disclosures Pursuant to Colo.R.Civ.P. 37*. Before trial, Objectors withdrew the motion to appoint a special master without prejudice. October 31 Order; November 2 Order at 5. The parties resolved the document dispute underlying Objectors' motion to compel without Court action. October 29 Order; November 2 Order at 4.

23. On September 19, 2012, certain Objectors filed a *Motion to Strike Expert Opinions*. Objectors contended that expert reports were not part of the information the Subdistrict had submitted with the 2012 ARP and that the State Engineer had not considered these reports in approving the ARP. Therefore, such reports were irrelevant to this proceeding. The parties resolved their dispute concerning the expert reports without action by the Court. At the October 24, 2012 motions hearing, the State Engineer and Supporters withdrew their tenders of expert witness designation and their expert reports without prejudice, and Objectors withdrew their motion. October 24 Order; October 29 Order; November 2 Order at 2, 4.

24. On September 19, 2012, certain parties filed a *Motion to Amend Invocations of Retained Jurisdiction and to Vacate Trial*. Objectors sought to withdraw without prejudice their challenges that were not dismissed by the Court's August 10, 2012 Order and that were not the subject of pending motions for summary judgment. Objectors further sought to vacate the trial based on their contention that upon such withdrawal of their challenges, no factual issues would remain for trial. The Costilla Ditch Company also sought the option of withdrawing its claims without prejudice. October 4 Order at 1 – 2.

25. The Court ruled on Objectors' motion to amend on October 4, 2012. The Court analyzed Objectors' motion as a motion to dismiss under Colo.R.Civ.P. 41(a)(2) and ruled as follows: (1) claims that were not specific to the 2012 ARP, but would apply also to future Annual Replacement Plans, and therefore could be decided once and put to rest, would be dismissed with prejudice as to the party who asserted them, or that party would be required to pay reasonable attorney's fees and costs; (2) claims that were specific to the 2012 ARP, because they concerned the accuracy of calculations for the 2012 plan year, could be withdrawn without payment of attorneys' fees because they would not be capable of being re-asserted against the next Annual Replacement Plan; (3) the Objectors must file by October 9, 2012 a document specifying which claims they sought to dismiss and under what terms.

26. At an October 4 status conference, the Court noted that the decretal paragraphs of the May 2010 Decree discuss various ways in which the Court can exercise its retained jurisdiction. October 4 Order at 4. The Court requested briefing and oral argument on the question of how the Court should exercise its retained jurisdiction in the future. October 4 Order at 4 – 5. The Court reserved its ruling on this question until after trial. The Court's conclusions will be set forth in a separate order.

27. On October 9, 2012, the Costilla Ditch Company filed a document stating that it did not wish to withdraw any of its claims. On the same date, the other Objectors filed a document specifying which claims they sought to dismiss and under what terms. Objectors contended that all of the claims that they sought to withdraw were specific to the 2012 ARP so they could be withdrawn without payment of attorneys' fees. The State Engineer and Supporters filed a response on October 19, 2012 in which they argued that Objectors had challenged the entirety of the ARP and the State Engineer's review and approval of the ARP and therefore the challenges were not specific to the 2012 ARP.

28. At the October 24, 2012 motions hearing, Objectors, other than the Costilla Ditch Company, withdrew with prejudice all of the remaining claims within their Invocations of Retained Jurisdiction except for claims that were the subject of the following pending motions: (1) Motion for Summary Judgment Regarding Augmentation Plan Wells; and (2) Motion for Summary Judgment Regarding Closed Basin Project Water. November 2 Order at 2-3. The Court clarified that the claims it was dismissing included all of Objectors' challenges to the methodologies used to make estimates or predictions in the ARP and that Objectors were barred from raising these claims in challenges to future Annual Replacement Plans. October 29 Order. The Objectors also reserved the right to appeal the Court's earlier orders which had dismissed several of their claims under the doctrine of law of the case.

29. Also at the October 24, 2012 motions hearing, the parties agreed that the Costilla Ditch Company's only claim remaining for trial was its claim concerning the use of water from the Closed Basin Project as a source of replacement water. November 2 Order at 4 – 5. The parties further agreed that the Costilla Ditch Company's other claims would be dismissed without prejudice, with no payment of fees and costs. November 2 Order at 4 – 5.

30. In addition, during the October 24, 2012 motions hearing the Court heard argument regarding the Court's future review of invocations of retained jurisdiction. The Court

ruled that it would apply the *de novo* standard of review for the purpose of determining the two remaining issues associated with the invocations of retained jurisdiction. The Court took under advisement the procedures, type of review, and the standard of review to be applied in the future for each type of invocation of retained jurisdiction.

31. On October 28, 2012, the parties filed a joint proposed trial management order (subsequently entered by the Court) detailing the issues remaining for trial, the dismissal of Objectors' challenges, the stipulations and agreements between the parties, and the remaining deadlines. The parties agreed to the resolution of all of the pretrial motions as explained above.

32. Thus, at the start of trial only two issues remained: (1) consideration of whether the water produced from the Closed Basin Project wells is, in fact, an appropriate and suitable source of replacement water to be used in the 2012 ARP; and (2) whether the 2012 ARP was invalid for failing to specify and provide a map of which Subdistrict Wells were also part of a plan of augmentation.

II. Development of the 2012 Annual Replacement Plan

33. After the Court issued the May 2010 Decree and while the appeal of that decree was pending in the Colorado Supreme Court, the District's General Manager, Steve Vandiver, together with his staff and consultants, began gathering the data necessary to develop the 2012 ARP and to find the water needed to replace injurious stream depletions in time, location and amount.

34. The Subdistrict collected the data necessary to assess fees to fund the operation of the Subdistrict and the ARP, including identifying the irrigated parcels within the Subdistrict and the various water supplies used on those irrigated parcels. There are three types of fees that the Subdistrict may collect: an administrative fee that is charged for each acre within the Subdistrict partially or fully irrigated by ground water; a CREP fee for each irrigated acre within the Subdistrict to supply the local cost share for the Conservation Reserve Enhancement Program;[1] and, a variable fee based upon measured pumping by Subdistrict Wells. For the year 2010, the Subdistrict imposed only the CREP and administrative fees, not the variable fee. *See*, Amended Plan, sec. IV.A; testimony of S. Vandiver. The Subdistrict assessed all three fees for 2011 which were collected in 2012.

35. With the funding sources in place, the Subdistrict began to develop a temporary fallowing program, as well as to acquire water to replace injurious stream depletions caused by pumping Subdistrict Wells, and to cooperate with the State Engineer in developing Subdistrict rules and regulations to fulfill the requirements of the Amended Plan and the May 2010 Decree.

36. The May 2010 Decree sets out the methodology required to be used in the ARP for the calculation and replacement of injurious stream depletions due to Subdistrict well pumping. *See*, May 2010 Decree at ¶¶94 – 243. The Subdistrict must estimate the amount of

[1] The CREP is a federal program designed to encourage the conservation of land and water through matching federal funding to a local cost-share to pay willing producers to temporarily or permanently cease irrigated agricultural operations. At the time the 2012 ARP was developed, the CREP program was not in place and so was not a part of the 2012 ARP.

pumping that will occur in the upcoming irrigation season and the amount of surface water that will be diverted into the Subdistrict under the recharge decrees that is available to offset the pumping, and in order to estimate the net groundwater consumptive use for the year. May 2010 Decree at ¶¶181 – 188. The Subdistrict Response Functions are then applied to net groundwater consumptive use to estimate stream depletions for the upcoming irrigation season. May 2010 Decree at ¶¶171 – 180. These depletions, combined with lagged depletions from previous years' pumping by Subdistrict Wells, estimate the total annual injurious stream depletions the Subdistrict must replace in time, location and amount.

37. The State Engineer operates the RGDSS model to develop Response Functions. Therefore, the prediction of stream depletions is the product of work by both the Subdistrict and the State Engineer.

38. Although the State Engineer's final predictions of estimated stream depletions for 2012 were not available to the Subdistrict until early April 2012, the State Engineer did supply preliminary predictions on March 2, 2012. With that information, the Subdistrict moved to find replacement supplies. As explained by Mr. Vandiver at trial:

> The first and most important and most critical thing was the acquisition of the surface supplies of water to replace our depletions. The Court had made it abundantly clear that our main priority was to replace depletions and keep the river whole and to deliver that water in the time, place, and amount of injury and eliminate the injury to senior water rights. So that was our first and most important goal right off the bat.

39. The Subdistrict assembled a water replacement portfolio that included trans-basin water stored in upstream reservoirs, a portion of the output of the water from the Closed Basin Project and a forbearance agreement with the Rio Grande Canal Water Users Association. The Subdistrict applied for and received approval of a Substitute Water Supply Plan ("SWSP") pursuant to section 37-92-308(5), C.R.S., for the trans-basin water. Exhibits 128 and 129. Neither the SWSP nor the forbearance agreement was in controversy at the trial in this matter. The Objectors did challenge the Subdistrict's use of the Closed Basin Project as a source of replacement water. The Court addresses that challenge below.

40. While the Subdistrict was developing the ARP, General Manager Steve Vandiver had discussions with Colorado Division of Water Resources personnel concerning the data and information the State Engineer expected to be included as part of the ARP submitted to the State Engineer.

41. Ultimately, these conversations led the State Engineer to send an "expectations letter" to Mr. Vandiver explicitly setting forth the data and other information the State Engineer would require to be submitted as part of the ARP. *See* Exhibit 126. Although new to the water users in Water Division No. 3, the State Engineer sends similar letters annually to water users in Water Division No. 2 as part of the annual replacement plan process under the Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado, which the Court has previously summarized. *See* February 2009 Order at ¶206.

III. Major Provisions of Subdistrict No. 1's 2012 Annual Replacement Plan

42. The 2012 ARP was admitted into evidence as Exhibit 125. Although by the time of trial Objectors challenged only two portions of the 2012 ARP, the Court will summarize the major provisions and contents of the ARP.

43. The 2012 ARP contains a comprehensive list of Subdistrict Wells included in the 2012 ARP. This list is necessary both so the Division of Water Resources will know which wells are part of the Subdistrict and may continue to be operated when ground water rules and regulations are adopted and to provide the basis for the estimated pumping for the ARP.

44. Next, the 2012 ARP addresses projected pumping from the Subdistrict Wells, considering the then-projected hydrologic conditions for the irrigation season and the then-projected reduction in irrigated acres due to the Subdistrict's fallowing program. The projected pumping from Subdistrict Wells for 2012 was 308,761 acre-feet.

45. The ARP then estimates the amount of recharge credit under the four recharge decrees for 2012. The Court extensively addressed the recharge decrees and approved their use by the Subdistrict in previous orders in these cases. May 2010 Decree at ¶¶116 – 150; 181 – 188. The Subdistrict applied the previous rulings of the Court in determining the recharge credits and projected recharge for 2012 as 113,002.75 acre-feet.

46. The ARP contains a summary of the farm unit data collected for the irrigated parcels within the Subdistrict. The farm unit data consist of the results of an annual field survey of the irrigated lands within the Subdistrict to determine the irrigated acres, cropping patterns and irrigation methods on parcels. The data were summarized in the ARP together with the ditch service areas with diversion in Subdistrict No. 1 for the 2011 irrigation year.

47. Next, the ARP sets out the methodology and calculations used to determine the estimated net groundwater consumptive use and uses these consumptive use predictions as inputs into response functions to provide the estimated and historical and projected stream depletions from groundwater pumping in Subdistrict No. 1.

48. The ARP also addresses the suitability of the response functions used in determining depletions. The predicted net groundwater consumptive use for 2012 was 143,269 acre-feet, resulting in a predicted total depletion for 2012, from both historical and projected pumping, of 4,706 acre-feet. That total amount is then broken down monthly by stream reach to establish the replacement required from the Subdistrict. Again, the Court has previously addressed the correct data and procedures to make these calculations and the ARP complies with those requirements. May 2010 Decree at ¶¶151 – 180.

49. The ARP contains the NRCS forecast for stream flows for the Rio Grande Basin, as of April 1, 2012, including the estimates of 2012 annual streamflow for the Rio Grande at Del Norte, and the Conejos, Los Pinos and San Antonio Rivers. It also sets forth the projected Closed Basin Project production for the plan year.

50. The ARP addresses the amounts and sources of replacement water and other actions available to the Subdistrict to remedy injurious stream depletions to senior surface water

rights: trans-basin water stored in upstream reservoirs which came from diversions by the Williams Creek Squaw Pass, Tabor Ditch No 2, Tabor Ditch No. 2 Enlargement, and Pine River Weminuche Pass Ditches; a portion of the production from the Closed Basin Project; and a forbearance agreement with the Rio Grande Canal.[2] The ARP also contains a summary of how this portfolio would be used to remedy injury. The forbearance agreement provides a remedy for injury to senior surface water rights by means other than providing water, and it is authorized by section 37-92-501(4)(b)(I)(B), C.R.S. The stockholders of the Rio Grande Canal Water Users Association specifically authorized the Company to enter into such an agreement. Objectors did not challenge the use of the stored water or the forbearance agreement, and both were used to remedy injurious stream depletions.

