10-3-2003

City of Aurora v. Simpson (In re Water Rights of Park County Sportsmen's Ranch)

SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue, Fourth Floor
Denver, Colorado 80203

Appeal from the District Court, Water Division 1
State of Colorado
Case Number: 96CW014
Honorable Jonathan W. Hays, Presiding
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH

Appellants:
CITY OF AURORA, a municipal corporation on the counties of Adams, Arapahoe and Douglas, acting by and through its Utility Enterprise; and PARK COUNTY SPORTSMEN'S RANCH, LLP, and KENNETH J. BURKE, former counsel for Park County Sportsmen's Ranch, LLP

Appellees:
Colorado State Engineer, Harold D. Simpson; Division Engineer for Water Division No. 1; Colorado Water Conservation Board; Colorado State Division of Wildlife; City of Thornton; City of Englewood; City and County of Denver; County of Park; Center of Colorado Water Conservancy District; Elkhorn Ranch Homeowners Association; Upper South Platte Water Conservancy District; Board of Commissioners of County of Park; Park County Water Preservation Coalition; United States of America; Centennial Water and Sanitation District; Union Pacific Resources Company; The Frieda Wahl Trust; Steve Bargas; Kimberly Bargas; Frida Bargas; H.D. and Mary Catherine Coleman; James T. Benes; James T. Benes, Jr.; Cassandra L. Benes Trust; Tarryall Land and Cattle, LLC; Magness Land Holdings, LLC; Estate of Bob Magness; Personal Representatives of the Estate of Bob Magness; Town of Fairplay; James Campbell; Ruth Bartle; Indian Mountain Corporation; Jill E. Boice; Bob Burch; Robert W. Heckendorf; Michael and Vicki Lothrop; Richard A. Grenfell; David Wilson; Darrell Johns; David Johns; John Johns; Joseph G. and Joyce C. Minke; James E. Copanos; Central Colorado Cattlemen's Association; Gregory Snapp; Roy G. Doerr; Erik Taylor; Wildwood Recreational Village Assoc.; Mark and Carol Carrington; Husludwig Kommert; and Stephen R. Cline, Esq.

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01-SA-412
Case Number

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APPELLANT KENNETH J. BURKE'S OPENING BRIEF

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I. INTRODUCTION

This direct appeal involves two parts: the appeal of the merits of the dismissal of the application and the appeal of the award of attorney fees. Applicant Park County Sportsmen's Ranch, LLP ("PCSR" or "Applicant") appeals the merits of the order dismissing the application and the order of attorney fees. Kenneth J. Burke ("Mr. Burke"), trial counsel for PCSR, appeals the award of attorney fees against him. The City of Aurora ("Aurora") also appeals the award of fees against it. PCSR has filed a brief on the merits of the dismissal. If PCSR is successful in its appeal of the merits, the attorney fees issue is moot. Mr. Burke supports the arguments in the opening brief of PCSR. Mr. Burke also supports the arguments in the brief of Aurora.

This brief will primarily address the attorney fees issue, but will also address two issues involved in the appeal on the merits. First, it explains why this application was squarely in line with the long history of Colorado law and thus not groundless. Second, it explains why the Water Court erred in ruling that certain portions of PCSR's claims were frivolous from inception.

II. STATEMENT OF ISSUES

1. When the application was supported by the testimony of seven expert witnesses, did the Water Court abuse its discretion in ruling the application was groundless because of lack of supporting evidence?
2. Was it an abuse of discretion to sanction trial counsel with a huge award of attorney fees because the court found the testimony of certain expert witnesses was not credible?
3. Was the application squarely in line with well-established Colorado water law and thus not groundless?

4. Did the Water Court err as a matter of law in awarding attorney fees based on a misreading of a memorandum by an expert witness?
5. Where the expert's memorandum discussed potential additional work, did the Water Court abuse its discretion in awarding attorney fees by ignoring evidence showing the work had been done or was not necessary?
6. After qualifying the applicant's experts and thus determining that their testimony was sufficiently reliable under C.R.E. 702, did the Water Court err by finding the claim was groundless because the experts' testimony was not sufficiently reliable?
7. After ruling that certain evidence could not be used at trial because of untimely disclosure, did the Water Court abuse its discretion in finding the claim was groundless because of the absence of that supporting evidence?
8. When the applicant sought to use water from precipitation, irrigation run-off, and water salvaged by a reduction in evaporative and vegetative losses, and where that part of the application was in accordance with Colorado water law, did the Water Court abuse its discretion in finding those claims were frivolous since inception?
9. Did the Water Court deny due process by ruling without a hearing that the Opposers were entitled to attorney fees?

