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| DISTRICT COURT, WATER DIVISION 2<br>PUEBLO COUNTY, COLORADO<br>320 W. Tenth St., Rm. 207<br>Pueblo, CO 81003<br><br>**CONCERNING THE APPLICATION FOR CHANGE OF WATER RIGHTS BY THE CITY OF FOUNTAIN AND WIDEFIELD WATER & SANITATION DISTRICT**<br>IN CUSTER COUNTY, COLORADO | DATE FILED: June 20, 2013<br><br>▲ **COURT USE ONLY** ▲ |
| | Case No. 08CW47<br>Water Division 2 |

**ORDER RE: THE STATE AND DIVISION ENGINEERS' SECOND MOTION FOR THE DETERMINATION OF QUESTIONS OF LAW**

This matter comes before the Court on the State and Division Engineers' ("Engineers") *Second Motion for the Determination of Questions of Law*, filed on March 26, 2013. The Applicants, the City of Fountain and Widefield Water & Sanitation District, filed a response in opposition to the motion. Pueblo West Metropolitan District and Round Mountain Water and Sanitation District adopted the Engineers' motion and filed a reply to the Applicants' response, as did the Engineers. Oral argument on the motion was held on June 11, 2013. Having reviewed the briefs, pleadings, and file, and being otherwise fully informed and advised, the court enters the following **FINDINGS AND CONCLUSIONS:**

## I. BACKGROUND

The Application herein, in part, seeks to change the type of use and place of use of the Applicants' interests in three water rights originally decreed to irrigate lands located on what is now known as the H20 Ranch (aka Adams Ranch) in Custer County. The Application seeks to quantify the historic consumptive use attributable to the water

rights in order to change their use from irrigation to all municipal uses within the Applicants' service areas.

The three water rights, W.A. Bell Ditch No. 1 (Priority No. 30), W.A. Bell Ditch No. 2 (Priority No. 23) and W.A. Bell Ditch No. 3 (Priority No. 114) were originally adjudicated by interlocutory decree of the Fremont District Court on May 12, 1893. The Final Order, Judgment and Decree entered on March 12, 1896 ("Original Decree"). The Honorable Dennis Maes entered an Order on April 24, 2012 resolving certain questions of law posed by the Engineers, the Upper Arkansas Water Conservancy District ("Upper"), and the Applicant. In that referenced Order, Judge Maes found that:

(1) In the Original Decree, the W.A. Bell Ditch No.1 was decreed for irrigation of 140 acres in the NE ¼ of Section 24, and the 140 acres in the SE ¼ of Section 13, both in Township 22 South, Range 73 West, 6th P.M. Upper's Exhibit 1. The former 140 acres are located on the H20 Ranch, the latter 140 acres are not.

(2) In the Original Decree, the W.A. Bell Ditch No.2 was decreed for irrigation of 50 acres of land in the S ½ NE ¼ of Section 23, Township 22 South, Range 73 West, 6th P.M. Upper's Exhibit 1. The entire 50 acre parcel is located on the H20 Ranch.

(3) In the Original Decree, Priority No. 114 of the W.A. Bell Ditch No.3 was decreed for irrigation of 360 acres of land in the NE ¼ of Section 24, SE ¼ of Section 13, SW ¼ of Section 18, and W ½ NW ¼ of Section 19, Township 22 South, Range 73 West, 6th P.M. Upper's Exhibit 1. Of these parcels, only the NE ¼ of Section 24, and therefore a maximum of 160 acres, is located on the H20 Ranch.

The originally decreed lands located on the H20 Ranch, which the Applicants now own and described by Judge Maes above, are hereinafter referred to as the "Originally Decreed Lands."[1] The Applicants' interests in these three water rights are referred to hereinafter as the "Subject Water Rights."

[1] At oral argument, Applicants' counsel suggested that the 1896 decree may not have described the acres to be irrigated correctly. However, Applicants' counsel has not filed a motion for such a determination and did not produce any affidavit or any other evidence setting forth facts as would be admissible in

### A. Conquistador Case No. W-4321

In Case No. W-4321, Conquistador, Inc. previously changed the Subject Water Rights to domestic, commercial, municipal (including landscape irrigation), and recreational (including snowmaking) purposes for Conquistador's proposed ski resort development. Conquistador had an option agreement with Lea and Celeste Adams, the owners of the Adams Ranch, to change and use the Subject Water Rights for the foregoing direct purposes and to store some of the changed water rights to be used to replace out-of-priority depletions under Conquistador's augmentation plan approved in W-4321. The W-4321 Decree quantified the historic consumptive use of the W.A. Bell Ditch No. 1 and W.A. Bell Ditch No. 2 water rights based on lands historically irrigated on the Adams Ranch prior to the entry of the W-4321 Decree, and also identified lands historically irrigated by the W.A. Bell Ditch No. 3 ("Historically Irrigated Lands"). The descriptions of the acreages and the locations of the Historically Irrigated Lands in the W-4321 Decree differ significantly from the Originally Decreed Lands (1893 Decree).

For the W. A. Bell Ditch No. 1 water right, the W-4321 Decree found it was used to irrigate 110 acres, lying south and east of Alvarado (Cheesefactory) Creek in the NE ¼ of Section 24, Township 22 South, Range 73 West, 6th P.M. *See* W-4321 Decree, p. 10, ¶ 15. Based on this irrigation, the Court found that there was "an associated annual historic consumptive use of 165 acre-feet in a typical average year and 110 acre-feet in a typical dry year." *Id.* at 11. In the W-4321 decree, the Court also found that "approximately 250 acres of land lying between Venable (Bothwell) and Alvarado (Cheesefactory) Creeks in the N ½ of Section 24 and the NE ¼ of Section 23, T22S,

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evidence as required by C.R.C.P. 56(e). As such, the Applicants' factual claims in this regard are not properly before the Court. Moreover, Applicants have not sought reconsideration of this Court's April 24, 2012 holdings as to the originally decreed lands or the binding nature of the 1896 adjudication.