51. The ARP includes an updated summary of the unconfined aquifer study, showing the changes in groundwater levels for the unconfined aquifer beneath the Subdistrict. This information is used to assess the Subdistrict's progress in restoring and maintaining the unconfined aquifer in a sustainable condition. § 37-92-501(4)(a)(II); February 2009 Order at ¶¶114 – 127.

52. The ARP summarizes the Subdistrict's fallowing program and the number and location of acres to be fallowed under that program. This information provided the data to support the reduction in projected pumping due to the fallowing program.

53. Finally, the ARP sets forth the funding available to the Subdistrict.

54. Appendices to the 2012 ARP contain much of the raw data summarized in the ARP itself, as well as supporting and other data useful to persons who wish to analyze the projections and conclusions contained in the ARP. Additional data and information were posted to public websites, including those maintained by the District and the Colorado Division of Water Resources ("DWR").

55. In reviewing the 2012 ARP, the State Engineer consulted the Amended Plan, the May 2010 Decree approving the Amended Plan, the Colorado Supreme Court's ruling affirming the May 2010 Decree and upholding the Amended Plan in *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 (Colo. 2011), and all applicable statutes, constitutional provisions, and rules and regulations adopted for Water Division 3.

56. The State Engineer determined that the 2012 ARP contained sufficient evidence and engineering analysis to predict where and when stream depletions caused by Subdistrict well pumping would occur and how the Subdistrict would replace or otherwise remedy those injurious stream depletions to avoid injury to senior surface water rights. The State Engineer determined that the response functions the Subdistrict utilized were suitable for estimating the historical and future stream depletions caused by groundwater pumping in the Subdistrict. The State Engineer also reviewed the methodologies the District used to estimate net groundwater consumptive use and verified the other inputs into the response functions.

---

[2] The ARP also lists Santa Maria Reservoir shares. However, these shares were not used

57. The State Engineer determined that the 2012 ARP identified the sources, availability and amounts of replacement water the Subdistrict proposed to use during 2012 and that the replacement sources were sufficient to replace or otherwise remedy injurious stream depletions caused by Subdistrict well pumping. The State Engineer determined that, subject to the terms and conditions contained in his letter approving the ARP, the replacement sources identified in the ARP were legally available for use by the Subdistrict, were sufficient in amount, and could be administered to replace injurious stream depletions caused by Subdistrict well pumping.

58. The State Engineer approved the 2012 ARP by letter to the Subdistrict dated May 1, 2012. The letter included a list of those who provided the State Engineer with letters, comments, and other objections to the ARP. These comments, including a transcript of comments received at the April 19, 2012 public meeting, were posted on DWR's website.

59. The State Engineer filed the letter approving the ARP in this Court on May 1, 2012

IV. Stipulated Facts

The parties stipulated to the following facts in the *Trial Management Order*.

60. Objectors timely filed their Invocations of Retained Jurisdiction.

61. Objector San Antonio, Los Pinos and Conejos Acequia Preservation Association is an association of over 150 members, many of whom own senior surface water rights on the Rio Grande and its tributaries including, but not limited to, the San Antonio, Los Pinos and Conejos Rivers and their tributaries.

62. Objector, Save Our Senior Water Rights, LLC, is an organization of owners of water rights in Water Division 3, many of whom are individual farmers and ranchers operating and managing agricultural operations.

63. Objector, Richard Ramstetter, owns senior surface water rights on the Rio Grande and its tributaries, and owns and operates a farm and ranch within the Subdistrict boundaries.

64. Objector, Peter D. Atkins, owns senior surface water rights on the Rio Grande and owns and operates a farm and ranch near the Subdistrict boundaries.

65. The 2012 ARP adequately quantifies the time, location and amount of depletions from Subdistrict Well pumping affecting the Rio Grande and its tributaries, except to the extent that Objectors argue, assert and/or claim to the contrary under the arguments, assertions and claims in the Motion for Summary Judgment Regarding Augmentation Plan Wells and reply in support thereof and in the Motion for Summary Judgment Regarding Closed Basin Project Water and reply in support thereof, subject to the Court's order regarding the Motion for Summary Judgment Regarding Closed Basin Project Water , entered October 4, 2012, (collectively "Objectors' Pending Claims").

66. The 2012 ARP includes adequate replacement water to replace depletions from Subdistrict Well pumping affecting the Rio Grande and its tributaries, except to the extent that Objectors and the Costilla Ditch Company argue, assert and/or claim to the contrary under Objectors' Pending Claims.

67. The 2012 ARP, and the underlying methodologies, meet all requirements of the Amended Plan, the Decree, and Colorado law except to the extent that Objectors and the Costilla Ditch Company argue, assert and/or claim to the contrary in Objectors' Pending Claims, and subject to the stipulation between the State Engineer and Supporters and the Costilla Ditch Company set forth above.

68. The 2012 ARP calculated the depletions in accordance with the Amended Plan, and water from the Closed Basin Project was one of the sources of water that was delivered to the Rio Grande for replacement of depletions.

V. The Closed Basin Project.

69. The 2012 ARP identified 2,500 acre-feet of water from the Closed Basin Project as a source of replacement water to remedy injurious depletions. The Objectors contest the adequacy and suitability of including project water as a source of replacement water in the 2012 ARP to prevent injury to senior water rights. This was an issue during the second trial and the Colorado Supreme Court addressed this issue in its decision on the appeal:

> Objectors contest the Subdistrict's listing of Closed Basin Project water as a source of replacement water to protect against injurious depletions to surface streams. That project was designed and decreed to provide water to the Rio Grande and its tributaries to help meet the requirements of the Rio Grande Compact. *See Cotton Creek Circles*, 181 P.3d at 255. The adequacy, timing and suitability of project water to prevent injury to water rights under the Plan will be addressed through the annual replacement plan procedure and need not be determined at this time.

Subdistrict, 270 P. 3d at 951. The question of the "adequacy, timing and suitability of project water to prevent injury to water rights under the Plan" is now before the Court.

A. Findings of Fact

70. The Court makes the following findings of fact based on the testimony and exhibits admitted at the trial. If a finding is based on evidence other than the testimony at the October 29th and 30th trial, the Court has cited the authority for the finding.

71. This Court, in this case, has previously made findings concerning use of water produced by the Closed Basin Project as replacement water in the Subdistrict's ARP. Nothing in the evidence presented or arguments made to the Court during the October 29 and 30th trial has caused the Court to change its mind concerning these findings. Accordingly, the Court reiterates the following findings concerning the Closed Basin Project that are part of the May 27, 2010 Decree:

302. The Closed Basin Project history is set forth in its decree in Case No. W-3038. It was conceived prior to 1929 as a surface collection system of canals and ditches to gather the water flowing into the sump of the Closed Basin. Because of water quality concerns wells were added to the project to provide higher quality water, and a final plan was developed by the Bureau of Reclamation in 1947. The Closed Basin Project is a federal reclamation project authorized by Congress. Act of Oct. 3, 1980, P.L. No. 92-514, 86 Stat. 964, as amended, Act of Oct. 3, 1980, P.L. No. 96-375, sec. 6, 94 Stat. 1505, 1507; *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 629 (Colo. 1987). The Project was decreed for a variety of purposes including irrigation use and most importantly, to accomplish maximum utilization of Colorado's share of the flows of the Rio Grande and its tributaries under the Rio Grande Compact. While this effort to attain maximum utilization is currently accomplished by delivering Project water to the Rio Grande to meet a portion of Colorado's Compact obligation and thereby reduce curtailment of water rights that otherwise would be required to meet the Compact, the method for allocating the benefits of the Project among Colorado water users is not specified by the Project legislation or its water rights decree. The Court determines that it is the responsibility of the Project owner, the United States Government through the U.S. Bureau of Reclamation, and the holder of the Project decree, the Rio Grande Water Conservation District, to determine whether and how to allocate the Project's production among the lawful beneficial uses, and whether to seek changes to existing allocation agreements.

303. The decree makes it very clear that the purpose of the project is to lower the entire water table within the project boundaries so as to preclude substantial loss through surface evaporation and evapotranspiration. The Project decree specifically finds that the purpose of the project wells will be to draw down groundwater an average of approximately 8 feet within areas of the Project and that ample, unappropriated groundwater is available within the boundaries of the Project to satisfy existing appropriations of underground water and the appropriations to be made by the applicant. These determinations are binding upon the Court and the parties to this litigation and are not subject to collateral attack. *See Closed Basin Landowners Ass'n,* 734 P.2d at 637. Closed Basin Project water delivered to the Rio Grande for the benefit of the Rio Grande and Conejos River can be substituted for the Compact deliveries otherwise required from the Conejos River, thereby making additional water available for upstream diversion. Thus, if the goal is to provide replacement water for injurious depletions in time, place and amount, a mechanism to reduce Compact delivery curtailments and thus permit additional diversion from the river is a useful and flexible tool. This is described in the 60/40 Agreement and in the decree.

304. Including Closed Basin Project production as part of the Subdistrict's Annual Replacement Plan is clearly within the scope of the beneficial uses set forth in the Closed Basin Project decree, and the Subdistrict's inclusion of Project water as a

possible replacement source is not prohibited. In fact, integrating the Subdistrict's plan of water management with the obligation for water delivery under the Rio Grande compact is an essential statutory requirement. Coordination with existing methods of addressing the Compact obligation and proven methods of improving water availability to senior surface water rights is both sensible and prudent.

305. In Exhibits 16-20, entities representing the beneficiaries of the Closed Basin Project contracted and agreed that the production from the project would be utilized for purposes of replacing depletions to river flows caused by well pumping through the delivery of Project production to the credit of the Conejos and Rio Grande. The terms of the 60/40 Agreements were subject to public notice and court hearing in Case No. 95CV51. The Court confirmed the existence and legality of the 60/40 Agreement as a contract binding upon the owner of the Closed Basin Project decree, the Rio Grande Water Conservation District. At this time, there has been no allocation other than by the 60/40 Agreement of Closed Basin Project production. Specifically, there has been no allocation of Project production to offset depletions caused by pumping within Subdistrict No. 1. It would be premature for the Court to determine how any new allocation might occur, if it would occur, and the process by which it would occur. The Court observes that the Amended Plan simply identifies Closed Basin project production as one of the potential sources of replacement water. Should an Annual Replacement Plan include Project production as replacement water, whether the allocation suffices to protect surface water sources from injury is an issue that would be subject to the Court's retained jurisdiction.

May 27, 2010 Decree at 103-04.

72. The entities representing the beneficiaries of the Closed Basin Project on the Rio Grande, the Rio Grande Water Users Association and the San Luis Valley Water Conservancy District, approved the allocation of up to 2,500 acre-feet of the Rio Grande's share of Closed Basin Project production to Subdistrict No. 1 for use in the 2012 ARP. Exhibits 153 and 154. By approving the ARP, the Rio Grande Water Conservation District, the owner of the Closed Basin Project decree, also approved the allocation.

73. Early in the spring of every year, the federal Bureau of Reclamation estimates the production from the Closed Basin Project; the Bureau estimated the Project would produce 11,500 acre-feet in 2012. This water is divided among the decreed priorities with several thousand acre-feet allocated annually to the Alamosa and Blanca Wildlife Refuges, and the remainder being allocated to meet Compact obligations.

74. The water from the Closed Basin Project is pumped into pipeline laterals which deliver the water to an open channel which then delivers the water to the Rio Grande at a location that is about five or six miles south of Alamosa. The water for the wildlife refuges is diverted from the conveyance channel before the Project water reaches the Rio Grande.

75. There are no active diversions from the river below the outfall of the Closed Basin Project[3] so all project water delivered to the river is counted as a Rio Grande Compact delivery at the Lobatos gage which is located at the New Mexico-Colorado state line.

76. Table 7.3 of the 2012 ARP lists the projected injurious depletions to the Rio Grande in 2012-13 caused by projected Subdistrict well-pumping as predicted through operation of the RGDSS Subdistrict response functions. 2012 ARP, Table 7.3, *Subdistrict No. 1 Monthly Stream Replacement Obligations of 2012 Plan Year*. These depletions are broken down into three reaches of the river. The majority of the depletions occur in the first reach, between the Del Norte gage, which is just west of Del Norte, down to the Excelsior head-gate. There are additional, much smaller depletions that occur in the second reach, between the Excelsior head-gate and the Chicago Ditch head-gate and the third reach, between the Chicago Ditch head-gate and the state line.

77. Since the Closed Basin Project water is delivered into the third reach, the Subdistrict's initial use of the 2,500 acre feet of project water allocated to it is to replace the injurious depletions occurring in that reach. In addition, the Subdistrict intended and did use the project water for substitution or exchange in the second reach of the river. This substitution allowed senior surface water users to divert water that the Division Engineer would otherwise have required to be left in the river to meet Rio Grande Compact obligations. Finally, the Subdistrict intended to use and did use Closed Basin Project water to replace injurious depletions which occur in all three reaches of the river during the winter months.