III. STATEMENT OF THE CASE

Mr. Burke adopts the Statements of the Case in the opening briefs of PCSR and Aurora.

IV. STATEMENT OF FACTS

A. Origins of the Project. In 1990, the Environmental Protection Agency vetoed the issuance of a permit for the massive Two Forks project. *Alameda Wtr. & San. Dist. v. Reilly,*

930 F. Supp. 486, 489 (D. Colo. 1996). The Two Forks project was intended to provide a large supply of water to a number of Colorado Front Range municipalities, including Aurora. *Park County Water Preservation Coalition v. Columbine Assocs.*, 993 P. 2d 483, 487 (Colo. 2000). After the Two Forks veto, Colorado's Front Range municipalities were challenged to meet their needs by developing smaller and more efficient water projects. The project that is the subject of this appeal had its genesis as a result of this veto. This project is today known as the South Park Conjunctive Use Project ("SPCUP").

James L. Jehn, a geologist and recognized water expert, is one of the partners in PCSR, the developer of the SPCUP *(Tr. 8/23/00, pp. 36, ll. 22-23)*. Through extensive prior geologic work in South Park, Jehn became aware of an untapped water supply in that region *(Tr. 8/23/00, p. 58)*. He believed such supply was capable of efficiently delivering water to Front Range municipalities. Jehn formed a plan to develop this water supply to meet these municipal needs *(Tr. 8/24/00, p. 44)*. In order to consider the legal aspects of his nascent project, Jehn formed a venture with Mr. Burke, a Denver attorney experienced in water matters. In time, Messrs. Jehn and Burke added three more partners to facilitate undertaking the SPCUP. This group eventually created PCSR, now a limited liability partnership *(Exhibit A-31, admitted 7/12/00, p.65, l. 23; Exhibit A-32, admitted 7/12/00, p.66, l. 9)*.

In 1990, the venture drilled wells, conducted water quality tests, and explored the underground water supplies in the area *(Tr. 8/23/00, p.60, l.7 to 85, l. 22)*. In the early 1990's, PCSR secured well permits *(See e.g. Exhibit A-68, and Park County Sportsmen's Ranch LLP v. Bargas,* 986 P.2d 262 (Colo. 1999) and began the adjudication of two existing reservoirs and other components of the ranch's existing irrigation system. These reservoirs and associated ditch

system were adjudicated *(Exhibits A-90, A-91 and A-92, admitted 8/28/00, p.41, l.17)*. These reservoirs would later be included in the SPCUP for municipal use. This Court has noted that PCSR "already has in place structures for recharging the aquifer." *Park County Commissioners v. Park County Sportsmen's Ranch,* 45 P.3d 693, 699-700, n. 6 (Colo. 2002) ("*PCSR II*").

In 1995, PCSR began negotiating with Aurora regarding that city's potential use of the SPCUP *(p. 5, ¶ 3(F) of Exhibit A-4, admitted 7/12/00, p.66, l.25)*. Aurora retained its own independent professional advisors to evaluate the feasibility of PCSR's project. Aurora determined there was unappropriated water available and retained PCSR's predecessor as its agent-in-fact to adjudicate the project. *(Exhibit A-4, Tr. 7/14/00, p.16, ll. 23-25)*. On January 29, 1996, an appropriate adjudication application was filed, and amended as a matter of course shortly thereafter ("Application"). The Application was filed by PCSR acting for itself and as agent-in-fact for Aurora.

B. Litigation History. The Application sought judicial confirmation of PCSR's absolute and conditional water rights. The Application included Aurora's municipal claims for surface direct flow and storage structures, its wells, an underground storage program, and a plan for augmentation and exchange. As noted, some of these claims were associated with facilities that were constructed and already in use. The Application also included a claim for an absolute water right for certain irrigation and stockwatering uses then being made on the ranch. *(Application, 1/29/96, ¶¶ 14-19 of 3rd Claim For Relief)*.