R73W, 6th P.M., have been variably irrigated with additional water from the W. A. Bell Ditches Nos. 1, 2 and 3." W-4321 Decree, p. 11, ¶ 15. Thus, the W-4321 Decree found historic irrigation of up to 360 acres of the ranch for this water right or its ditch as opposed to the 140 acres of the ranch originally decreed to the W.A. Bell Ditch No. 1.

For the W. A. Bell Ditch No. 2 water right, the W-4321 Decree found it was used to irrigate 102 acres of hay meadow, lying north and west of Venable (Bothwell) Creek, and south and east of Taylor Creek in the NE1/4 of Section 23 and the NW1/4 of Section 24, Township 22 South, Range 73 West, 6th P.M. *See* W-4321 Decree, p. 10, ¶ 15. Based on this irrigation, the Court found that there was "an associated annual historic consumptive use of 150 acre-feet in a typical average year and 143 acre-feet in a typical dry year." *Id.* at 11. As previously noted, in the W-4321 decree, the Court also found that "approximately 250 acres of land lying between Venable (Bothwell) and Alvarado (Cheesefactory) Creeks in the N ½ of Section 24 and the NE ¼ of Section 23, T22S, R73W, 6th P.M., have been variably irrigated with additional water from the W. A. Bell Ditches Nos. 1, 2 and 3." W-4321 Decree, p. 11, ¶ 15. Thus, the W-4321 Decree found historic irrigation of up to 352 acres of the ranch for this water right or its ditch as opposed to the 50 acres of the ranch originally decreed to the W.A. Bell Ditch No. 2.

For the W.A. Bell Ditch No. 3 water right, the W-4321 Decree found that it "contributed some consumptive use in a typical average year" to the irrigation of "approximately 250 acres of land lying between Venable (Bothwell) and Alvarado (Cheesefactory) Creeks in the N ½ of Section 24 and the NE ¼ of Section 23, T22S, R73W, 6th P.M.," which were "variably irrigated with additional water from the W. A. Bell Ditches Nos. 1, 2 and 3." W-4321 Decree, p. 11, ¶ 15 (emphasis added). No historic consumptive use from the use of the "additional water" to irrigate the 250 acres was

determined by the Court in W-4321. *See id.* It appears no specific quantification of the historic use of the W.A. Bell Ditch No. 3 water right was determined, because the historic consumptive use attributed to the W. A. Bell Ditch No. 1 water right and the W. A. Bell Ditch No. 2 water right exceeded the 175 acre-feet of consumptive use contemplated by Conquistador planned development. *See id.* at pp. 10-11. However, discontinuing irrigation under the W.A. Bell Ditch No. 3 was presumed to offer additional protection from any injury due to the changes of the three water rights. The W-4321 decree did not identify which portion of the 250 acres was irrigated by the junior W. A. Bell Ditch No. 3 water right (Priority No. 114), which was originally decreed for use only on the NE ¼ of Section 24 and not *all* of the N ½ of Section 24. Nor was this junior right originally decreed for use in the NE ¼ of Section 23. Thus, the W-4321 Decree found historic irrigation of up to 250 acres of the ranch for this water right or its ditch as opposed to the 160 acres of the ranch in the location originally decreed to the W.A. Bell Ditch No. 3.

Conquistador's planned development did not proceed as planned, and the augmentation plan in Case No. W-4321 never took effect or became operational. Paragraph 2 of the decretal portion of the W-4321 decree provided that the decree would be of no force or effect unless and until specific conditions were satisfied according to their terms, which did not occur.

**B. Mountain Cliffe Case No. 95CW09**

In Case No. 95CW09, Conquistador's successor, Mountain Cliffe, Inc., filed an application stating that it had succeeded to all of the water rights that were the subject of Case No. W-4321 and the lands historically irrigated by those rights. Mountain Cliffe sought, in part, to "[c]hange the water rights decreed to the W.A. Bell Ditches Nos. 1, 2

and 3…so that they may only be exercised for the irrigation of the lands they were historically used to irrigate prior to the entry of this Court's decree in Case No. W-4321 and to prohibit their use in the plan for augmentation approved in that case."

The application indicated the following for the Subject Water Rights: (1) historic use of the W. A. Bell Ditch No. 1 water right was for the irrigation of 110 acres of land as found by the Court in W-4321; (2) historic use of the W.A. Bell Ditch No. 2 water right was for the irrigation of 102 acres of land as found by the Court in W-4321; and (3) historic use of the W.A. Bell Ditch No. 3 water right was in conjunction with the Bell No. 1 and Bell No. 2 rights for the irrigation of 250 acres of land as found by the Court in W-4321. Finally, the application requested the Court enter a decree granting the application, awarding the requested changes of water rights, and vacating the decree in Case No. W-4321.

On June 25, 1995, the Division Engineer, Steven J. Witte, issued his Consultation Report including the Summary of Consultation held on April 5, 1995 for 95CW09. The Division Engineer wrote that "Applicant seeks to change back to original uses and locations five water rights and a portion of a sixth after these rights were changed to support a augmentation plan in W-4321." *Id.* The Division Engineer recommended that "irrigated areas and locations of any water rights associated with this application should be specifically described in any new decree." *Id.* The State and Division Engineers filed a statement of opposition in 95CW09 and stipulated to the 95CW09 Decree on July 23, 1996.