78. The RGDSS model response functions predict that even though the Subdistrict wells are not diverting water during the non-irrigation season, the Subdistrict's well pumping during prior months and years will cause injurious depletions to the river during the non-irrigation season. Table 7.3, 2012 ARP. Since there are no diversions from the river during the non-irrigation season, there are no Colorado water users whose right to divert is being curtailed to meet Compact obligations. Rather, all of these depletions show up at the state line as less water available to satisfy Compact obligations. The Closed Basin Project is a good source of water to remedy these depletions because the water enters the river so close to the Lobatos gage at the state-line. It would be more difficult for the Subdistrict to replace these winter depletions with the other sources of water it has obtained because the other sources of water are located in the upper reaches of the river, one hundred or so miles from the state line. It is obviously problematic to move water down from the upper reaches of the Rio Grande in the winter when the river is covered with two or three feet of ice.

79. During cross-examination of Mr. Vandiver, and during oral argument, counsel for the Costilla Ditch Company pointed out that the Rio Grande Compact's delivery requirement is an annual amount, not a monthly or daily requirement. Therefore, the Subdistrict does not have to replace the calculated winter depletions during the winter months: it would be possible for the Subdistrict to put water in the river during non-winter months to make up for the injurious depletions that occur in the winter. Operating in such a fashion would make it easier for the

[3] The diversion for the Tres Rios Ranch is below the outfall of the Closed Basin Project, however, the restrictions on that water right, Case No. 91CW29, have meant that it has never come into priority and it unlikely to come into priority in the foreseeable future. In fact, Mr. Vandiver testified that he did not think there was an operable diversion structure on the Rio Grande at the point of diversion of that water right.

Subdistrict to use sources of water other than the Closed Basin Project water to remedy these depletions. Although this is factually true, no evidence was presented to the Court to suggest that operating the Subdistrict in this way would be more beneficial to injured senior surface water owners than the way in which the Subdistrict has chosen to operate—by replacing winter depletions during the winter.

80. The actual mechanics of delivering Closed Basin Project production to the Rio Grande was the same in 2012 as in all prior years. With or without the Subdistrict and the 2012 ARP, the same amount of water from the Closed Basin Project would have crossed the state line. The only difference in 2012 was that a portion of that water was identified or "colored" as water that is used to replace depletions associated with Subdistrict well-pumping.

81. The Division Engineer for Water Division 3 prepares Rio Grande Compact Ten-Day Reports to continuously monitor Colorado's compliance with Rio Grande Compact delivery requirements. The Ten-Day Reports dated October 3, 2012 and October 18, 2012, include the 2,500 acre feet of Closed Basin Project production acquired by the Subdistrict as part of the water that is being or may be credited to meet Rio Grande Compact obligations. Exhibits S-100 and S101.

82. Subdistrict No. 1 made no payments to the District or any other entity to have the right to use the Closed Basin Project water.

83. The wells that are included in Subdistrict No. 1 are a subset of all of the wells that are covered by the 60/40 Agreement.

84. The W-3038 Decree granted the Closed Basin Project a conditional water right with an appropriation date of July 31, 1963, and a priority date of December 22, 1972. W-3038 Decree at 2-3, ¶ 4(c).

85. The water right granted in the decree "is junior to all appropriations of water senior to it which may be affected thereby." W-3038 Decree at 9, ¶ 2.

86. Neither the District nor any other entity has obtained an augmentation plan for the Closed Basin Project wells. The Closed Basin Project wells are not located in the Subdistrict and are not Subdistrict wells.

87. In granting the Closed Basin Project water rights decree, the Court found that "[t]he unconfined aquifer of the Closed Basin, together with its inflow tributaries, constitutes a natural stream system within the meaning of the Colorado Constitution, Article XVI, Sections 5 and 6. As such, the waters thereof are subject to appropriation and CRS 1973, 37-90-137(4) does not apply." W-3038 Decree at 8 (¶6).

88. The Court further found that "[a]mple unappropriated ground water is available within the boundaries of the Project to satisfy existing appropriations of ground water, and the appropriations to be made by the applicant." W-3038 Decree at 7, ¶ 4(j).

89. The decreed source of water for the Project Water Rights is "salvage, seepage, drainage and underground waters developed [in the Project area] ... including diversions by

approximately 129 wells." *See* W-3038 Decree at 8-9. The water "developed by drainage and the operation of the proposed wells" is to be collected and transported to the Rio Grande. W-3038 Decree at 5. All of the approximately 129 Project Wells "will be pump wells drawing water from the unconfined aquifer." W-3038 Decree at 9.

90. The W-3038 Decree approves the use of Project water for "irrigation, domestic, industrial, recreational, fish culture, and wildlife uses by exchange and sale, regulation and maintenance of minimum stream flows, and to provide supplemental water to meet Colorado's obligation under the Rio Grande Compact, and to accomplish maximum utilization of Colorado's share of Rio Grande waters under the Compact." W-3038 Decree at 9.

91. At the conclusion of the evidence in this case, the parties stipulated that the RGDSS groundwater model takes into account the pumping of the Closed Basin Project Wells in determining the effects of Subdisrict groundwater pumping on the rest of the water system in Division 3. The RGDSS groundwater model, however, does not account for the production of the Closed Basin Project; this water is not used in determining the amount of injurious depletions caused by Subdistrict well pumping. Rather, the water produced by the project wells is accounted for separately, outside the model, like other surface water.

B. Conclusions of Law

92. The 2012 ARP's inclusion of Closed Basin Project water as a source of replacement water for injurious depletions caused by Subdistrict well-pumping is adequate and suitable to prevent injury to senior water rights. That this is so is made clear by comparing the use of Closed Basin Project water to the use of trans-basin water in the 2012 ARP. The Objectors have agreed that the trans-basin water the Subdistrict acquired as a replacement water source is adequate for that purpose. The Subdistrict is using Closed Basin Project water the same way it is using the trans-basin water. Just as the trans-basin water is released into the river to replace injurious depletions calculated by the RGDSS response functions, so is the Closed Basin Project water placed in the river. The only difference in the use of this water is that the Closed Basin Project water enters the river below all diversions on the Rio Grande and the trans-basin water enters the river above those diversions. Because of the delivery requirements of the Rio Grande Compact, however, water delivered below all of the diversions is just as useful for replacing injurious depletions as is water delivered above the diversions. This is because water delivered below all active diversions but above the Lobatos gage at the state-line can be used to meet Colorado's Compact obligation at the state-line which allows upstream surface water owners to continue to divert water from the river rather than having their diversions curtailed to make required Compact deliveries. Accordingly, just as the trans-basin water is a suitable replacement source of water, so is the Closed Basin Project water.

93. Objectors argue, however, that placing Closed Basin Project water into the river does not accomplish the same result as placing trans-basin water in the river because the Project wells themselves cause injurious stream depletions. In addition, Objectors argue that the Subdistrict's use of Closed Basin Project water for replacement of groundwater depletions is not one of the legally decreed uses approved in the W-3038 Decree. Moreover, Objectors argue that the Subdistrict's use of 2,500 acre feet of Closed Basin Production to replace injurious depletions violates section 37-92-501(4)(a)(B), C.R.S., because it unreasonably interferes with Colorado's

ability to meet its Rio Grande Compact obligations. Objector Costilla Ditch Company makes a related argument that the mere designation of a portion of water, which is already committed to the Rio Grande from the Closed Basin, as "replacement water" does not replace injurious depletions. Finally, Objectors ask the Court to disallow the Subdistrict's use of Project water because the Subdistrict failed to present evidence showing that the Bureau of Reclamation agreed to the allocation of 2,500 acre feet of Project water to the Subdistrict as a replacement water source.

1. Under Currently Known Facts and Court Decrees Court Must Find that Pumping of Closed Basin Project Wells does not Cause Injurious Stream Depletions

94. Objectors argue that the W-3038 Decree determined that the water pumped from the Closed Basin Project is tributary and, therefore, the water rights decreed must be administered within the system of priority for water tributary to the Rio Grande. Since there is no plan of augmentation, substitute water supply plan or plan of water management for the Closed Basin wells, Objectors argue that pumping those wells is out-of-priority and illegal. In support of this, Objectors note this Court has determined that the Rio Grande and its tributaries were over-appropriated as of the early 1900's, long before the 1963 appropriation date of the Closed Basin Project. *See Alamosa-La Jara v. Gould,* 674 P.2d 914 (Colo. 1984). Therefore, Objectors argue, any withdrawal of groundwater that is tributary to this over-appropriated water system is presumed to be injurious to senior water rights owners. *See Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252, 256 (Colo. 2008).

95. While it is true that the W-3038 Decree found that the water of the unconfined aquifer of the Closed Basin together with its inflow tributaries constituted "a natural surface stream system" making the water available for appropriation, the decree also specifically found that the water produced from the Project wells would be obtained by reducing water losses caused by surface evaporation and evapotranspiration. W-3038 Decree at 5 and 7 ¶4(i). Thus, the W-3038 Decree determined that the water produced from the Project wells was not water that would have normally made its way to the Rio Grande.

96. Objectors argue, however, that even though the W-3038 decree found that the project water was salvaged from evaporation and evapotranspiration, Colorado law requires that "salvaged" water must be administered within the priority system. Objectors rely on the distinction between "salvaged water" and "developed water" as it is explained in *Southeastern Colo. Water Conservancy Dist. v. Shelton Farms, Inc.,* 187 Colo. 181, 187, 529 P.2d 1321, 1325 (1976):

> Developed implies *new* waters not previously part of the river system. These waters are free from the river call, and are not junior to prior decrees. Salvaged water implies waters in the river or its tributaries (including the aquifer) which ordinarily would go to waste, but somehow are made available for beneficial use. Salvaged waters are subject to call by prior appropriators.

97. In *Shelton Farms*, the Colorado Supreme Court was considering an appeal from a water court decision granting a junior appropriator a water right free from the call of the river based on water the junior appropriator had "salvaged" by killing water-using vegetation on the

junior appropriator's land adjacent to the river. *Id.* at 183, 529 P.2d at 1322. The Supreme Court reversed the water court decision because it determined that when water, such as the water made available by the destruction of phreatophytes along the Arkansas River, would naturally return to the river, then such water must be administered according to the prior appropriation system because "it is said to be part and parcel thereof, and senior consumers are entitled to use it according to their decreed priorities." *Id.* at 187, 529 P.2d at 1325.

98. In reaching its decision, the court reviewed and distinguished prior cases that found that "one who adds to an existing water supply is entitled to a decree affirming the use of such water." *Id.* at 186, 529 P.2d at 1324. The court stated:

> There are three important situations, analogous to this case, when these rare decrees have been granted. The first is when one physically transports water from another source, as when the Water Conservancy District transported water from the Frying Pan River basin to the Arkansas River. The second is when one properly captures and stores flood waters. The third is when one finds water within the system, which would never have normally reached the river or its tributaries.

Id. at 187, 529 P.2d at 1324.

99. Despite the W-3038 decree's use of the word "salvaged" to describe the water produced by the Closed Basin Project wells, it is clear that the Closed Basin Project water belongs in the third category of developed water because it involves water that could not return to the Rio Grande. *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation District,* 734 P.2d 627, 629 (Colo. 1987)("Normally, water that flows into the Closed Basin from precipitation and irrigation diverted from the Rio Grande is trapped by a natural hydraulic barrier at the southern boundary of the Basin. The water collects in the sump area of the Basin and much of the water is lost to evaporation and evapotranspiration."); *Simpson v. Cotton Creek Circles, L.L.C.*, 181 P.3d 252, 254 (Colo. 2008)("A federal reclamation project called the Closed Basin Project has for decades "salvaged" shallow groundwater from the sump area of the Closed Basin that would have otherwise largely been lost to evaporation and evapotranspiration."); *see also* Rio Grande Compact, P.L. No. 96, 53 Stat. 785 (1939); §37-66-101, C.R.S. (2012)("The goal of the Closed Basin project is to lower the water table in the sump area by approximately two feet through the construction and operation of over one-hundred shallow wells, and to reduce water losses to evaporation and evapotranspiration.").

100. Furthermore, *Shelton Farms* did not find that killing phreatophytes failed to create more water for the system. Rather the *Shelton Farms* court made the policy decision that salvaged water made available by removing phreatophytes belonged not to the person removing the phreatophytes, but to the existing appropriators on the river in accordance with their established priorities. *Shelton Farms,* 187 Colo. 190, 529 P.2d at 1326.

101. With regard to the Closed Basin Project water, however, the Colorado Supreme Court has determined that the W-3038 decree's award of a water right for water created by the reduction of evaporation and evapotranspiration, although possibly incorrect under the *Shelton*

Farms decision, is not subject to collateral attack. *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation District,* 734 P.2d at 637.