One of the first significant hearings in the case was held in Fairplay on November 6, 1998. At that time, the Water Judge recounted his experience with another case he had recently tried in which an augmentation plan was also involved. The Water Judge acknowledged that

even where the applicant had "dismally failed to show" that its plan would avoid injury, the pertinent statute (§37-92-305(3), 10 C.R.S. (2002)) required that **two** opportunities be afforded to establish an augmentation plan *(Tr. 11/6/98, p. 98, ll. 12-23)*. Nonetheless, the Water Judge made it clear that he would like to eliminate the need for the second trial in the instant case *(Tr. 11/6/98, p. 99, ll. 8-11)*. The Water Judge later offered a road map to the Opposers to attack PCSR's regional model and the credibility of PCSR's experts whereby they could defeat PCSR's claim without conducting the second trial required by statute. *See February 14, 2001 Order, p. 4.* The Opposers followed that suggestion when they moved to dismiss the application on such grounds.

Before trial, PCSR and Aurora performed a wide variety of geologic and engineering activities in support of the project: literature review, field and laboratory investigations, well and core drilling, installation of piezometers, geologic and geophysical logging and log analysis, analysis of formation and aquifer samples, water quality analyses, test-well pumping at multiple locations, aquifer percolation and recharge testing, aerial photography, surveys of site locations, and securing federal permitting needed for testing on federal lands. PCSR and Aurora created at least five computer-assisted models to estimate water availability and project impacts, to demonstrate the project's recharge capabilities, to assist in the design and sizing of project features, and to illustrate the project's feasibility. PCSR and Aurora issued at least eight formal reports digesting the results of the foregoing field efforts, laboratory testing, and modeling.

The parties filed more than 1000 documents with the court and took the depositions of over 30 individuals, the vast majority of whom were experts, and many of whose depositions

extended over multiple days. Pursuant to numerous extensions granted by the Water Judge, discovery ended on June 26, 2000. Trial began on July 10, 2000.

In all, PCSR and Aurora spent nearly $7 million for the foregoing technical and legal preparations *(Tr. 7/12/00, p. 73, l.24 – p. 74, l. 8; 7/14/00, p. 18, ll. 21-24).*

C. PCSR's Modeling Efforts. PCSR developed three independent MODFLOW ground water models. Two of these models were local ground water models designed to assess the ability of the aquifers to be recharged. These models were incorporated into PCSR's Percolation Test Report, an extensive expert report describing each aquifer's recharge capabilities at four of PCSR's six recharge sites *(Exhibit A- 900)*. The third model was a regional ground water model. PCSR's regional ground water model was developed by geologist Harvey Eastman, PhD ("Eastman"), of Jehn Water Consultants *(Tr. 7/19/00, p. 76)*, with substantial assistance from Paul Van Der Heijde, PhD, chairman of the International Ground Water Modeling Institute *(Tr. 8/7/00, p. 18, ll. 5-6)*, Ken Kolm, PhD, professor of computer modeling at Colorado School of Mines *(Tr. 8/17/00, p.18, ll. 5-6)* and geologist and PCSR partner Jehn. *(Tr. 8/23/00, pp. 149-150)*. Further assistance and peer review of the ground water model was provided by engineer Dan Ault ("Ault") and geologist Tom Hesemann ("Hesemann") of Rocky Mountain Consultants *(Tr. 8/17/00, p.18, ll. 16-17)*.

A surface water model was constructed by engineer Ross Bethel ("Bethel") *(Tr. 8/17/00, p. 18, ll. 17-18)*. The surface water model was designed to estimate the availability of surface water for beneficial use, aquifer recharge, and other project purposes *(Tr. 8/7/00, p. 58)*.

Aurora had developed a model to predict its demand for water in the future, as a gauge of how the SPCUP might be operated in practice *(Tr. 2/20/01, p. 108, ll. 8-17)*.

This court has in the past favorably reviewed the expert testimony of Messrs. Ault, Bethel and Jehn: *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 88-89 (Colo. 1996) (Ault); *City of Thornton v. Clear Creek Wtr. Users' Alliance*, 859 P.2d 1348 (Colo. 1993) (Bethel); *Simpson v. Yale Investments*, 886 P.2d 689 (Colo. 1994) (Jehn).