The 95CW09 Decree confirmed that the W-4321 Decree never had any force or effect, and vacated the W-4321 Decree. *See* 95CW09 Decree, p. 7, ¶ 10. In doing so, the 95CW09 Decree concluded as a matter of law that "[a] decree which previously

changed a water right may be vacated so as to restore the use of the water divertible under that right to the place and for the purpose for which it was originally decreed." 95CW09 Decree, p. 10, ¶ 2. After vacating the W-4321 Decree, the 95CW09 Decree stated that "Applicant's interests in the water rights decreed to the following described structures, as modified by the decree in Case No. W-4321 are hereby changed so that they may be used only for the purposes of irrigation on the lands upon which water diverted in their exercise was historically used prior to the entry of the decree in Case No. W-4321." 95CW09 Decree, p. 11, ¶ 2. The 95CW09 Decree then references Mountain Cliffe's interest in each of the Subject Water Rights "as decreed May 13, 1893 in Fremont District Court." 95CW09 Decree, pp. 11-12, ¶¶ 2(a)-(c). In addition, the 95CW09 Decree approved these changes, in part, upon the condition that "[w]ater diverted in the exercise of the Applicant's interests in the W.A. Bell water rights shall be used only in the irrigation of 462 acres of land within the Adams Ranch in the NE/4 of Section 23 and the N/2 of Section 24, Township 22 South, Range 73 West, 6$^{th}$ P.M. which was historically irrigated thereby." 95CW09 Decree, p. 12, ¶ i.

### C. Fountain/Widefield Case No. 08CW47

Subsequently, the Applicants in the present case acquired the Subject Water Rights and the Adams Ranch, which is now known as the H20 Ranch. This case followed. During these proceedings, disputes have arisen between the Applicants and certain opposers as to the meaning of the Court's previous decrees in Cases No. W-4321 and 95CW09 and their effect on the Applicants' historic use analysis. Applicants contend that their historic use analysis may include irrigation use on all of the Historically Irrigated Lands. The Engineers, Upper, Pueblo West and Round Mountain contend and all but Upper continue to contend that the analysis may only include

irrigation use on the Originally Decreed Lands.

In response to a motion for the determination of questions of law filed by the Applicants and cross-motions filed by the Engineers and Upper, Judge Maes held that "[t]he decree in W-4321 was vacated by 95CW09 and is therefore deprived of all conclusive effect in every regard including conclusions concerning historic acreage and historic consumptive use." Order, April 24, 2012, p. 5. The Court found that "the parties are bound by the adjudication of the Subject Water Rights in Fremont County in 1896." *Id.* The Court also stated that "[t]he 95CW09 decree is controlling to the extent it has not modified the terms of the 1896 Subject Water Rights without proper notice to all interested parties." *Id.*[2] And, finally, the Court held that "Applicants cannot claim HCU attributable to the use of water rights they do not own." *Id.*

After the entry of the Court's April 24, 2012 Order, the parties disagreed over its meaning. Applicants' counsel instructed the Applicants' engineer to use irrigation of the Historically Irrigated Lands in the historic use analysis. The Engineers' present motion objects contending that the Court found that the parties are bound by the adjudication of the Subject Water Rights in Fremont County in 1896 and the historic use analysis should only include irrigation of the Originally Decreed Lands. The Engineers' motion, adopted by Pueblo West and Round Mountain, requests that the Court hold that:

> (1) the plain language of the decree in 95CW09 did not modify the places of use of the 1896 Subject Water Rights, and the Applicants' historic consumptive use analysis for the proposed change of water rights

[2] The Applicants agree that, although both the Applicants and the Engineers argued the issue of proper notice in previous filings, it did not appear that the Court made any determination as to whether notice was sufficient in 95CW09 as to any alleged change in place of use of the Subject Water Rights to the historically irrigated acreage. *See* Applicant's Resp. at 15. Thus, the Court finds that the issue of sufficient notice in 95CW09 as raised by the Engineers' second motion is properly before the Court. The Court now finds its sentence regarding the controlling effect of the 95CW09 decree in the April 24, 2012 Order to be ambiguous, confusing and in need of clarification.

should be limited to the lawful historic use of the water rights in their respective places of use as originally decreed;

(2) the application in 95CW09 was insufficient to put interested persons on inquiry notice of a claim to change the places of use of the 1896 Subject Water Rights; or

(3) in the alternative, if the Court finds the decree in 95CW09 is either ambiguous as to a modification of the places of use of the 1896 Subject Water Rights or actually approved such a change, the Applicants' historic consumptive use analysis for the proposed change of water rights for the period prior to the entry of the 95CW09 decree should nonetheless be limited to the lawful historic use of the water rights in their respective places of use as originally decreed.

In response, the Applicants contend that: (1) the Engineers are foreclosed from re-litigating the outcome of the April 24, 2012 Order; (2) the 95CW09 Decree specifically identifies the acres which the Subject Water Rights must serve with irrigation water, and these are the same acres identified by the W-4321 Decree; (3) when read as a whole, the 95CW09 Decree approved the use of the Subject Water Rights on the Historically Irrigated Lands rather than restoring them to their use only on the Originally Decreed Lands; (4) the 95CW09 Application put the world on inquiry notice that the Subject Water Rights would be returned to irrigate the lands that were historically irrigated; (5) the present Application does not re-open the 95CW09 Decree such that the Court can now limit the historic use analysis to the Originally Decreed Lands; (6) the *de facto* change in use of the Subject Water Rights to irrigate lands other than the Originally Decreed Lands was lawful prior to 1969; (7) any alleged enlargement of use is a question of fact, which precludes the Court from granting the motion; (8) the Court should grant the Engineers' request for alternate relief for use of a 1997-2007 study period for the historic use analysis; and (9) the Court should award the Applicants their reasonable attorney fees for having to respond to the Engineers' vexatious and frivolous

motion.