102. Accordingly, the facts currently before the Court as well as a consideration of prior decrees of this Court demonstrate that the Closed Basin Project production is developed water and is placing water into the Rio Grande that would never have normally reached the river. Thus, the Court cannot presume that pumping the Closed Basin Project wells causes injury to senior surface water rights. *Cf. Simpson v. Cotton Creek Circles, LLC,* 181 P.3d at 256, *Alamosa-La Jara*, 674 P.2d at 931.

103. Opposers did not offer any evidence in an attempt to show injury. Therefore, the Court finds that the Subdistrict's inclusion in the 2012 ARP of 2,500 acre-feet of the production of the Closed Basin Project is suitable and adequate to replace, in time, location and amount, injurious stream depletions caused by the pumping of Subdistrict Wells.

2. *Use of Closed Basin Project Water as Part of the 2012 ARP Complies with the W-3038 Decree*

104. The Objectors argue that the W-3038 Decree sets out the beneficial uses for which Closed Basin Project water may be used but these beneficial uses do not include either augmentation or replacement of groundwater depletions. This Court, however, has already ruled on this objection, finding:

> Including Closed Basin Project production as part of the Subdistrict's Annual Replacement Plan is clearly within the scope of the beneficial uses set forth in the Closed Basin Project decree, and the Subdistrict's inclusion of Project water as a possible replacement source is not prohibited.

May 27, 2010 Decree at ¶ 304.

3. *Allocation of 2,500 Acre-Feet of Closed Basin Production to Subdistrict Neither Double Counts the Benefit of that Water nor Violates Section 37-92-501(4)(a)(V).*

105. Objectors argue that the Subdistrict's use of 2,500 acre-feet of Closed Basin Production to replace injurious depletions violates section 37-92-501(4)(a)(V), C.R.S., because it unreasonably interferes with Colorado's ability to meet its Rio Grande Compact obligations. Objector Costilla Ditch Company joins in this argument and makes a related argument that the mere designation of a portion of water, which is already committed to the Rio Grande from the Closed Basin, as "replacement water," does not replace injurious depletions because injured senior appropriators were already receiving that replacement water through operation of the Closed Basin Project.

106. The Colorado general assembly has determined that one of the principles the state engineer must apply in regulating the aquifers in Division 3 is:

> (V) Underground water use shall not unreasonably interfere with the state's ability to fulfill its obligations under the Rio Grande compact, codified in article

66 of this title, with due regard for the right to accrue credits and debits under the compact.

Section 37-92-501(4)(a)(V).

107. Objectors argue that if the Subdistrict exchanges Closed Basin project water upstream allowing upstream senior water right owners to continue to divert:

> . . . then the Project water [is] being diverted and beneficially used by the injured senior water right owners. If the Project water [is] being beneficially used by the injured senior water right owners, then project water [is] not being delivered to the Rio Grande to meet Compact obligations.

Proposed Findings of Fact, Conclusions of Law, and Decree filed by Objectors on December 7, 2012, at p. 29, ¶121. Objector Costilla Ditch Company similarly argues that since the 2,500 acre feet of Project water allocated to the Subdistrict for replacement of injurious depletions is a part of the 11,500 acre feet of Project water counted toward satisfaction of Colorado's Compact obligations, "the allocation and dedication does not make any replacement water available to injured appropriators that they were not already receiving through operation of the Project." *Proposed Order* filed by Costilla Ditch on December 7, 2012, at 8. Essentially, Objectors are arguing that the Subdistrict's use of the Closed Basin Project water as replacement water for injurious depletions caused by Subdistrict well-pumping when that water is also counted as credit against Colorado's Rio Grande Compact obligations is a kind of double-counting of that water.

108. In fact, however, the use of Closed Basin Project water as a source of replacement water for injurious depletions caused by the pumping of Subdistrict wells and the use of Closed Basin Project water to meet Rio Grande Compact obligations are not separate and distinct purposes. This Court has already determined that the operation of the Subdistrict's Amended Plan should be integrated with Rio Grande Compact administration:

> The State and Division Engineers can make adjustments in Rio Grande Compact curtailments to avoid injurious depletions to surface water rights from Subdistrict Well pumping. If the Subdistrict is inadvertently under-replacing actual injurious depletions to the compact streams, the Division Engineer can reduce the existing Compact curtailment and thereby make more water available to surface water rights. The Subdistrict could then replace the reduced Compact curtailment by delivery of more replacement water to the stream in a subsequent month, thereby keeping the Compact delivery "whole." This is possible because the Compact has an annual delivery schedule and a system of annual debits and credits, so the Division Engineer can temporarily reduce curtailments in aid of Compact deliveries; and the Subdistrict can make up that reduction at a later date, even after the irrigation season, and the intervening reduction in Compact curtailment will have prevented injury. Exhibit 112, Opinion 2. As noted earlier, integration of the operation of the Amended Plan with the well-understood administration of the Rio Grande Compact has many benefits including those described here. The objectors did not present any evidence to refute the ability of the Division

> Engineer to administer the Compact curtailment in this manner to assist in avoiding material injury. The Court finds that such administration is within the discretion of the Division Engineer, and does not unreasonably interfere with the state's ability to fulfill its obligations under the Rio Grande Compact and is otherwise consistent with the requirements of sections 37-92-501(4)(a) and (b). In fact, this is an excellent example of the "sound and flexible integrated use of all the waters of the state." § 37-92-102(2), and the "wide discretion to permit the continued use of underground water consistent with preventing material injury to senior surface water rights." § 37-92-501(4)(a).

May 2010 Decree at 116, ¶ 337.

109. Thus, this Court has already determined that reductions in Rio Grande Compact curtailment of diversions under senior surface water rights avoids or replaces depletions to senior surface rights. Introduction of the Closed Basin Project water into the Rio Grande serves to reduce curtailments of senior surface water rights caused by the Compact and, therefore, it serves both purposes: it reduces injurious depletions to senior surface rights while, and because, it meets Rio Grande Compact obligations.

110. The question really seems to be who is entitled to claim credit for the Closed Basin Project production or is it appropriate to allocate a portion of the Closed Basin Project production to specific water users. Costilla Ditch argues that the W-3038 decree for the Closed Basin Project states that the purpose of the decree is to benefit the citizens of Colorado in general, to accomplish maximum utilization of Colorado's share of the flows of the Rio Grande and, therefore, no particular water user or water using entity is entitled to credit for Closed Basin Project production.

111. The Court, however, has already upheld a specific allocation of Closed Basin Project water between the Rio Grande and Conejos Rivers. Order Concerning Petition for Judicial Examination and Confirmation of an Act, Proceeding or Contract of the Rio Grande Water Conservation District, Case No. 95-CV-51 (February 5, 1996). The Court has also previously explained the purpose and application of this allocation, known as the "60/40 Agreement." Case No. 2004CW24 Concerning the Confined Aquifer New use Rules for Division 3, Findings of Fact, Conclusions of Law and Decree dated November 9, 2006, at ¶¶ 102 – 110.

112. Until the present operation under the 2012 ARP, there has not been a need to make more specific allocations from the Closed Basin Project to wells or groups of wells to remedy injurious stream depletions. May 2010 Decree at ¶ 306. This is because there are no rules and regulations regarding existing groundwater depletions, which are the necessary prerequisite to the State Engineer's administration of groundwater within the Rio Grande basin.

113. As stated above, it is acceptable, if not preferred, for the production of the Closed Basin Project to be integrated into subdistrict plans. One way this can be done is through a specific allocation among the various existing and future subdistricts, as was done here.

114. One purpose of the Closed Basin Project is to augment streamflows by replacing stream depletions from the operations of groundwater well pumping. The increased streamflow allows surface water rights to increase their diversions by exchange and at the same time assists the State of Colorado in meeting its obligations under the Rio Grande Compact. And, as discussed above, use of the Closed Basin Project production to replace well depletions is a lawful decreed use of the Closed Basin Project's water right.

115. Requiring Subdistrict No. 1, and by extension all other wells within the basin, to replace all depletions without regard to additional water provided for this purpose by the Closed Basin Project would require wells to replace more than the injurious stream depletions caused by their pumping. This would increase the stream flow in the Rio Grande beyond what would have occurred in the absence of well-pumping and thus would make more surface water available for diversion than would have occurred in the absence of well-pumping.

116. As the Colorado general assembly has said, however, the integration of groundwater diversions into the priority system:

> . . . shall not be used to allow ground water withdrawal which would deprive senior surface rights of the amount of water to which said surface rights would have been entitled in the absence of such ground water withdrawal and that *ground water diversions shall not be curtailed nor required to replace water withdrawn, for the benefit of surface right priorities*, even though such surface right priorities be senior in priority date, *when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by such surface rights* under the priority system.

Section 37-92-501(1), C.R.S (emphasis added).

117. Thus, it is appropriate for Subdistrict No. 1 to include Project production in the 2012 ARP and counting that production as a source of replacement water for Subdistrict Well-pumping does not interfere with operation of the Rio Grande Compact nor does it give groundwater users double credit for that water.

4. No Evidence that Bureau of Reclamation Agreed to Allocation of 2,500 Acre Feet of Closed Basin Production to Subdistrict

118. Finally, Objectors ask this Court to invalidate the Subdistrict's inclusion of Project water in the 2012 ARP because the Subdistrict did not present evidence that the Bureau of Reclamation had agreed to the allocation of 2,500 acre feet of Project water to the Subdistrict to be used as a source of replacement water. The Objectors rely on the following statement of this Court:

> The Court determines that it is the responsibility of the Project owner, the United State Government through the U.S. Bureau of Reclamation, and the holder of the Project decree, the Rio Grande Water Conservation District, to determine whether and how to allocate the Project's production among the lawful beneficial uses, and whether to seek changes to existing allocation agreements.

May 2010 Decree at 103, ¶ 302.

119. The evidence at trial demonstrated that the San Luis Valley Water Conservancy District and the Rio Grande Water Users Association each approved the allocation of 2,500 acre-feet of the Rio Grande's sixty percent of the annual usable yield of the Closed Basin Project to Subdistrict No. 1 to replace stream depletions to the Rio Grande. The uncontested evidence at trial demonstrated that the San Luis Valley Water Conservancy District and the Rio Grande Water Users Association, together with the Rio Grande Water Conservation District, have the authority to allocate the Rio Grande's 60% allocation of the yield of the Closed Basin Project pursuant to the 60/40 Agreement. The evidence at trial demonstrated that the Rio Grande Water Conservation District, the owner of the Closed Basin water right, also approved the allocation of 2,500 acre feet of Closed Basin production to the Subdistrict.

120. This evidence is sufficient to show that the parties with authority to approve the allocation of Closed Basin Project water to various users have made such an allocation to the Subdistrict. The Court finds that no further approvals are necessary to allow the Closed Basin Project water to be allocated to the Subdistrict for replacement of depletions caused by Subdistrict well pumping.

VI. Augmentation Plan Wells

121. Some of the wells located in the Subdistrict have judicially decreed augmentation plans under which the court has recognized that some or all of the depletions those wells cause are made up by the well-owner's acquisition or ownership of other water rights that are used to recharge the aquifer or replace water to streams. The May 2010 Decree requires the Subdistrict to keep a separate list of these "augmentation wells and what their status is." May 2010 Decree at ¶323. Specifically, the Decree requires the Subdistrict to include, in Appendix 3, a "separate list of wells with augmentation plans, links to the plans and a map of the locations of these wells." The District failed to include the required list in the 2012 ARP.

122. Objectors argue that the Subdistrict's failure to include the required separate list of augmentation plan wells, the links and the map, violates the Amended Plan of Water Management and the May 2010 Decree and invalidates the 2012 ARP. In addition, they argue that the 2012 ARP attempts to authorize the augmentation plan wells to pump more water than the individual augmentation plans authorize and, since neither the Subdistrict nor the State Engineer can authorize additional pumping beyond these wells' court decrees, the 2012 ARP is invalid.

123. In contrast, the Supporters and the State ask the Court to find that the Subdistrict's failure to include the separate list of augmentation plan wells was an oversight that did not cause harm to the Objectors or others and to order the Subdistrict to include the proper list in the future. In addition, the Supporters and the State argue that the Subdistrict's treatment of the augmentation plan wells, particularly the inclusion of the un-augmented portion of the pumping from the augmentation plan wells as Subdistrict pumping that must be remedied by the 2012

ARP, is appropriate under the Amended Plan and the Decree in this case and does not affect the operation of the individual augmentation plans.

A. Findings of Fact

124. Pursuant to the Trial Management Order, the Court takes judicial notice of the following decrees that were identified as involving the augmentation plan wells: 81CW69; 81CW72; 99CW9; 99CW25; 00CW19; 00CW42; 01CW6; 07CW64; 82CW17; 89CW45; and 96CW5. The Court makes the following findings of fact based on a review of the decrees and the testimony and exhibits admitted at the trial.[4]

1. Subdistrict's Identification of Augmentation Plan Wells in 2012 ARP and Subsequent Litigation

125. Pursuant to the 2012 ARP:

> The Subdistrict Wells include some wells that are part of an augmentation plan. The augmentation plans vary in their conditions, but they coordinate surface rights and other wells in administration of the respective plan. They are included in the list for fee determination, and if any portion of their pumping is not covered by their augmentation plans, it is subject to Subdistrict No. 1 fees and Subdistrict No. 1 will replace injurious depletions due to their pumping as part of this ARP.