PCSR and Aurora also made a separate mathematical analysis of the project based upon the Glover Equation, a recognized technique widely used in augmentation plans *(Tr. 7/19/00, p. 38, ll. 19-20; 6/19/00 Affidavit of Daniel Ault, attached as Exhibit 5 to Response to Motion To Exclude From Evidence the RMC Glover Analytical Stream Depletion Model)*. The results of this analysis were consistent with the results of PCSR's ground water model *(6/19/00, Affidavit of Daniel Ault, attached as Exhibit 5 to Response to Motion To Exclude From Evidence the RMC Glover Analytical Stream Depletion Model)*. The Water Judge precluded PCSR's use of this analysis at trial *(Tr. 7/20/00, pp. 75-77)*.

D. PCSR's Claims for Salvaged Water. Throughout the conceptualization of this project, PCSR had accounted for certain recharge water captured by its wells and underground storage facilities from sources such as precipitation. Some of this precipitation was captured because of decreased evaporation and reduced plant transpiration caused by lowering of the water table *(Tr. 7/17/00, pp. 45-46)*. The Opposers labeled this "Salvaged Water" *(Tr. 8/8/00, p. 70)*.[1] About one month prior to trial, the Water Judge considered motions directed toward this water. In ruling on these motions, The Water Judge ordered that PCSR may obtain a junior priority in salvaged water (*Order of June 5, 2000, at 1*).

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1 Such a salvaged water plan is the cornerstone of Colorado's massive Closed Basin Project, a federal reclamation project located in the San Luis Valley. Closed Basin Landowners Ass'n v. Rio Grande Water Cons. Dist., 734 P.2d 627 (Colo. 1987).

E. Trial Proceedings. Trial began on July 10, 2000 and continued for eight weeks, from July 12 to August 31, 2000 and from February 20 to 22, 2001. The Water Judge qualified seven expert witnesses under C.R.E. 702 to offer opinion evidence and admitted hundreds of exhibits in support of the application. There were five principal expert witnesses. Bethel was qualified as an expert in hydrology, water rights engineering, water resource engineering, and water resource computer modeling. *(Tr. 7/12/00, p. 16)*. Eastman was qualified as an expert in geology, geologic mapping, geochemistry, geomorphology, hydrogeology, and ground water modeling. *(Tr. 7/19/00, p.54, 75)*. Jehn was admitted as an expert in geology, hydrogeology, computer modeling, water rights, geophysical log interpretation, and augmentation plans *(Tr. 8/23/00, p. 56)*. Ault was qualified as an expert in civil engineering, water resources engineering, water rights engineering, and ground water modeling and analysis *(Tr. 2/20/01, p. 93)*. Hesemann was qualified as an expert in geology, hydrogeology, water rights, geochemistry, ground water modeling, and geophysics *(Tr. 8/28/00, p. 202)*.

These five experts were unwavering in their opinions that the SPCUP was a feasible recharge project that would be operated to prevent injury to other water rights. *(Tr. 2/22/01, p. 418, ll. 14-15 (Bethel); 8/10/00, p. 37, ll. 8-9 (Eastman); 8/24/00, pp. 31, ll. 4-17 (Jehn); 2/21/01, pp. 269 l. 20 – 270, l. 10, (Ault); 2/20/01, pp. 23-27, 47-48, 79 (Hesemann))*.

In fact, the Water Judge had stated that PCSR's claims were "legitimate" and "valid and contemplated by law at the time of filing." (*Order of 11/13/01, p. 10; Order, 5/1/03 p. 13, copy attached hereto as Appendix A*). During the course of the trial, the Water Judge refused to allow PCSR to support with expert testimony the newly proposed terms and conditions in its proposed decree. He imposed new conditions never before required of Water Court applicants and, as

demonstrated in the briefs of PCSR and Aurora, he disallowed certain important supportive evidence sought to be introduced by PCSR.