## II. STANDARD OF REVIEW

C.R.C.P. 56(h) provides, "At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question." The Colorado Supreme Court has explained that the purpose of Rule 56(h) is "to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds." *Matter of Bd. Of County Commissioners of County of Arapahoe*, 891 P.2d 952, 963, n. 14 (Colo. 1995) (quoting 5 Robert Hardaway & Sheila Hyatt, *Colo. Rules of Civil Procedure Annotated* § 56.9 (1985)). The Court has determined that there are no genuine issues of material fact necessary to determine whether this Court is precluded from examining whether the historic consumptive use analysis for the proposed change of water rights should be limited to the lawful historic use of the water rights in their places of use as originally decreed. However, this Court determines that there are outstanding issues of material fact necessary to determine whether there has been an expansion of use i.e. whether water has been applied to additional acreage, resulting in increased consumptive use above that perfected under the 1896 decreed appropriation.

## III. ANALYSIS

### A. The meaning and effect of the stipulated decree in 95CW09.

Recently, the Colorado Supreme Court in *Town of Minturn v. Tucker*, 2013 CO 3, 293 P.3d 581, 590, reh'g denied (Feb. 11, 2013) stated:

> Water courts may adopt and incorporate a proposed stipulation into a decree. *Colo. River Water Conservation Dist. v. Bar Forty Seven Co.,* 195 Colo. 478, 481, 579 P.2d 636, 638 (1978). Courts construe a stipulated decree as they

> would a contract. *Cherokee Metro. Dist. v. Simpson,* 148 P.3d 142, 146 (Colo.2006) [*Cherokee I*]; *City of Golden v. Simpson,* 83 P.3d 87, 93 (Colo.2004). . . . Consistent with ordinary contract principles, . . . [the] primary goal when construing a stipulation is to give effect to the intention of the parties. *Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.,* 247 P.3d 567, 573 (Colo.2011) [*Cherokee II*].

Courts interpret a stipulated decree as they would interpret a contract. *City of Golden v. Simpson*, 83 P.3d 87, 93 (Colo. 2004) *citing USI Props. East v. Simpson,* 938 P.2d 168, 173 (Colo. 1997). "The interpretation of a contract is a question of law for the court." *Randall & Blake, Inc. v. Metro Wastewater Reclamation Dist.*, 77 P.3d 804, 806 (Colo. App. 2003). "A court's duty is to interpret a contract in a manner that effectuates the manifest intention of the parties at the time the contract was signed." *Id.* "In construing a contract, the meaning and intent of the parties must be determined in light of the contract as a whole." *Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1066 (Colo. 1994); *see also City of Boulder v. Sherrelwood, Inc.*, 604 P.2d 686, 689 (Colo. App. 1979) ("We must review the consent decree as a whole, and look at all of its provisions and their interrelationships."); *Rocha v. Financial Indem. Corp.*, 155 P.3d 602, 606 (Colo. App., 2006) ("[W]e examine the language in question not in isolation, but by looking to the contract as a whole."). When construing a contract, the Court must construe the contract in its entirety to harmonize and give effect to all the provisions, rendering none meaningless or superfluous. *See Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007).

### B. The decree's first conclusion of law.

The 95CW09 Decree includes the following conclusion of law: "A decree which previously changed a water right may be vacated so as to restore the use of the water divertible under that right to the place and for the purpose for which it was originally decreed." 95CW09 Decree, p. 10, ¶ 1. In the 95CW09 Decree, the only relevant decree that previously changed a water right was the W-4321 Decree, which was expressly vacated by the 95CW09 Decree. The conclusion of law language suggests the parties intended to vacate the W-4321 Decree to restore the Subject Water Rights to their use as originally decreed on May 13, 1893 in Fremont District Court, with the final judgment entered on March 12, 1896. This conclusion is consistent with this Court's previous finding in its April 24, 2012 Order that "the parties are bound by the adjudication of the Subject Water Rights in Fremont County in 1896."

Based on the plain meaning of the words employed, the first conclusion of law appears to be subject to only one reasonable interpretation. *See Fort Lyon Canal Co. v. High Plains A&M, LLC*, 167 P.3d 726, 728-729 (Colo. 2007) ("Should the language of the contract be ambiguous, lending itself to more than one reasonable interpretation, extrinsic evidence of the intent of the parties may be helpful in resolving the ambiguity."). "To determine whether there is ambiguity, courts must examine the instrument's language and construe it in harmony with the plain and generally accepted meaning of the words employed." *Town of Minturn v. Tucker (In re Application for Water Rights of Ginn Battle South, LLC)*, 2013 CO 3, P40 (Colo. 2013) *citing In re Water Rights v. Upper Black Squirrel Creek Ground Water Mgmt. Dist.*, 247 P.3d 567, 573 (Colo. 2011) ("*Cherokee II*"). "Simply because the parties disagree regarding the correct interpretation of the instrument does not itself create an ambiguity." *Cherokee II*,

247 P.3d at 573.

No ambiguity appears to exist here. The Applicants have failed to offer another reasonable interpretation for the first conclusion of law in the decree. The Applicants contend that the purpose of the 95CW09 Decree was to restore the use of the water divertible under the Subject Water Rights to the irrigation of the Historically Irrigated Lands and not the Originally Decreed Lands. However, this interpretation would render the Court's first conclusion of law meaningless or superfluous. Such a conclusion of law would be irrelevant if the Court was actually restoring the Subject Water Rights to be used in places and purposes for which they were not originally decreed.