Section 1.0 Database of Wells, at 5.

126. Appendix A to the 2012 ARP is a list of all wells included in the 2012 ARP. The list does not distinguish the wells that are part of an augmentation plan from the other wells. The 2012 ARP also does not include the conditions of any augmentation plans or a map of the locations of augmentation plan wells in the Subdistrict.

127. Rio Grande Water Conservation District Manager Steve Vandiver testified that in the process of creating the 2012 ARP, he, Subdistrict consulting engineer Allen Davey, and the Subdistrict staff, considered and accounted for the augmentation plan wells. Their intent, and what they believe they accomplished, was to give each well owner who had an augmentation plan, proper credit under the augmentation plan so the Subdistrict did not charge the well owner for pumping ground water that was covered by the provisions of the augmentation plan. He

---

[4] The Supporters' proposed findings of fact included detailed findings based on evidence that was not presented at the trial. Much of this detail is contained in Exhibit 6 to the Supporters' *Brief Opposing Motion for Summary Judgment Regarding Augmentation Plan Wells* which is an affidavit of Deborah A. Sarason, an employee of Davis Engineering Services, Inc. The affidavit lists the Augmentation Plan Wells included on the list of the Subdistrict Wells and explains how the Subdistrict charged fees to the farm operators for those wells. Although the Court reviewed this affidavit prior to trial in the context of the motion for summary judgment, the Court has not relied on this affidavit to make findings of fact in this order. This is because the parties did not stipulate to these facts and the evidence contained in the affidavit was not presented at trial and the Court is required to make its findings of fact based on the evidence presented at trial. *See e.g. Kearney Inv. Corp. v. Capitol Federal Sav. & Loan Ass'n of Denver,* 169 Colo. 30, 38, 452 P.2d 1010, 1014 (Colo. 1969).

admitted, however, that they overlooked the Decree's requirement that the Subdistrict provide a separate list of the wells that were involved in an augmentation plan.

128. On April 19, 2012, Dick Wolfe, the State Engineer, held a public hearing concerning the 2012 ARP. At that hearing, members of the public and attorneys made numerous comments about the 2012 ARP. One of the specific objections made to the State Engineer at the hearing was that the 2012 ARP failed to comply with the Decree because it did not include the separate list of the augmentation plan wells. Nevertheless, when the State Engineer approved the 2012 ARP he did not require the Subdistrict to add a separate list of augmentation plan wells, even though he did add other conditions to his approval. Exhibit 127.1, May 1, 2012, "Review, Findings, and Approval of Subdistrict No. 1's 2012 Annual Replacement Plan" ("Approval Letter) at 12-13. Mr. Wolfe testified at the October 2012 trial that this was an oversight.

129. On June 11, 2012, in partial response to the Objectors' *Invocation of Retained Jurisdiction*, and particularly in response to the portions of the Invocation that sought information used to create the 2012 ARP, the Supporters filed a Memorandum Providing Annual Replacement Plan Information. The Memorandum provides links to data that is located on the internet. Section D contains a link to a memorandum, also dated June 11, 2012, titled "Treatment of Augmentation Plan Wells that are Part of a Farm Unit (Section 1.0 Database of Wells)." ("Augmentation Plan Wells Memo").

130. The Augmentation Plan Wells Memo identifies twenty-four wells in augmentation plans that are part of Farm Units:

WDID	Case No.	Structure Name	Owner
2705546	81CW69		Beard/John Slane
2705547	81CW69		Beard/John Slane
2006662	81CW72		Slane/Rob Jones
2014257	81CW72		Slane/Rob Jones
2013756	99CW9		Off Ranches/Cory Off
2009876	99CW9		Off Ranches/Cory Off
2013884	99CW25		James Bradley
2005728	00CW19		Roger Entz
2011878	00CW19		Roger Entz
2014243	00CW42		Donna (James) Cooley
2008692	00CW42		Donna (James) Cooley
2014013	01CW6		Kim and Dee Ann Cooley
2014016	01CW6		Kim and Dee Ann Cooley
2014014	01CW6		Kim and Dee Ann Cooley
2009165	07CW64		JDS Farms and Entz
2009403	07CW64		JDS Farms and Entz
2009405	07CW64		JDS Farms and Entz
2008188	82CW17		S.R.S. Ranch (Nickel)
2008190	82CW17		S.R.S. Ranch (L. Schmidt)
2006633	89CW45		M.V. Pro Credit Assoc/Scidmore
2013719	96CW5		Jason Kirkpatrick

2013720	96CW5		Jason Kirkpatrick
2013721	96CW5		Jason Kirkpatrick
2013722	96CW5		Jason Kirkpatrick

131. This memorandum also discusses, in general, how the Subdistrict treated these wells:

Problem: The Subdistrict Wells include some wells that are part of an augmentation plan, as shown in the table above. The plans vary in their conditions, but they coordinate surface rights and other wells in administration of the respective plan. In some cases, the augmentation plan wells cannot be totally separated from the farm operation for fee calculation purposes.

Analytical Approach: The details of administration of each augmentation plan were reviewed with DWR to determine the amount of pumping that was covered and the amount of surface water dedicated to the respective plan for the Plan year. The Subdistrict fees for the farm unit were adjusted to reflect any changes this made in the calculation of surface water credit.

Results: The augmentation plan wells that are part of a farm unit are included in the Subdistrict Well list for fee determination. If any portion of the injurious depletions from pumping is not replaced by their plans, it is subject to fees and Subdistrict No. 1 will replace such injurious depletions as part of the ARP. A list of these wells with augmentation plans identified was provided to DWR February 29, 2012 for inclusion in the draft ARP.

132. The Augmentation Plan Wells Memo did not include information about the conditions of each augmentation plan, it did not include a map of the location of the augmentation plan wells and it did not include hyper-links to the decrees. In addition, it did not include the list of wells that was referred to in the Memo as having been provided to the Division of Water Resources on February 29, 2012.

133. The Subdistrict has also prepared another list of wells classified as augmentation plan wells. This list is included in the complete list of Subdistrict Wells attached as the Well Database Appendix, Dated May 11, 2009, to the Amended Plan of Water Management. Exhibit 124.3. This list included the following nine wells:

WDID	Case No.	Structure Name	Owner
2005728	W2058	Well No. 2	Roger Enz
2006662	81CW72	Well No. 3	Robert Jones
2008240	82CW188	Well No. 1	George Kirkpatrick
2008241	82CW188	Well No. 2	Jason Kirkpatrick
2008692	W0245	Well No. 1	James and Donna Cooley
2010235	W1153	Well No. 2	James Bradley
2013756	99CW9	Well No. 1A	Off Ranches
2705546	81CW69	Well No. 2	John W. Slane
2705547	81CW69	Well No. 3	John W. Slane

This Appendix states that "the database is considered a draft and will continue to be updated." It also includes the following statement concerning the augmentation plan wells:

> We can not clearly identify from the data in this database the wells that are included in a separate augmentation plan. DWR can provide a list of the well WDIDs associated with the augmentation plan lands that are found within the Subdistrict #1 boundary. The Subdistrict will need to maintain this list separate from the Subdistrict wells as part of their normal bookkeeping.

Exhibit 124.2, "Well Database Appendix, May 11, 2009" at 1.

138. All of the wells listed on the Augmentation Plan Wells Memo or on the Well Database Appendix are included in the 2012 ARP Appendix A list of Subdistrict wells.

2. Augmentation Plan Provisions for the Augmentation Plan Wells Included as Subdistrict Wells

134. The decrees for the Augmentation Plan Wells included in the list of Subdistrict Wells can be classified into four distinct categories: (1) decrees that are only change of water rights decrees which should not have been classified as augmentation plans; (2) decrees that authorize the construction of new wells and change the method of irrigation of land historically irrigated with surface water to irrigate that land with ground water from the new wells; (3) decrees that authorize auxiliary or supplemental wells to irrigate land that is also irrigated with Subdistrict Wells; and (4) decrees that replace depletions from increased withdrawals from existing wells, but that do not augment the lawful pre-existing groundwater use from the same wells.

(a). Change of Water Rights Cases – Wells That Were Incorrectly Categorized as Augmentation Plan Wells – Case No.'s 81CW69 and 81CW72.

135. The decrees in Cases No. 81CW69 and 81CW72 state they are for a change of water rights and do not claim to be augmentation plans. Accordingly, the Augmentation Plan Wells Memo incorrectly included these wells on the list of augmentation plan wells and the status of these wells as Subdistrict Wells is not at issue.

(b). Augmentation Plans That Provide a Change in Method of Irrigation – Case No.'s 01CW06 and 82CW17.

136. Case No. 01CW06, Application of Kimothy R. and Dee Ann Cooley, approved an augmentation plan under which the owners changed the use of their 200 shares of the San Luis Valley Canal from direct surface irrigation, to recharge. The owners were granted permission to drill up to four wells to withdraw the recharge water through the wells. According to the Augmentation Plan Wells Memo, there are three wells associated with Case No. 01CW06 and they have WDID numbers 2014013, 2014016, and 2014014. Because these wells are limited to pumping recharge, they create no net depletions from their operations that must be replaced under the 2012 ARP.

137. Case No. 82CW17, Application of SRS Ranch, Inc. allowed the applicant to drill five replacement wells in exchange for abandoning three original wells. The augmentation plan required the applicant to use its shares in the Rio Grande Canal and the Midland Ditch for recharge and allowed the applicant to divert water from the five replacement wells to irrigate the land originally irrigated by the three original wells and the surface water. Since the decree does not quantify the historical consumptive use of the three original wells and does not limit the withdrawals under the augmentation plan to a specific quantity of water recharged, the decree appears to consider the surface water rights used for recharge sufficient to offset the pumping from the replacement wells without attributing any of the diversions from the replacement wells to the exercise of the water rights of the original three un-augmented wells. According to the Augmentation Plan Wells Memo, two of the wells involved in this augmentation plan, WDID numbers 2008188 and 2008190, are part of the Subdistrict. Because the augmentation plan decree finds that the wells' pumping is offset by the surface water rights used for recharge, there are no net depletions from the operations of these wells that must be replaced under the 2012 ARP.

138. Since the augmentation plans for both of these decrees appear to offset all well pumping with surface water recharge, these wells could operate independently from the Subdistrict. The fact that these wells are included as Subdistrict Wells suggests the owners desired to include these wells and the land they serve within one larger farm unit for purposes of determining Subdistrict fees.

(c). Augmentation Plans that Result in Subdistrict Wells and "Augmentation Plan" Wells Supplying Water to the Same Land – Case No.'s 89CW45 and 96CW5.

139. The decrees in Case No. 89CW45 and Case No. 96CW5 authorize the applicants to drill one or more auxiliary or supplemental wells to be used to irrigate land already irrigated by a previously decreed un-augmented well or wells. Each applicant had historically irrigated the land with water from both the previously decreed well or wells and surface water rights. In Case No. 89CW45, the applicant had used surface water rights from the Excelsior Ditch and the San Luis Valley Canal. In Case No. 96CW5, the applicant had used surface water rights in the Prairie Ditch and the San Luis Valley Canal. Both augmentation plan decrees authorized the applicant to change the use of the surface water to use it for recharge and, based on that recharge, to withdraw water from a new well or wells. Both decrees required the applicants to measure the amount of surface water being used for recharge and limited the amount of water pumped from the new wells based on a formula applied to the amount of water recharged. Both decrees require the applicants to report these measurements to the Division Engineer on a periodic basis to allow that office to monitor the operation of the augmentation plans.

140. According to the augmentation plan decrees, the supplemental and auxiliary wells' use of groundwater is offset by the quantity of surface water the applicants recharge. Therefore, these augmentation plan wells caused no net depletions that needed to be replaced under the Amended Plan. The augmentation plans, however, did not offset the pumping from the originally decreed, un-augmented wells that supplied the same land.

(d). Augmentation Plans That Authorize Increased Withdrawals for Existing Un-Augmented Groundwater Rights – Case No.'s 99CW9, 99CW25, 00CW19, 00CW42 and 07CW64..

141. The decrees in Case No.'s 99CW9, 99CW25, 00CW19, 00CW42 and 07CW64 authorize the applicants to divert additional water from previously decreed, un-augmented wells[5] to irrigate land historically irrigated by the un-augmented wells, by surface water rights or by a combination of the two. In Case No.'s 99CW9, 99CW25 and 00CW19, the applicants owned surface water rights in both the Rio Grande Canal and the Santa Maria Reservoir Company. In Case No.'s 00CW42 and 07CW64, the applicants owned surface water rights in the Prairie Ditch Company. All of the augmentation plan decrees authorize the applicants to change the use of these surface water rights to recharge rights. Each of the decrees requires the applicants to measure the amount of surface water being used for recharge and limits the amount of augmentation water that may be diverted from the wells based on a formula applied to the amount of surface water recharged. Each of the decrees also requires the applicants to report these measurements to the Division Engineer on a periodic basis to allow that office to monitor the operation of the augmentation plans.