PCSR concluded its presentation of evidence on February 22, 2001, and the Opposers' portion of the case was scheduled to begin on July 5, 2001. Shortly after the conclusion of PCSR's case in chief, certain Opposers followed the Water Judge's earlier "road map" and moved to dismiss the entire application as unsupported by credible evidence. This motion was granted on June 1, 2001 (*copy attached to PCSR Opening Brief as Appendix J*). The Water Judge's order was crafted in such a way that he precluded conduct of the statutory "second trial," that he had stated two years before he wished to avoid. The dismissal order included dismissal of PCSR's claims for some structures that were built and already in use. Without comment, the Water Judge also dismissed PCSR's uncontroversial claim for an absolute decree for the existing irrigation and stockwatering uses of PCSR Spring No. 4.[2]

F. Attorney Fee Proceedings. After the Water Judge dismissed PCSR's case, certain Opposers filed claims for attorney fees. Nearly all of these claims were unquantified and unspecified. In an Order of November 13, 2001, the Water Judge ruled without a hearing that PCSR's claims were "groundless" and that PCSR's claims for salvaged water and other credit were "frivolous since inception" (*copy attached to PCSR Opening Brief as Appendix K*). He did so notwithstanding the fact that he had previously ruled in PCSR's favor on the principal legal

2 PCSR adequately supported this claim. See, e.g. Bethel, 7/14/00 p. 51, 11. 17-23; Jehn, 8/23/00, p. 143, l. 15 to 144, l. 1 and 8/24/00 p. 97, ll. 12-18; discussion generally from Tr. 8/28/00 pp. 10-13; Exhibit A-34 admitted on Tr. 8/24/00 p. 126, l. 15 and discussion on lines 2-20; and pages 3-4 of Exhibit A-1200, admitted on 2/20/2001, p. 43, ll. 11-15, describing Spring No. 4 Collection System as "an existing irrigation ditch which collects water from springs emanating from the Reinecker Ridge." See also patents, Exhibit A-40, admitted on 8/28/00 p. 15, l. 22 and Exhibit A-41, admitted on 8/28/00, p. 17, 11. 10-13 along with discussion between court and counsel from page 14, l. 2 to page 17, l. 13.

issue involved regarding the use of salvaged water (*Order of June 5, 2000, at 1*). The Water Judge also joined Aurora as an additionally liable party and directed that a future hearing would determine the *amount* of fees. The Water Judge later ruled that Mr. Burke, trial counsel for PCSR, was included in the fees award and could separately participate in the hearings. Mr. Burke then withdrew as counsel for PCSR.

After hearing limited evidence regarding the statutory factors, the Water Judge entered an order awarding attorney fees against PCSR, Aurora and Mr. Burke, jointly and severally, for more than $1.2 million (*5/1/03 Order; copy attached hereto as Appendix A).* The Court's award of attorney fees was narrowly based on an expert's memorandum regarding potential additional work and the claims put forth by Applicant to use precipitation, irrigation return flows and recharge through reduced evapotranspiration.

V. SUMMARY OF ARGUMENT

The Court erred as a matter of law and abused its discretion when it awarded attorney fees against Mr. Burke. The Court did not apply the proper standard for an award of attorney fees under §13-17-102(5) C.R.S. (2002). Colorado courts have found a claim to be groundless if the allegations of the complaint are not supported by any credible evidence at trial. The mere fact that a party does not prevail in an action does not justify an award of attorney's fees. A claim is frivolous when there is no rational argument based on the evidence or law in support of the claim. These circumstances do not exist here.

As the basis for the fee award, the Court found (1) the Application became groundless as of the date of Eastman's October 28, 1998 Memo, and (2) the portion of the Application relating to the use of salvaged water, precipitation, and irrigation returns was frivolous from inception.

PCSR's Application sought a decree confirming its right to divert and store water in a manner founded on well-established Colorado water law. The Water Judge's ruling on underground storage was contrary to this Court's prior decision in this matter (*PCSR II*) and incorrectly construes the General Assembly's intent regarding this activity. The Application also included an augmentation plan. In determining PCSR's obligations, the Water Judge ignored the dictates of this Court delivered in an earlier appeal (*Park County Sportsmen's Ranch LLP v. Bargas*, 986 P.2d 262 (Colo. 1999) (*PCSR I"*)). Colorado statutes require a Water Judge to approve any augmentation plan if such plan will not injuriously affect other water users. If the Water Judge determines that the proposed decree would cause an injurious effect, then the Water Judge is obligated under Colorado statute to afford the applicant an opportunity to propose terms and conditions which would prevent injurious effects. The Water Judge failed to fulfill his statutory obligations to consider PCSR's proposals to avoid injury and instead simply dismissed the Application. In doing so, the Water Judge misunderstood the purpose of retained jurisdiction. The Water Judge required the Applicant, in advance, to prove its depletions in time and amount with reasonable certainty. The Colorado legislature clearly did not expect the Water Court, in initially determining an augmentation plan, to make anything but a **preliminary** decision regarding injury. The Court incorrectly applied the statutory requirements and dismissed the Application based on his incorrect interpretation of the statute.