In the alternative, the Applicants contend that this provision is a "boiler-plate" provision that should not be given its plain meaning or purpose. However, the Applicants failed to provide any legal or factual support for the notion that this provision has ever been included in another water court decree. Given the unique facts of this case, the Court concludes that this provision is not a "boiler-plate" provision and must be given its plain meaning and not be rendered superfluous. In any event, the W-4321 Court cannot be presumed to have adopted any "boiler-plate" provision without determining whether it was appropriate for the decree or without intending such a provision to actually mean what it says.

The Applicants next contend that, if the provision is to be given any meaning, the words "originally decreed" should be construed to mean "originally decreed in W-4321." However, this produces the absurd result of vacating the W-4321 Decree in order to restore the W-4321 Decree. The Court must avoid an interpretation of a stipulated decree that produces such an absurd result. The Applicants interpretation of the decree does not harmonize this conclusion of law provision with the Applicants interpretation of

other provisions. The Engineers' interpretation does so.

### C. Paragraph 8 of the decree and Appendix 1.

The Applicants also contend that paragraph 8 of the W-4321 decree "specifically identifies" the acres which the Subject Water Rights must serve with irrigation water. Paragraph 8 sets forth the W-4321 Decree's previous findings regarding the lands historically irrigated by the three ditches. After these findings, paragraph 8 states that "[t]he lands historically irrigated by use of those portions of those water rights are shown on the attached Appendix 1." 95CW09 Decree, p. 6. The Court then "finds that the Applicant is the sole owner of those lands." *Id.* Relying primarily on paragraph 8, the Applicants contend that "the 95CW09 Decree ordered a return to the pre-1969 *de facto* changed acres described in Appendix 1 and paragraph 8 of the 95CW09 decree." Applicants' Resp. at 20. Appendix 1 is only referenced in paragraph 8.

The Engineers contend that, based on the pattern and structure of the decree, paragraph 8's only purpose was to confirm Mountain Cliffe's ownership of the lands where the Subject Water Rights were historically used. The Court agrees with the Engineers based on the decree's pattern of identifying water rights and their accompanying lands, and confirming Mountain Cliff's sole ownership of both. Paragraph 4 of the decree confirms that Conquistador, Inc. was Mountain Cliffe's predecessor, and that certain wells to be used under the W-4321 Decree were located on the Adams Ranch, now owned by Mountain Cliffe. Paragraphs 5 and 6 then address the ground water rights for the wells and Mountain Cliffe's acquisition of the lands to be served by those wells under the W-4321 Decree. Paragraph 7 then addresses the surface water rights described in W-4321, i.e. the Subject Water Rights, and finds that Mountain Cliffe "is the sole owner" of the Subject Water Rights. In turn, Paragraph 8

reiterates where the W-4321 Decree found the Subject Water Rights had been historically used, and finds that Mountain Cliffe is "the sole owner of those lands." Thus, Paragraph 8 is part of the decree's pattern of identifying the water rights and accompanying lands in W-4321, and confirming Mountain Cliffe's sole ownership of both.

The Court further finds that none of the acreages described in the text of paragraph 8 of the 95CW09 Decree match the acreages in Appendix 1 of the decree. Yet, the Applicants contend that both specifically identify the acreage to be irrigated under the 95CW09 Decree. The Court concludes that, rather than decreeing specific acres to be irrigated, paragraph 8 was intended to confirm that all of the lands historically irrigated by the Subject Water Rights are located within the total Adams Ranch lands owned by Mountain Cliffe as shown in Appendix 1 of the decree. The Applicants' contrary interpretation does not harmonize the differing acreage amounts, and would create an internal conflict or ambiguity in the decree as to the location and amount of acres to be irrigated under each of the Subject Water Rights. If possible, the Court must avoid creating such a conflict or ambiguity when construing the decree. The Engineers' interpretation of paragraph 8, as only confirming Mountain Cliffe's sole ownership of the lands historically irrigated by the Subject Water Rights, does not conflict with any other provisions of the decree, and is consistent with the structure and pattern of the decree.

**D. The "exercise" of a water right.**

The Applicants' interpretation of the 95CW09 Decree also does not take into account or dismisses the decree's repeated references to returning the Subject Water Rights to how they were "exercised" prior to the entry of the W-4321 Decree or would be

"exercised" going forward. The "exercise" of a water right is a well-established term of art in Colorado law referring to the use of a water right within its express and implied limits. *See V Bar Ranch LLC v. Cotten,* 233 P.3d 1200, 1209 (Colo. 2010) (holding that "because the water right was created upon the completion of the appropriation, the scope of that right and the lands upon which it may be *exercised* are defined by the beneficial use for which the water was appropriated" (emphasis added)); *In re Office of the State Engineer's Approval of the Plan of Water Mgmt. v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist.*, 270 P.3d 927, 950 (Colo. 2011) ("Nothing in the fee calculation prevents Subdistrict water right holders from *exercising* their rights in any lawful way they choose." (Emphasis added.)); *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 664 (Colo. 2011) *citing Jones Ditch,* 147 P.3d at 14 ("*exercise* of a decreed water right limited to the amount of water necessary to irrigate acreage connected to the appropriation regardless of flow rate stated in the decree" (emphasis added)); *Ready Mix Concrete Co. v. Farmers Reservoir & Irrigation Co. (In re Application for Water Rights)*, 115 P.3d 638, 646 (Colo. 2005) ("In proposing this change from its prior decree, Ready Mixed Concrete alters the subject matter, the cause of action, and the parties affected by the proposed action, in contrast *to exercise of the water right pursuant to the terms of the existing decree*." (Emphasis added)); *Qualls, Inc. v. Berryman*, 789 P.2d 1095, 1098 (Colo. 1990) ("subsection 37-92-305(11) authorizes water courts to limit the *exercise* of conditional water right decrees entered before July 1, 1985" (emphasis added)).