142. These decrees also recognize the applicants' previously decreed right to divert un-augmented water from the wells. In Case No.'s 99CW9, 99CW25 and 07CW64, the decree quantifies the "historical use credit" in acre-feet based on the previous decrees for the wells. In Case No. 00CW19, the decree does not quantify the historical use by acre-feet but the decree indicates the wells at issue can continue to be used to irrigate the land they historically irrigated under the pre-existing decrees. Finally, in Case No. 00CW42, while the decree does not quantify the historical use of the un-augmented portion of the wells at issue, it also does not limit the exercise of the historically decreed un-augmented water rights for the wells.

143. According to the augmentation plan decrees, the new use of groundwater by the additional pumping of the previously decreed wells is offset by the quantity of surface water the applicants recharged. The pumping of these same wells, however, under their original decrees, is not offset by the augmentation plans.

3. The Subdistrict's Treatment of Augmentation Plan Wells Included as Subdistrict Wells

144. The Subdistrict treated these Augmentation Plan Wells in exactly the same way it treated all other Subdistrict Wells for purposes of calculating net groundwater consumption--all of the pumping was included in the calculation. The only way in which the Subdistrict treated the Augmentation Plan Wells differently from other Subdistrict wells was for purposes of calculating Subdistrict fees. Including these Augmentation Plan Wells as Subdistrict Wells actually created a fee calculation problem for the Subdistrict because the Subdistrict had to ensure that it did not charge farm operators who were using wells with augmentation plans for pumping that was covered by the augmentation plan.

---

[5] Case No. 99CW9 and Case No. 99CW25 also approved the drilling of new alternate point of diversion wells in each case but these alternate points of diversion were authorized to divert water in the same way as the originally decreed wells—both under the historically decreed right and under the new augmentation right. So, for purposes of this decision, these wells are no different from the original wells.

145. The Subdistrict Amended Plan contains a detailed discussion of the calculation of Subdistrict fees. The Subdistrict assesses an Annual Service and User Fee, which is the total yearly fee assessed upon Subdistrict acres. Exhibit 124.1, Amended Plan of Water Management at 2. The fee is the sum of the Administrative Fee, the CREP Fee, and the Variable Fee. *Id.* The Administrative Fee is a fee of up to five dollars ($5) per Subdistrict acre "to provide sufficient revenue to fund the operations of the Subdistrict and to repay any sums advanced by the [Rio Grande Water Conservation] District during the formation process." *Id.* at 19, ¶ IV(A)(1). The CREP Fee is a fee of up to twelve dollars ($12) per Subdistrict acre "to provide sufficient revenue to fund the local cost share components of a CREP Program designed initially to retire from irrigation a total of 40,000 acres of land in the Subdistrict." *Id.* at 19, ¶IV(A)(2). The Variable Fee is an amount that is calculated per acre-foot of water pumped from a Subdistrict Well. *Id.* at 2.

146. The Variable Fee is determined by multiplying the Net Groundwater Pumped by the Water Value. Exhibit 124.1, Amended Plan of Water Management at 2. The Water Value is the charge per acre-foot of Net Groundwater Pumped, $45.00 in 2011, and not to exceed $75.00 per year as determined annually by the Board of Managers. *Id.* at 3.

147. "Net Groundwater Pumped" is defined as "the total groundwater pumped less the applicable Surface Water Credit [and it may] result in either a positive or negative value. "Surface Water Credit" is defined as:

> [T]he surface water brought into the Subdistrict that is not consumed through irrigation practices or other beneficial uses and returns to or is introduced into the unconfined aquifer. Such Surface Water Credit is used by the Subdistrict for purposes of computing the Variable Fee and has no relationship to Recharge Decrees adjudicated by the Division 3 Water Court....

Id. at 3. The amount of the Surface Water Credit for a Farm Unit depends upon how the surface water is used. *Id.* at 22-23, Appendix 2 to Amended Plan. Surface Water Credit is calculated annually. *Id.*

148. The Variable Fee is assessed on Net Groundwater Pumped for a "Farm Unit." Testimony of Allen Davey, 10/29/12 afternoon. In fact, it was the calculation of the Variable Fee that drove the idea for the Farm Unit. *Id.* The "Farm Unit" concept "was developed fairly early on in the development of the water management plan." *Id.* A "Farm Unit" is a collection of parcels identified as irrigated acres by the County Assessor and Treasurer. *Id.* The Farm Operator chooses which parcels are included in the "Farm Unit." *Id.* The Subdistrict then adds the total groundwater pumped in the "Farm Unit" and subtracts the total surface water credit for the "Farm Unit" to arrive at the Net Groundwater Pumped for that "Farm Unit". *Id.*; Exhibit 124.1, Amended Plan at 22-23. The Net Groundwater Pumped is then multiplied by the Water Value to determine the Variable Fee for the entire "Farm Unit." *Id.*

149. If a Farm Operator includes lands irrigated by Augmentation Plan Wells in a Farm Unit, the Subdistrict must consider that land, and all of its wells and surface water rights when calculating the applicable Subdistrict Fees.

150. As noted above, (¶¶134-143) there are three situations in which a Farm Operator sought to include an Augmentation Plan Well in a Farm Unit during 2012: (1) By inclusion of wells that caused no net depletions of groundwater because their augmentation plans merely allowed a change in the method of irrigation; (2) By inclusion of wells that caused no net depletions themselves, but which wells irrigated land also irrigated by non-augmented wells; and (3) By inclusion of wells that pumped water pursuant to two separate rights: the augmentation plan right and a pre-existing un-augmented groundwater decree.

151. When an augmentation plan decree only changed the method of irrigation, the Subdistrict did not charge any fees to the farm operator for the water pumped pursuant to that augmentation plan or for the land irrigated by that water. Testimony of Steve Vandiver, 10/29/12 in the A.M. When an augmentation plan approved new, supplementary wells to irrigate land already being irrigated by previously existing un-augmented wells, or when an augmentation plan approved additional pumping from a previously existing un-augmented well, the Subdistrict charged fees to the farm operator for the portion of the water pumped that was not covered by the augmentation plan and for the acres irrigated with water that was not pumped pursuant to the augmentation plan. *Id.*

4. *The Subdistrict's Treatment of the Augmentation Plan Wells as Subdistrict Wells Results in a Slight Overcompensation to the Rio Grande for Subdistrict Well Pumping*

152. The Subdistrict included all of the pumping from the Augmentation Plan Wells, both the augmented and un-augmented portions, as part of the Subdistrict well pumping for purposes of calculating the Subdistrict's net groundwater consumptive use.

153. The inclusion of the pumping from all of the Augmentation Plan Wells in the calculation of pumping of Subdistrict Wells has the effect of overstating, slightly, the net amount of groundwater pumping due to Subdistrict wells. Testimony of Allen Davey, October 29, 2012. The reason for this is that the calculation of net groundwater pumping involves taking the total projected pumping of Subdistrict Wells and subtracting the annual recharge credit calculated from the recharge decrees for the Rio Grande Canal, the San Luis Valley Irrigation District, the Prairie Ditch and the San Luis Valley Canal. *Id.* For some of the Augmentation Plan Wells, however, the source of replacement water for the augmentation plan is water that is not included in one of these recharge decrees: for example the Santa Maria Reservoir water. *Id.*; Decrees in Case No.'s 99CW9, 99CW25 and 00CW19. Thus, although all of the pumping from the Augmentation Plan Wells is included in the calculation of Subdistrict net groundwater pumping, some of the off-setting recharge available, and actually occurring under the augmentation plans, is not included in the calculation. Testimony of Allen Davey. This has the effect of overstating, slightly, the net amount of groundwater pumping due to Subdistrict Wells and thus slightly overstating the net groundwater consumptive use due to Subdistrict well-pumping. *Id.*

154. Slightly overstating net groundwater consumptive use has the effect of slightly overstating the amount of injurious depletions the Subdistrict must replace. *Id.* Net groundwater consumptive use is input into the response functions to determine the injurious depletions due to the Subdistrict's well pumping. *Id.* The higher the net groundwater consumptive use, the greater will be the calculated injurious depletions. *Id.* Thus, the 2012 Annual Replacement Plan slightly over-compensates the river for well depletions because it does not include all of the sources of replacement water that offset well-pumping in decreed plans for augmentation.

5. The Subdistrict's Treatment of Augmentation Plan Wells Does Not Change the Way the Augmentation Plans are Operated

155. The Subdistrict does not attempt to determine what injurious depletions were caused by the pumping of an Augmention Plan Well or what injurious depletions were caused by the portion of the pumping of an Augmention Plan Well that was not covered by the associated augmentation plan. Such a calculation is impossible because the Rio Grande Decision Support System ground water model and the response functions it generates are not capable of identifying the depletions attributable to a single well or a small group of wells.

156. The way in which the Subdistrict assessed fees on these wells and this land has no effect on the operation of the augmentation plans themselves. In determining the appropriate fees for a Farm Unit, the Subdistrict assumed that the augmentation plan wells were pumping within their permits and decrees. The Subdistrict does not monitor that pumping; such monitoring is done by the Division Engineer pursuant to the augmentation plans.

6. The Augmentation Plan Wells are Only a Small Fraction of the Subdistrict Wells

157. This Court previously found there are some 3,000 irrigation wells and approximately 174,000 irrigated acres in the Subdistrict. *Findings of Fact, Conclusions of Law and Order,* February 18, 2009, ¶118. There are only twenty-some Augmentation Plan Wells, less than $1/100^{th}$ of the total Subdistrict wells. Of these twenty or so wells, those involved in two cases are fully augmented: Case No.'s 01CW6 and 82CW17. Moreover, with regard to two cases, Case No.'s 89CW45 and 96CW5, the wells are supplemental wells that supply water to lands also served by Subdistrict Wells. Only the wells covered by Case No.'s 99CW9, 99CW25, 00CW19, 00CW42 and 07CW64 involve pumping both augmentation plan water and Subdistrict water from the same well. It is only with regard to these wells that the Subdistrict is remedying the injurious depletions caused by their lawful un-augmented withdrawals. The remaining wells are included only for purposes of calculation of fees for the relevant Farm Units.

B. Conclusions of Law

158. The Objectors contend that under the Amended Plan, Subdistrict Wells and Augmentation Plan Wells are mutually exclusive and therefore no Augmentation Plan Well can be a Subdistrict Well and vice-versa. On this basis the Objectors argue that the 2012 ARP violates the terms of the augmentation plan decrees by allowing more pumping from the Augmentation Plan Wells than is lawful under the decrees, changes the source of augmentation water under the augmentation plan decrees, and unlawfully makes replacement for increased pumping by the Augmentation Plan Wells. In addition, they argue that the Subdistrict's failure

to comply with the 2010 Decree's specific requirement to include a list of augmentation plan wells, links to the decrees for those augmentation plans and a map of the locations of those wells, violates the Decree. As a remedy for each of these violations, the Objectors ask the Court to invalidate the 2012 ARP and reverse the State Engineer's approval of the ARP.

1. Inclusion of Wells with Augmentation Plans as Subdistrict Wells in the 2012 ARP Does Not Violate the Amended Plan or the Decree.

159. The interpretation of a water rights decree is a question of law for the Court. *See, e.g. Hinderlider v. Canon Heights Irrigation & Reservoir Co.,* 117 Colo. 183, 185 P.2d 325 (1947). The Court's interpretation of a decree should focus on its plain language. *See LoPresti v. Brandenburg,* 267 P.3d 1211, 1215 (Colo. 2011). To the extent necessary, the Court may examine documents regarding the facts and circumstances surrounding entry of a decree, in order to determine the decree's setting, intent, meaning, and effect. *In re Tonko,* 154 P.3d 297, 405 (Colo. 2007). When the construction of a decree is necessary, it must first be construed in the light of its underlying record. *Orchard City Irrigation Dist. v. Whitten,* 146 Colo. 127, 361 P.2d 130 (1961).

(a). The Amended Plan and Decree Make Exclusion of Augmentation Plan Wells Optional Not Mandatory

160. To determine whether the inclusion of Augmentation Plan Wells in the 2012 ARP violates the Decree or the Amended Plan, the Court must determine the meaning of a "validly decreed plan for augmentation" as that phrase is used in the definition of "Non-Benefitted Subdistrict lands:"

> "Non-Benefitted Subdistrict Land" – land that is irrigated only with surface water without an irrigation well in the parcel and/or without the physical ability to receive delivery of water pumped from a well on another parcel. In addition, it shall include land irrigated with groundwater pursuant to, and in compliance with, the provisions of a validly decreed plan for augmentation. Non-benefitted lands will not be assessed by the Subdistrict or subject to service and user fees.