The Water Court's award of attorney's fees was based on a misinterpretation of Eastman's Memo and, further, was contrary to the evidence. The Memo was intended to **enhance** the model's ability to withstand criticism at trial, not to propose a list of tasks to be completed before the model could be defended at all. The Court improperly disregarded testimony that many of

the tasks set forth in the Memo were completed and that the model was reliable. The Court disregarded the testimony of four expert witnesses, all of whom found the project feasible. The huge award of attorney fees against trial counsel will have a chilling effect on the use of expert witnesses, cases, and frustrate other important water law policies and virtually preclude conjunctive use projects.

The Water Court erred in refusing to consider the existence of PCSR's rebuttal expert reports in determining groundlessness.

The Water Court improperly found the portion of the Application relating to precipitation, irrigation return flows and salvaged water was frivolous from inception. In doing so, the Court misapplied Colorado law.

Finally, the Water Court denied Mr. Burke's right to due process by finding entitlement to attorney's fees without conducting a hearing.

VI. LEGAL ARGUMENT

This brief will discuss the standard for an award of attorney fees under Colorado statutory and case law, and will detail how the Water Judge failed to apply the correct standard when he awarded fees. In order to review the Water Court's determination that the Application was groundless, it is important to understand the requirements for water appropriation and storage in Colorado. We will then discuss the law of water augmentation and show where the Water Judge incorrectly applied Colorado law.

This brief will next show that not only did the Water Judge apply the incorrect standard when awarding attorney fees, his award disregards the evidence. PCSR presented the testimony of five experts, all of whom found the project feasible. The Water Court had disallowed

additional expert reports and testimony, and then failed to consider the existence of that evidence in making its determination on groundlessness.

The Water Court also found a small portion of the application frivolous from inception, in contradiction to Colorado law. This brief will address the statutory and case law relating to such claims to demonstrate where the court erred.

Finally, this brief will show how Mr. Burke's due process rights were violated by the Water Judge's failure to conduct a hearing on the entitlement to attorney fees prior to awarding them.

A. THE WATER COURT FAILED TO APPLY THE CORRECT STANDARD FOR AN AWARD OF ATTORNEY FEES.

1. THE COURT DISREGARDED THE PROPER STANDARD FOR FINDING A CLAIM TO BE GROUNDLESS.

The Court's award of attorney fees pursuant to §13-17-102(5), C.R.S. (2002) is supported neither by legal precedent, nor the intent of the statute. C.R.S. § 13-17-102(1) states:

> Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

A claim is groundless if the allegations of the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by **any** credible evidence at trial. *E-470 Public Highway Authority v. Jagow*, 30 P.3d 798 (Colo. App. 2001), *aff'd on other grounds, Jagow v. E-470 Public Highway Authority,* 49 P.3d 1151 (Colo. 2002); *Western United*

Realty, Inc. v. Isaacs, 679 P.2d 1063, 1069 (Colo. 1984). Even though the court has authority to award attorney fees under this statute, fees should not be awarded simply because a party does not prevail in the action. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

In determining the amount of an attorney fee award, the trial court, in the exercise of discretion, is required to consider, among other factors, "the availability of facts to assist a party in determining the validity of a claim... ." *Harrison v. Smith*, 821 P.2d 832, 834 (Colo. App. 1991). Even though not accepted by the trier of fact, if the court is able to conclude that a claim had supporting evidence and was not facially frivolous or groundless, then attorney fees should be declined. *Christian v. Westmoreland*, 809 P.2d 1105, 1106 (Colo. App. 1991). Here, as previously noted, several experts testified in support of the claim, and the Court itself observed that the claim was "legitimate" and "valid and contemplated by law" when filed.