The decretal portion of the 95CW09 Decree uses the term "exercise." This portion of the decree does not identify the specific acreage to be irrigated by each water right after the entry of the decree. Instead, it describes the Subject Water Rights "as

decreed May 13, 1893 in Fremont County District Court" and provides that "[t]he Water diverted *in the exercise* of the Applicant's interests in the W.A. Bell water rights shall be used only in the irrigation of 462 acres of land within the Adams Ranch in the NE/4 of Section 23 and the N/2 of Section 24, Township 22 South, Range 73 West, 6th P.M. which was historically irrigated thereby." 95CW09 Decree, p. 12. Historically, water diverted in the exercise of these rights could only be applied to the lands for which they were appropriated "as decreed May 13, 1893 in Fremont County District Court," all of which lands are within the Adams Ranch. *See V Bar Ranch,* 233 P.3d at 1209.

**E. The parties' intent when the stipulated decree is read as a whole.**

When read as a whole, the Court concludes that the parties to the stipulated decree in 95CW09 intended to restore the Subject Water Rights to their status quo prior to the entry of the W-4321 Decree. "Applicant's interests in the water rights decreed to the…described structures, as modified by the decree in Case No. W-4321 are hereby changed so that they may be used only for purposes of irrigation on the lands upon which water diverted in their exercise was historically used prior to the entry of the decree in Case No. W-4321." 95CW09 Decree, p. 11, ¶ 2 (emphasis added); *see also* p. 9, ¶ 14 ("restore the streams of the Grape Creek System to the historic regimen that existed prior to the entry of the Decree in Case No. W-4321"); p. 10, ¶ 2 ("restoration of a stream flow regimen to that regimen which existed prior to the entry of vacated [*sic*] change decree"); p. 13, ¶ 4 (finding the retained jurisdiction period to be "reasonable in light of the fact that the historical use of the water rights prior to the entry of the decree in Case No. W-4321 will be resumed").

Paragraph 16 of the 95CW09 decree confirmed that the W-4321 Decree included elaborate terms and conditions, which were designed to approximate the stream

regimen "at times when those rights would be used for purposes other than those for which they were originally decreed." 95CW09 Decree at 9, ¶ 16. The Court concludes that, by vacating the new purposes of the W-4321 Decree, the parties intended to restore the Subject Water Rights to the purposes "for which they were originally decreed." This is consistent with the decree's first conclusion of law. The decree's elimination of the elaborate terms and conditions to prevent injury from a change of water right confirms that no changes from the originally decreed purposes were intended for the Subject Water Rights in 95CW09.

The Court is not able to find that the parties to the stipulated decree intended to allow Mountain Cliffe or its successors to count historically irrigated acreage outside the areas defined in the 1896 decree in some future re-quantification case. The Court finds that the 95CW09 stipulated decree was simply intended to cancel the plan for augmentation previously decreed in case W-4321, to vacate that W-4321 decree in its entirety, and to provide assurance that Mountain Cliffe could resume or continue the irrigation of its lands as if Case No. W-4321 had never been filed. In this regard, the Court understands the use of the word "change" in the 95CW09 proceedings to refer only to the said vacation of the W-4321 decree and reversion of the Subject Water Rights to their pre W-4321 status. If anything else had been intended, it is likely the 95CW09 decree would not have cancelled the W-4321 decree, but would have instead adopted or adjusted the quantifications made in that decree, or would have established a new quantification of the water rights in terms of volumetric annual amounts of consumptive use. None of this was done by the decree.

**F. Lawfully irrigated lands versus historically irrigated lands.**

The present dispute centers on lands lawfully irrigated under the Subject Water

Rights for the purposes of a historic use analysis rather than on the lands historically irrigated by the subject ditches. The Court finds that, under Colorado law, prior to the entry of the W-4321 Decree, the Subject Water Rights could only be lawfully exercised to irrigate their Originally Decreed Lands. The Court further finds that, because the W-4321 Decree never took effect and was eventually vacated, the Subject Water Rights remained bound by the original 1896 decree at least until the entry of the 95CW09 Decree.

"In Colorado, appropriations of water for irrigation are made by and for use on specific land." *V Bar Ranch LLC v. Cotten,* 233 P.3d 1200, 1208-09 (Colo. 2010) (holding that "because the water right was created upon the completion of the appropriation, the scope of that right and the lands upon which it may be exercised are defined by the beneficial use for which the water was appropriated") *citing In re Water Rights of Cent. Colorado Water Conservancy Dist. v. City of Greeley*, 147 P.3d 9, 14 (Colo. 2006) ("*Jones Ditch*") ("When usage is decreed for irrigation purposes, the change decree is limited to both the express volume of water utilized and the specific acreage irrigated."); *Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co.*, 120 Colo. 423, 428 (Colo. 1949) ("Appropriations of water for irrigation are made by and for use on specific land."). These are "black-letter principles of Colorado water law." *Jones Ditch*, 147 P.3d at 14. A "water right decreed for irrigation purpose cannot lawfully be enlarged beyond the amount of water necessary to irrigate the lands for which the appropriation was made." *Id.* (finding that appellant's interpretation of an 1882 decree would substantially enlarge the lawful historic use of the Jones Ditch Water Right).