Amended Plan at 2, §I (D).

161. The Objectors argue that no Augmentation Plan Wells can be included in the Amended Plan or the ARP, even if they have a pre-existing, un-augmented water right, and that lands served by Augmentation Plan Wells must be treated as Non-Benefitted Subdistrict Lands even if they are also served by un-augmented previously decreed wells. If followed to its conclusion, the Objectors' argument would apparently require the Subdistrict to (1) treat any land served by an Augmentation Plan Well as Non-Benefitted Subdistrict Land; (2) exclude any Subdistrict Well that provides irrigation water to land now served in any degree by an Augmentation Plan Well; and (3) exclude any Subdistrict Well that has any portion of its withdrawals authorized by a plan for augmentation. Under this standard the original wells in these cases would no longer be Subdistrict Wells and the injurious stream depletions resulting from the lawful exercise of their well permits and decrees would not be replaced

162. Such a reading of the term Non-Benefitted Subdistrict Land does not comport with the remainder of the 2010 Decree. This Court addressed the meaning of "Non-Benefitted Subdistrict Lands" in paragraph 188 of the May 2010 Decree, stating:

> Finally, the Amended Plan defines "Non-Benefitted Subdistrict Land" to include land irrigated with groundwater pursuant to, and in compliance with, the provisions of a validly decreed plan for augmentation. Non-benefitted lands will not be assessed by the Subdistrict or subject to service and user fees. Landowners obtaining plans for augmentation for their wells would be considered "Non-Benefitted Subdistrict Land," and their land and water rights would not be included in the Amended Plan. *Thus, landowners within the Subdistrict who do not wish to be part of the Subdistrict may have a means to operate their surface water and wells outside of the Amended Plan,* subject always to the applicable provisions of the articles of incorporation, bylaws and rules and regulations of the ditch company, the statutes governing irrigation districts, and the rules and regulations of the irrigation district. (citations omitted)

(Emphasis added)

163. As this Court explained, a "validly decreed plan for augmentation" in this context means obtaining approval of a plan pursuant to which land can be irrigated with groundwater "outside of the Amended Plan." This was viewed as a method that would allow a landowner who did not want to participate in the Amended Plan to operate his or her wells outside of the Amended Plan by obtaining a decreed plan for augmentation. It was not intended as a retrospective exclusion from the Amended Plan of wells that had obtained plans for augmentation before the Amended Plan was approved or before the Subdistrict was created. For irrigation wells within the Subdistrict to operate outside of the Amended Plan requires, *inter alia*, that all of the injurious depletions from the use of groundwater from the well be remedied by the augmentation plan.

164. The Court's explanation also makes clear that this provision was not intended to be mandatory. Rather, it was an option for Subdistrict landowners "who did not wish to be part of the Subdistrict." It was not intended to force any well owner with a plan for augmentation out of the Subdistrict. The Court's explanation clearly contemplates that a Subdistrict landowner with an augmentation plan could choose to keep his wells within the Subdistrict, as is apparently the case with the Augmentation Plan Wells discussed above. If the owner of a Subdistrict Well for which only part of the withdrawals are augmented (e.g. Cases No. 99CW09, 99CW25, 00CW19, 00CW42 and 07CW64) wishes to rely on the Amended Plan to remedy injurious stream depletions from other lawful diversions by a well, then the well is not part of a "validly decreed plan for augmentation" within the meaning of Non-Benefitted Subdistrict Land. Likewise, if the owner of a Subdistrict Well wishes to rely on the Amended Plan to remedy the injurious stream depletions from a well that irrigates land also served by an augmented supplemental well (e.g. Cases No. 89CW45 and 96CW05), there is nothing in the definition of Non-Benefitted Subdistrict Lands that would preclude them from doing so.

165. The fact that a Subdistrict Well is also the point of diversion for a plan of augmentation does not, in and of itself, disqualify a well from operating under the Amended Plan. Under the well-established law in Colorado, a single structure can serve as the point of diversion for more than one water right. *E.g.* Section 37-92-103(3)(a), C.R.S.; *Saunders v. Spina*, 344 P.2d 469 (Colo. 1959) (citing *Nichols v. McIntosh*, 19 Colo. 22, 24 P. 278 (1893)). In effect, that is what occurs when a well is used as both a Subdistrict Well and an Augmentation Plan Well; it serves as the point of diversion for two different legal entitlements to divert water. Absent a provision in the augmentation plan decree that limits diversions to the amount allowed under the augmentation plan, all other lawful withdrawals can be included in the Amended Plan.

166. The May 2010 Decree is 136 pages long and contains very little discussion of augmentation plan wells. Beyond the discussion of the Amended Plan's definition of "Non-Benefitted Subdistrict Land" quoted above, the Court also discussed augmentation plan wells in the section of the Decree where the Court addressed the adequacy of the methodology the Subdistrict used to identify, describe and update the list of Subdistrict Wells contained in Appendix 3 to the Amended Plan. Decree at 112-13, ¶¶321-326. The Court noted that

> 323. . . . the Subdistrict recognizes the need to keep a list of augmentation wells and what their status is. Since the Court is approving a start date of 2012 for the first Annual Replacement Plan, the updating of Appendix 3 can and should include the separate list of wells with augmentation plans, links to the plans and a map of the locations of these wells.
>
> 324. The Appendix 3 "database will continue to be updated" in order to accurately summarize reality. Appendix 3, at p.1. The Subdistrict Well Database will inevitably change on an annual basis and changes to the database to make it more accurate to best reflect the state of the Subdistrict are reasonable and necessary and do not render the Amended Plan void for vagueness. [citation omitted].

2010 Decree at 112-13, ¶¶323-24. Here and in other parts of the Decree, this Court discussed the need to collect and use data that is accurate and that reflects reality and that may change over the course of time.

167. It is true, as the Objectors point out, that in the Decree, the Court was considering augmentation plan wells and the land they serve in an "either/or" context: Either a well and the land it served was part of an augmentation plan or it was part of the Subdistrict. But this was because the Court had not been presented with the circumstance of a well that was only partially covered by an augmentation plan or lands that were served by both an augmentation plan well and a non-augmented well, or even, with a farm operator who desired to join all of his or her farm operation, including the part of the farm served by an augmented well, into one Farm Unit for purposes of determining Subdistrict fees.

168. Only now are these circumstances coming to light. There appear to be twenty-plus wells with augmentation plans located within the Subdistrict territory whose owners desire to have the wells included in the Subdistrict. Allowing the Subdistrict to admit these wells into the Subdistrict and to cover these wells' un-augmented pumping with the 2012 ARP does not

violate the 2010 Decree and is not an improper attempt to modify the Decree. Rather, given the May 2010 Decree's focus on revising the list of wells to accurately summarize reality, and the Decree's lack of any language excluding such wells or explaining a rationale for such an exclusion, it only makes sense that the un-augmented portion of the pumping of an Augmentation Plan Well would be included in the Subdistrict if the well operator desired it to be included.

169. The Objectors support their interpretation with references to testimony from the 2009 trial. The Court has reviewed the testimony referred to by the Objectors and does not believe it has the meaning the Objectors attributed to it. The Objectors refer to the testimony of Carla Worley on pages 312-313 of the transcript. However, reading further, and particularly at pages 319 – 321, Ms. Worley expressed considerable uncertainty about the effect of an augmentation plan on a water user's ability to remain in the Amended Plan.

170. The Objectors also refer to the testimony of Steve Vandiver on pages 145, 146, and 168 of the transcript of the 2009 trial. Reviewing that testimony in context reveals that Mr. Vandiver was not asked and did not testify that the fact that a well had an augmentation plan meant it was automatically excluded from the Amended Plan. Rather, he was responding to a question based upon the assumption that a well "dropped out" to be included in a plan for augmentation or another subdistrict. The questions assumed a choice by the well owner not to be covered by the Amended Plan, not a forced exclusion from the Amended Plan.

171. Finally, the Objectors rely on Mr. Davey's testimony at pages 370 – 371 that Augmentation Plan Wells are not Subdistrict Wells. Reading further, Mr. Davey explained that Augmentation Plan Wells are those wells that did not need replacement water and could operate under their own augmentation plan. This testimony is consistent with the Court's understanding of an Augmentation Plan Well as a well that can operate entirely outside of the Amended Plan.

172. The primary purpose of the Amended Plan and Decree is to remedy injurious stream depletions by irrigation wells operating in the Subdistrict. Allowing the well owner to elect to have any lawful un-augmented groundwater use remedied by the Subdistrict helps accomplish that goal and protect senior surface water rights. The Objectors' interpretation, on the other hand, would defeat this goal by unnecessarily excluding wells from the Amended Plan.

(b). The Subdistrict Properly Assessed Augmentation Plan Wells under the Amended Plan.

173. The Non-Benefitted Subdistrict Lands irrigated with groundwater pursuant to a validly decreed plan for augmentation are not assessed Subdistrict Fees. Where Subdistrict land is irrigated by both an Augmentation Plan Well and a Subdistrict Well, the Subdistrict did not assess a Variable Fee for groundwater withdrawn pursuant to a decreed plan for augmentation, and did not give Surface Water Credit for the surface water consumed under the plan for augmentation. The non-assessment of these fees is the Subdistrict's recognition that it is not required to remedy injurious depletions resulting from the decreed operation of an Augmentation Plan Well, even if the land is also served by a Subdistrict Well. This manner of assessment complies with the requirements of the Amended Plan.

(c). The Inclusion of the Augmentation Plan Wells in the 2012 ARP Does Not Authorize Increased Pumping of Augmentation Wells or Modify the Terms or Operation of the Augmentation Plan Decrees and Thus Does Not Violate Colorado Law.

174. The Objectors argue that the 2012 ARP "purports to authorize pumping of Augmentation Plan Wells" and this "purported authorization violates both the Plan and the Decree." Objectors' Proposed Decree filed December 7, 2012, at ¶144. The Objectors' assertion is based, in part, on the following language in the Subdistrict's proposed Annual Replacement Plan for 2012:

> The Subdistrict Wells include some wells that are part of an augmentation plan. The augmentation plans vary in their conditions, but they coordinate surface rights and other wells in administration of the respective plan. They are included in the list for fee determination, *and if any portion of the pumping is not covered by their augmentation plans, it is subject to Subdistrict No. 1 fees and Subdistrict No. 1 will replace injurious depletions due to their pumping.*

2012 ARP at 5. (Emphasis added).

175. The Objectors also rely on the following language in the State Engineer's approval letter dated May 1, 2012:

> Wells in Subdistrict No. 1 that are part of an augmentation plan are also included in Appendix A of the ARP. *The ARP provides for replacing any injurious stream depletions caused by pumping by these wells that is not otherwise covered by an augmentation plan.* All pumping, including augmented wells and associated recharge, is accounted for in the Response Functions. The individual wells included in augmentation plans are appropriately given credit for their augmentation sources as part of the financial accounting of the Amended PWM.

May 1, 2013 letter at 2. (Emphasis added).

176. As noted above, there are some Subdistrict Wells that withdraw water under their underlying well permits and decrees and withdraw additional water pursuant to a plan for augmentation. ¶¶ 141-43 above. Under the Amended Plan, the Subdistrict remedies any injurious stream depletions that would result from the portion of the pumping from these wells authorized by the original decrees for the wells that the augmentation plan does not cover. The language from the 2012 ARP and the State Engineer's approval letter quoted above simply acknowledges the fact that a portion of the pumping by these wells is lawful under a well permit or decree, and the 2012 ARP is remedying any injurious stream depletions from that use.

177. As Objectors point out, the augmentation plan decrees "fix the conditions" under which the State and Division Engineers may allow the augmented portion of the pumping of the

Augmentation Plan Wells. *See Empire Lodge Homeowners Ass'n v. Moyer,* 39 P.3d 1139, 1153 (Colo. 2001). The augmentation plan decrees set forth how the depletions from the augmented portion of the pumping of the Augmentation Plan Wells are to be quantified. *See id.* at 1150-51. The augmentation plan decrees set forth how such depletions are to be replaced in time, location, and amount to prevent injury to other water rights. *See* C.R.S. §37-92-305(c); *Aurora v. State Engineer*, 105 P.3d 595, 614-15 (Colo. 2005).

178. The 2012 ARP, however, does not purport to authorize increased pumping by any well over and above the amount allowed by its well permit and/or decrees. Furthermore, the 2012 ARP does not allow increased pumping over the quantity authorized in a decreed augmentation plan, and does not modify the terms of any augmentation plan.

2. Subdistrict's Failure to Include List of Augmentation Plan Wells Does Not Invalidate the 2012 ARP

179. The Subdistrict violated the Amended Plan and this Court's May 2010 Decree when it failed to include in the 2012 ARP a list of wells located in the Subdistrict Territory that were included in augmentation plans. In addition, the State Engineer failed to require the Subdistrict to include such a list in the 2012 ARP, despite the Court's direction in the May 2010 Decree that such a list be included in each annual replacement plan.