The test for groundlessness assumes that the proponent has a valid legal theory but can offer *little or nothing* in the way of evidence to support the claim. *Bilawsky v. Faseehudin*, 916 P.2d 586, 590 (Colo. App. 1995). In this case the applicant offered weeks of expert testimony and hundreds of exhibits in support of the application. The court may not have found the evidence persuasive, but it cannot characterize this as *little or no evidence.*

During the course of the eight-week trial, the Applicant presented voluminous expert testimony with regard to the feasibility of the project. Eastman testified that not only could the ground water model reasonably predict depletions, but that the entire project was feasible. *(Tr. 7/27/00, p. 24, ll. 17-18).* As will be demonstrated below, Ault and Hesemann testified that the model was adequate and the Applicant would be able to predict depletions that caused

injuries to other users, although PCSR proposed to determine actual depletions through measurement and monitoring.

Mr. Burke will also show that the quantum of evidence admitted by the Court in support of the application was prodigious. Due to that amount of evidence and the Court's awareness of rebuttal evidence which further supported the application, the Water Court erred when it found the application was groundless.

2. THE COURT DISREGARDED THE PROPER STANDARD FOR FINDING A CLAIM FRIVOLOUS.

The Colorado Supreme Court has defined *frivolous* claims as those where "the proponent can present no rational argument based on the evidence or law in support of that claim or defense." *Western United Realty, supra,* 679 P.2d at 1069. This definition does not apply to meritorious actions that prove "unsuccessful, legitimate attempts to establish a new theory of law, or good faith efforts to extend, modify, or reverse existing law." *Id.; see also* §13-17-102(7), 5 C.R.S. (2002).

Fee awards ***will*** be set aside if the record does not support a determination that the claim was frivolous. *SaBell's Inc. v. City of Golden*, 832 P.2d 974 (Colo. App. 1991); *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991)(rejecting trial court's finding that action was frivolous, where substantial legal arguments supported plaintiffs' position); *William H. White Co. v. B&A Manufacturing Co.*, 794 P.2d 1099 (Colo. App. 1990)(claim not frivolous where plaintiff asserted a rational argument in support of its contention). Here, there was abundant support for the validity of the application. At the very least, PCSR provided strong arguments for changes in the law or the application of a new legal theory with respect to its use of precipitation, irrigation

return flows, and what the Court has referred to as "salvaged water." Thus, the court's decision to award attorney fees is not supported by the record and should be reversed.

3. THE INTENT OF THE ATTORNEY FEES STATUTE IS TO PREVENT EGREGIOUS CONDUCT, NOT TO PUNISH AN ATTORNEY FOR BRINGING A CLAIM WHICH PROVES UNSUCCESSFUL.

The Court's Order granting attorney fees was contrary to the intent and purpose of the statute, which is to prevent egregious conduct. Mr. Burke adopts the arguments on this issue set forth in CTLA's *Amicus* Brief.

B. THE APPLICATION WAS NOT GROUNDLESS BECAUSE IT FOLLOWED WELL-ESTABLISHED COLORADO WATER LAW.

PCSR developed its conjunctive use project in accordance with Colorado water law. The application was therefore not groundless.

1. LAW OF APPROPRIATION IN COLORADO. The Colorado Doctrine of Prior Appropriation is enshrined in Sections 5 and 6 of Article XVI of the Colorado Constitution. These sections declare that the waters of Colorado's natural streams are public property subject to appropriation, and provide that the right to divert Colorado's unappropriated waters "shall never be denied." The precise means by which the natural flows are altered or controlled is immaterial to the constitutional right to appropriate, so long as the water is applied to a beneficial use. *Larimer County Reservoir Company v. People*, 8 Colo. 614, 616, 7 P. 794, 796 (1886). Applicants also have the right to use streams to transport water to its place of ultimate application to beneficial use. §§37-83-101, 10 C.R.S. (2002) and 37-83-104, 10 C.R.S. (2002).

In addition to the **removal** of water **from** its natural course or location, Colorado statutory law defines the term "divert" to include the **control** of water **in** its natural course or location. §37-92-103(7), 10 C.R.S. (2002). This definition expressly recognizes that such

removal or control may be accomplished by means of a ditch, canal, reservoir, pipeline, well, or pump. The SPCUP incorporates each of these devices. Portions of PCSR's application seek a decree confirming its right to divert and store water both above and below the ground surface.