The Supreme Court has held that, in a change of use proceeding, the applicant may not "dispense with the basic requirement of a change of water right that requires the

proponent of the change to identify the extent of actual beneficial use of the decreed appropriation at its place of use." *Santa Fe Trail Ranches Property Owners Assn. v. Simpson*, 990 P.2d 46, 54, 58 (Colo. 1999) In *Santa Fe*, the Court found that unlawful use of water for over 30 years could not be considered for determining historic use under the decreed water right to be changed. Moreover, because the 95CW09 Decree vacated the historic consumptive use findings of the W-4321 Decree and made no new historic consumptive findings, any use under the 95CW09 Decree was still implicitly limited to that usage which occurred for the original appropriation. *See Orr v. Arapahoe & Sanitation District*, 753 P.2d 1217 (Colo. 1988). In *Orr*, "surface irrigation rights, dating as early as the 1860s, were changed in a 1969 proceeding to an alternate point of diversion for irrigation by wells." *Santa Fe*, 990 P.2d at 55. "In 1981, the change water rights were the subject of a further proceeding to change the type and place of use to municipal purposes." *Id.* Because historical usage of the original surface irrigation rights had not been determined previously, the Supreme Court interpreted the 1969 change decree "as containing an implied limitation restricting usage to that which occurred for the original appropriation." *Id.* Both *Santa Fe* and *Orr* are applicable to the present case. Because the 95CW09 Decree lacked any determination of historic use, it contained an "implied limitation restricting usage to that which occurred for the original appropriation." *Id.* Thus, the Applicant's historic use analysis must be limited to the historic irrigation use on the Originally Decreed Lands both before and after the 95CW09 Decree.

In *Jones Ditch*, the Court found that "the Jones Ditch Water Right is limited to the amount of water necessary to irrigate the approximately 344 acres originally irrigated by Mr. Jones and for which he sought an absolute decree in 1882, no matter the number of acres that may have been subsequently irrigated." *Id.* at 22. The evidence at trial in

*Jones Ditch* revealed that there was a post-1882 increase in irrigated acreage from the Jones Ditch resulting in an enlargement of overall consumptive use. *See id.* "Such enlargement was unlawful in 1882 for the same reason that it is unlawful today – there is an implied limitation on consumptive use in the 1882 Decree fixing the lawful amount of water to the acreage for which the water was appropriated." *Id.* "Any use beyond that appropriation, for however long a period, is not 'historic use' for the purposes of establishing the lawful historic use of the Jones Ditch Water Right, and constitutes an unlawful enlargement." *Id.*

**G. Changing a water right's place of use prior to the 1969 Act.**

The Applicant contends that, prior to the adoption of the Water Right Determination and Administration Act of 1969, *de facto* changes in the place of use of a decreed water right were lawful without court approval provided no expansion of use occurred or nobody complained about and proved an expansion of use. However, the Supreme Court rejected such notions in *Jones Ditch*. In *Jones Ditch*, the Central Colorado Water Conservancy District offered "three reasons for why the lawful historic use of the Jones Ditch Water Right includes both the water used to irrigate the 344 acres [originally irrigated by Mr. Jones] *and* the additional acreage irrigated by Mr. Jones and his successors with water drawn from the Jones Ditch after 1882." *Id.* The three reasons were as follows:

> First, Central claims that, at the time the 1882 Decree was entered, Colorado law did not limit lawful historic use to the acreage irrigated when the decree was entered. Second, Central argues that the 1882 Decree is silent as to acreage, and consequently, that the water court was wrong to limit the decree to the acreage originally irrigated by Mr. Jones. Third, Central contends that the doctrine of laches bars the Opposers from challenging the use of water from the Jones Ditch to irrigate acres in excess of those in 1882.

*Jones Ditch*, 147 P.3d at 14.

The *Jones Ditch* Court held that "[w]e are not persuaded by Central's arguments and therefore affirm the water court's order as to the lawful historic use of the Jones Ditch Water Right." *Id.* The *Jones Ditch* Court rejected Central's first argument by holding that, under the principle of Colorado water law announced in previous cases, "the Jones Ditch Water Right is limited to the amount of water necessary to irrigate the approximately 344 acres originally irrigated by Mr. Jones and for which he sought an absolute decree in 1882, no matter the number of acres that may have been subsequently irrigated." *Id.*, 147 P.3d at 16. The Court rejected Central's second argument by finding that the 1882 Decree was "*silent* – not ambiguous – as to the specific acreage to which the decreed water would be used," and holding that, under such circumstances, "Colorado law recognizes an implied limitation to the acreage for which the appropriation is made." *Id.* (Original emphasis.) "This is not a rule for construing water decrees; it is a term implied by Colorado's law of appropriation and consumptive use." *Id.* (Emphasis added.).

Central's third laches argument was based on Mr. Jones irrigating lands beyond his decreed lands for 80 years without any challenge from other water users. *Id.*, 147 P.3d at 17-18. The *Jones Ditch* Court rejected this argument citing *Santa Fe*'s holding that unlawful use of water for over 30 years could not be considered for determining historic use. *See id.* The *Jones Ditch* Court found that, in the absence of any showing that opposers acted deceitfully, fraudulently, or with turpitude as to the timing of their challenge to Central's applications for a change in use, the doctrine of laches did not bar the opposers from challenging the irrigation of excessive acreage with water drawn by means of the Jones Ditch after the original appropriation in 1882. *See id.* at 17.