180. The Subdistrict failed to fully remedy the situation until August 29, 2012, when the Supporters filed their *Brief Opposing Motion for Summary Judgment Regarding Augmentation Plan Wells.* Exhibit 6 to that brief is an affidavit that lists all of the augmentation plan wells and discusses how the Subdistrict treated those wells for assessment of fees. Prior to that time the Subdistrict had provided the Augmentation Plan Wells Memo but that memorandum does not explain how the Subdistrict treated the augmentation plan wells and inaccurately lists wells that did not have augmentation plans associated with them.

181. Both the Subdistrict and State Engineer acknowledge these failures and assure the Court they will not overlook the requirement of a list of augmentation plan wells in the future.

182. Since the Subdistrict and the State Engineer admit to violating the Amended Plan and this Court's Decree, the only question before the Court is what remedy is required. In closing argument, the Objectors asked the Court to disapprove the 2012 ARP because it did not include the required list of augmentation plan wells and to require the Subdistrict to file an amended 2012 ARP with the Court. The Objectors ask the Court to hold the Subdistrict and the State to strict compliance with the May 2010 Decree and the Amended Plan because only if they are held to such strict compliance can the Court and the public be assured that the Amended Plan of Water Management is being operated under the approved terms. In contrast, the Supporters and the State Engineer believe the court should be guided by the law of substantial compliance in determining what remedy to impose for the Subdistrict's failure to include the list of augmentation plan wells in the 2012 ARP.

183. The Court will analyze the question of the appropriate remedy for violation of the Amended Plan in the context of the purpose of the Amended Plan. The Amended Plan has two

primary goals: the prevention of injury to senior surface water rights and the recovery of groundwater levels in the unconfined aquifer of the Closed Basin within the Subdistrict. Prevention of injury to senior surface water rights is accomplished by delivery of replacement water to the affected stream in a manner that prevents injury or through agreements with the otherwise injured water right owner. Amended Plan at 13, § III.C. Recovery of groundwater levels is to be accomplished by reducing the number of acres irrigated with groundwater through fallowing programs or other arrangements. Amended Plan at 15, § III.D.

184. The Subdistrict's failure to include a list of Augmentation Plan Wells did not interfere with the accomplishment of either of the primary goals of the Amended Plan. The evidence presented at the trial indicates that the Subdistrict has slightly over-compensated the Rio Grande for the injurious depletions caused by Subdistrict well-pumping. Furthermore, none of the evidence presented suggests that the failure to include the list of Augmentation Plan Wells in the 2012 ARP affected the Subdistrict's ability to reduce Subdistrict acres irrigated with groundwater. In addition, none of the Objectors have alleged any harm they have suffered from the Subidstrict's failure to include the list of Augmentation Plan Wells. Accordingly, the Court will apply the law of substantial compliance rather than strict compliance to the Subdistrict's failure.

185. In the context of statutes, the Colorado Supreme Court has stated:

> In determining whether initiative proponents have achieved substantial compliance, we must consider (1) the extent of noncompliance, (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance, and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead. . .

Fabec v Beck, 922 P.2d 330, 341 (Colo. 1996). The Court believes these three criteria are an appropriate guide for its evaluation of the proper remedy for this oversight.

(a). Extent of the Noncompliance.

186. The extent of the noncompliance is minimal. The preparation of a separate list of augmentation wells is but one of many pieces of information the Amended Plan and Decree require the Subdistrict to include in the ARP. The State Engineer and the Subdistrict have otherwise complied with the requirements of the Amended Plan and the Decree.

187. In addition, the Augmentation Plan Wells represent a tiny fraction of the irrigation wells in the Subdistrict and they serve a tiny fraction of the irrigated land in the Subdistrict. The Amended Plan does not purport to modify the operation of those augmentation plans or to make replacement of depletions under those plans. The terms of the augmentation plans decrees are wholly unaffected by the ARP. Thus, no substantive rights of any party have been changed or impaired by the failure to provide a separate list of the Augmentation Plan Wells within the Subdistrict.

(b). Achievement of the Purpose of the Provision.

188. The apparent purpose of the requirement to separately list augmentation plan wells is to advise the public what irrigation wells are not included in the Amended Plan. The owners of these wells do not need this information because they know from their tax assessments whether their wells have been included in and assessed for purposes of the Amended Plan. Thus, the effect of the oversight was to deprive the interested public of information it could have used to understand the scope of the 2012 ARP.

189. Even after the Objectors filed their Invocation of Retained Jurisdiction setting forth this concern, the Subdistrict did not file a complete list of the augmentation plan wells until it included Exhibit 6 with its Response to the Objectors' Motion for Summary Judgment at the end of August 2012. As discussed above, the list of augmentation plan wells the Subdistrict made available in early June 2012 was not complete or accurate and did not explain the way in which the Subdistrict actually treated those augmentation plan wells.

190. Throughout the May 2010 Decree, this Court stressed the importance of transparency and the need to provide accurate and timely information to the public to allow all water users in the basin to understand the annual replacement plan and participate in the Subdistrict's process of creating and approving the plan. May 2010 Decree at ¶¶ 344, 356, 357, 358, among others. The Subdistrict's failure to include the list of Augmentation Plan Wells, and the State Engineer's failure to require the addition of the list as one of the conditions of his approval of the 2012 ARP, interfered with the public's and other water users' complete understanding of the ARP and frustrated the Court's goal of complete transparency in the process.

191. On the other hand, as noted above, the overall purposes of the annual replacement plan and the Amended Plan have been substantially achieved by the 2012 ARP. And, even after receiving the information about the specific Augmentation Plan Wells involved in the Subdistrict, the Objectors did not challenge the inclusion on the list of any specific well, but instead objected to how the ARP generally treated Augmentation Plan Wells. Thus, it does not appear that the delay in furnishing this information frustrated the Objectors' ability to review the individual wells. And, the Subdistrict and State Engineer now have a clear understanding of the need to include this information in future ARP's which will achieve the Court's goal of transparency.

(c). Good Faith Efforts to Comply.

192. Finally, the evidence before the Court does not demonstrate any bad faith on the part of the Subdistrict or the State Engineer in the failure to provide this information earlier. The testimony of both Steve Vandiver and Dick Wolfe establish that this was an oversight caused by their unfamiliarity with the ARP process, the complexity of the ARP and the short period of time they had in which to create the ARP. The failure to include the list of augmentation plan wells was not an attempt to mislead or hide information but rather was an honest mistake made in the first effort to prepare an ARP under the Amended Plan.

(d). The Omission of the Augmentation Well Tabulation did not Cause Harm.

193. The Objectors made no showing of any injury to any vested water right that has resulted from this oversight, and they make no claim that this oversight has prevented the ARP from remedying injurious stream depletions or from taking real and concrete steps toward reducing groundwater irrigated acreage in the Subdistrict. Likewise the Objectors have not shown any prejudice to anyone as a result of this oversight.

194. The Court finds that in the context of the 2012 ARP the failure of the Subdistrict to provide the information on Augmentation Plan Wells required by the Decree was not intentional, was remedied, and resulted in no injury or prejudice to any party. The Court concludes that under the circumstances, and considering the Subdistrict's inexperience with the ARP process, this oversight was harmless. In keeping with the testimony at trial, the Court does not expect the Subdistrict will make the same mistake in the future.

195. The Court also finds that the State Engineer's failure to ensure the data submitted by the Subdistrict with the ARP included the information on Augmentation Plan Wells required by the Decree was not intentional, but rather was the result of the complexity of the ARP and the parties' inexperience with this particular process. Accordingly, the Court concludes that the State Engineer's approval of the ARP without the information on Augmentation Plan Wells was a harmless error and does not render the State Engineer's approval of the ARP unreasonable, arbitrary or capricious, or unsupported by the data submitted by the District with the ARP. In keeping with the State Engineer's testimony at trial, the Court does not expect the State Engineer will make the same mistake in the future.

VII. ORDER AND DECREE

Based upon the foregoing findings of fact and conclusions of law, the Court determines and decrees that:

(1) The 2012 Annual Replacement Plan and the methodologies used to develop the ARP are reasonable, are not arbitrary or capricious, and are supported by the data included in the submittal of the Annual Replacement Plan and such other documentation as the Objectors submitted.

(2) The State Engineer's approval of the 2012 Annual Replacement Plan and the terms and conditions imposed by him were lawful and appropriate and were supported by the information he considered.

(3) The 2012 Annual Replacement Plan and the State Engineer's approval of the Annual Replacement Plan conform with the terms of the May 27, 2010 Decree of this Court.

(4) The evidence presented in this proceeding supports the 2012 Annual Replacement Plan and the State Engineer's approval of it.

(5) The inclusion of Closed Basin Project water as a source of replacement water in the 2012 Annual Replacement Plan is approved; Closed Basin Project water is adequate and

suitable as a source of replacement water to prevent injury to senior surface water rights under the 2012 ARP.

(6) The inclusion of the Augmentation Plan Wells as Subdistrict Wells in the 2012 Annual Replacement Plan did not violate the May 2010 Decree, the Amended Plan or Colorado law.

(7) The Subdistrict is ordered to include the list of Augmentation Plan Wells in all future annual replacement plans. The list should include both those wells that are listed as Subdistrict Wells but that have augmentation plans associated with them as well as those wells, located within the Subdistrict Territory that have augmentation plans and that will operate independently of the Subdistrict.

(8) At a minimum, the list of Augmentation Plan Wells shall include the well WDID number, the structure name, the owner's name, the augmentation plan decree case number, an explanation of the augmentation plan and an explanation of the way the Subdistrict treated the Augmentation Plan Well. The Subdistrict should also include a map with the locations of both types of Augmentation Plan Wells indicated on the map. Finally, any list of Augmentation Plan Wells that is posted on the internet should include hyper-links to the court decrees for each court-decreed augmentation plan.

(6) The Court denies all of the Objectors' remaining challenges to the 2012 Annual Replacement Plan and to the State Engineer's approval of the Plan.

DONE this 10th day of April, 2013.

BY THE COURT:

Digitally signed by Pattie P. Swift
DN: cn=Pattie P. Swift, o=12th Judicial District, ou=Chief Judge, email=pattie.swift@judicial.state.co.us, c=US
Date: 2013.04.10 17:47:39 -06'00'

Pattie P. Swift
Water Judge
Water Division No. 3

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 2013, I served the foregoing Order via ICCES to the following:

PARTIES TO 07CW52

Jim Bailey
Bailey & Peterson, P.C.
1660 Lincoln St.
Suite 3175
Denver 80264

David W. Robbins
Peter J. Ampe
Jennifer H. Hunt
Hill & Robbins, P.C.
1441 18th Street, Suite 100
Denver, CO 80202-1256

Timothy R. Buchanan
Buchanan and Sperling, P.C.
7703 Ralston Road
Arvada, CO 80002

Stephane W. Atencio
SW Atencio & Associates, P.C.
601 Third Street
Alamosa, CO 81101

Martin Shellabarger
61935 CR U 60
Moffat, CO 81143

David Bradley
7519 N Road 2 E
Monte Vista, CO 81144-9456

William A. Hillhouse II
Andrew H. Teske
Hoskin Farina & Kampf, P.C.
200 Grand Avenue, #400
P.O. Box 40
Grand Junction, CO 81502

Perry Alspaugh
40351 C.R. E
Del Norte, CO 81132

Erich Schwiesow
P.O. Box 1270
Alamosa, CO 81101

William A. Paddock
Karl D. Ohlsen
Carlson, Hammond & Paddock, LLC
1700 Lincoln St., Suite 3900
Denver, CO 80203

John McClure
McClure & Eggleston, P.C.
1401 17th St., Suite 660
Denver, CO 80202

Kelly Sowards
P.O. Box 65
Manassa, CO 81141

Richard J. Mehren
Patricia M. DeChristopher
Moses, Wittemyer, Harrison &
Woodruff, P.C.
P. O. Box 1440
Boulder, CO 80306-1440

JOHN W. SUTHERS, Attorney General
MARI DEMINSKI
PRESTON V. HARTMAN
Assistant Attorneys General
1525 Sherman Street, 7th Floor
Denver, CO 80203

PARTIES TO 06CV64

Stephane W. Atencio
Atencio, S W & Associates PC
601 Third Street
Alamosa, CO 81101

James S. Bailey
Bailey & Peterson PC-Denver
1660 Lincoln St., Suite 3175
Denver, CO 80264

Craig Cotton
Division 3 Water Engineer
State of Colorado

Timothy Buchanan
Buchanan & Sperling PC
7703 Ralston Road
Arvada, CO 8002

William A. Hillhouse II
Hoskin Farina & Kampf PC
200 Grand Avenue, #400
Grand Junction, CO 81502

John C. McClure
McClure & Eggleston, LLC
1401 17th St., Suite 600
Denver, CO 80202

Dick Wolfe
State Engineer
State of Colorado

David Robbins
Hill & Robbins PC
1441 18th Street, Suite 100
Denver, CO 80202-1256

_____
Water Clerk