Like the 1882 Jones Ditch Water Right, the 1896 Subject Water Rights were

decreed absolute. The 1896 decree confirms that each of the Subject Water Rights had been appropriated for the purpose of irrigating specific acreages in specific locations through actual beneficial use. However, the 1896 decree for the Subject Water Rights was neither silent nor ambiguous as to the lands to be irrigated. In Judge Maes' Order of April 24, 2012, the court confirmed the amount and location of the expressly decreed lands for each of the Subject Water Rights on the Adams Ranch (aka H20 Ranch). *See* Order, April 24, 2012, p. 2. The Applicants' pre-1969 theory cannot trump the express provisions of a court decree confirming the lands irrigated under an absolute water right.

The Applicants' pre-1969 argument was also recently rejected by the General Assembly by implication through its enactment of Senate Bill 13-074. This bill, to be codified in relevant part under section 37-92-305(4)(a)(I)(B), C.R.S., addresses any pre-1937 decree for an irrigation water right that did not "expressly limit the number of acres an appropriator may irrigate under the water right." *See* Senate Bill 13-074, as signed by the Governor on April 4, 2013. The new statute provides that, for the purpose of determining lawful historic use under such a decree, "the lawful maximum amount of irrigated acreage equals the maximum amount of acreage irrigated in compliance with all express provisions of the decree during the first fifty years after entry of the original decree, unless a court of competent jurisdiction has entered a final judgment to the contrary." *Id.* at Section 1, amendment to section 37-92-305(4)(a)(I), C.R.S.

By limiting this legislation to pre-1937 decrees for irrigation water rights that did not expressly limit the number of acres appropriators may irrigate under the water rights, the General Assembly implicitly affirmed that irrigation water rights in other pre-1937 decrees are limited to their expressly decreed acreages. Also, if the Applicants' pre-1969 theory was correct as a matter of law, then there was no need to limit the period to 50 years after

a pre-1937 decree when the General Assembly could have simply ended the period in 1969 when the Applicant's allege the law changed. Thus, in the present case, for the purpose of determining the historic use of the Subject Water Rights under their pre-1937 decree, the lawful maximum amount of irrigated acreage is that acreage expressly decreed for each of the Subject Water Rights in 1896.

Senate Bill 13-074 appears, in part, to address the *Jones Ditch* decision regarding an 1882 decree that did not expressly limit the acreage to be irrigated such that, under the new legislation, any lands irrigated within a reasonable proximity to the Jones Ditch by 1932 would be considered for the purpose of determining lawful historic use under the Jones Ditch Water Right. However, this necessarily means that any change in location of use after 1932 and prior to 1969 would be considered unlawful, which is contrary to the Applicant's pre-1969 argument. Senate Bill 13-074, expressly and by implication, affirms the Engineers' position that, for the purpose of determining lawful historic use of the Subject Water Rights, the lawful maximum amount of irrigated acreage equals the maximum amount of acreage irrigated in compliance with the express provisions of their original 1896 decree, including express provisions regarding the amount and location of acreage to be irrigated under the Subject Water Rights.

**H. Reopening the 95CW09 Decree.**

Finally, in the present case, the "change of water right application reopens the prior decree for determination of the true measure of the appropriative right's consumptive use draw on the river system." *Ready Mix Concrete*, 115 P.3d at 646 (finding that a previous decree determining water to be nontributary could be corrected during a change adjudication because the water was, in fact, tributary). The "right to change a water right is limited to that amount of water consumed beneficially over a

representative historical period of time by use pursuant to the decree at the appropriator's place of use." *Id.* at 645-46. Thus, under *Jones Ditch, Ready Mix Concrete*, *Santa Fe*, and *Orr*, even if the 95CW09 decree erroneously identified the acreage *lawfully* irrigated under the subject water rights prior to the W-4321 decree, then the Court may correct that error in the present change case, enforce *Orr's* implied limitation, and determine the true measure of the appropriative right's consumptive use at the appropriator's originally decreed place of use. Under *Jones Ditch* and *V Bar Ranch*, any enlargement of use on lands beyond those this Court has already found to be the decreed places of use was either unlawful use or use under an un-adjudicated water right, neither of which may be included in the Applicants' analysis of the historic consumptive use of the Subject Water Rights in the present case.

In the present case, the Applicants propose a change from the 95CW09 decree, which "alters the subject matter, the cause of action, and the parties affected by the proposed action, in contrast to the exercise of the water right[s] pursuant to the terms of the existing decree" *Id.* The 95CW09 Decree was only controlling as to the exercise of the water rights pursuant to the terms of the 95CW09 decree after it was entered. It does not control what happened prior to the 95CW09 decree and it does not control the Court's determination of lawful historic use under the 1896 water rights for change purposes in the present change case. Even if the Court were to agree with the Applicants' interpretation of the 95CW09 Decree, any erroneous findings about the lawful location of use for the Subject Water Rights could now be corrected so as to determine the true measure of the 1896 rights. Accordingly, the Court now clarifies Judge Maes' April 24, 2012 Order and holds that the Applicants' historic consumptive use analysis for the proposed change of water rights should be limited to the lawful

historic use of the Subject Water Rights in their respective places of use as originally decreed in 1896.

## IV. CONCLUSION

For all of the foregoing reasons, the Court grants the Engineers' motion and finds that the plain language of the decree in 95CW09 did not modify the places of use of the 1896 Subject Water Rights. The Court holds that only historic consumptive use attributable to each of the Subject Water Rights, as historically used on the parcels specifically decreed to be irrigated under each water right in 1896, can be included in the historic use determination for each right. This analysis must be done separately for each of the Subject Water Rights. In light of the Court's conclusions, the Engineers' requests for alternative relief are now moot and, therefore, denied. The Applicants' request for attorney fees is also denied.

So ordered this 20th day of June, 2013.

**BY THE COURT:**

**LARRY C. SCHWARTZ, WATER JUDGE**
**DISTRICT COURT, WATER DIVISION 2**