2. **WATER STORAGE IN COLORADO.** The right to store water in reservoirs is expressly recognized by Colorado statutory law as a right of appropriation under the Colorado Constitution. §37-87-101, 10 C.R.S. (2002). Such water may be stored above or below ground. This court has recognized that the right to store water in underground reservoirs comprises a right of constitutional stature. *Board of County Commissioners of the County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 704-710 (Colo. 2002) ("*PCSR II*"). *See also State v. Southwestern Colo. Wtr. Conservation Dist.*, 671 P.2d 1294, 1320-1321 (Colo. 1983) ("*Huston II*") (wherein this court ruled that the stated claim for the underground storage of water met the requirements for a determination of an appropriation of tributary water). Such rights, of course, are derived from the Colorado Constitution. The Colorado legislature has also expressly sanctioned the underground storage of water in aquifers. §§37-87-101(2), 10 C.R.S. (2002) and 37-92-103(10.5), 10 C.R.S. (2002).

Water may be stored in one of two ways:

Use of Artificial Structures. The traditional way to store water is to construct a new facility such as a dam. The dam would then impound water for later use. This water would be captured after the structure is placed on-line and the water would be released when needed. Such storage would not entail the creation of storage capacity by utilizing an existing, natural structure such as a crater lake or cavern.

Use of Natural Structures Water may also be stored by taking advantage of natural structures. *See, e.g. Kistler v. Northern Colo. Wtr. Conservancy Dist.*, 126 Colo. 11, 246 P.2d 616 (1952), *Cresson Consolidated Gold Mining Co. v. Whitten*, 139 Colo. 273, 338 P.2d 278 (1959) ("*Cresson*"); *Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960); State v. Lionello*, 157 Colo. 161, 401 P.2d 593 (1965). When these structures are already full of water, storage capacity is created by reducing the level of water in the natural structure. When the project is out of priority, injury is prevented by maintaining the normal outflow to the extent needed to protect those relying on the tributary contributions of the structure in question. *Cresson.* (As used herein, the term "normal outflow" means the outflow to the streams that would have occurred in the absence of the project.)

In the case of aquifers, storage takes place when the decree holder fills available capacity with waters legally available under the priority system. §37-92-103(10.5), 10 C.R.S. (2002); *Huston II, 671 P.2d at 1320-132I; PCSR II.* So long as the normal outflow is maintained when necessary, no one is injured by the storage. *Cresson.*[3]

As recharge water becomes available to a project consistent with the priority system, the appropriator may store such water for later use. When done pursuant to decree, such water is properly regarded by statute as being "stored" or "in storage." PCSR sought and supported its claims to just such a decree in this case, based on these well-recognized principles.

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3 Additionally, such water may be stored out-of-priority under section 37-80-120 (1), 10 C.R.S. (2002), by taking into account the sufficiency of the water supply thereafter available to downstream seniors. See also §37-92-501 (1), 10 C.R.S. (2002) (precluding the curtailment of ground water withdrawals when water would not have been available to the seniors in the absence of such withdrawals). §§37-92-102(2)(d), 10 C.R.S. (2002) and 37-92-502(2)(a), 10 C.R.S. (2002) contain similar provisions.

3. LEGITIMACY OF PCSR'S PROPOSED PRE-STORAGE ACTIVITIES. In the case of full, natural storage structures such as aquifers, the creation of storage capacity necessarily entails the prior pumping or drainage of water. This water is the property of the public. See *PCSR II*, 45 P.3d at 707. Once diverted, the released water becomes the property of the appropriator subject to allocation by it. So long as the normal outflow is maintained to the extent necessary when the project is out-of-priority, no one can possibly be injured by an appropriator's proposed initial creation of a project's storage capacity.[4] Such flows may be maintained indefinitely.

Downstream water users rely on the flows leaving the South Park aquifers. PCSR's wells would maintain the normal outflows as needed. Since no person would be deprived of water to which he or she would be entitled, no replacement of the diverted water is required and no additional augmentation is called for to support these initial withdrawals. As shown by PCSR in its brief, the Water Judge ruled to the contrary and directed that all of this water needed to be fully replaced by PCSR. This ruling is wholly at odds with the holding of this Court in *PCSR I.* The Water Judge's erroneous ruling infected his entire disposition of PCSR's application. This error alone warrants reversal of the dismissal and the resulting award of fees.

In fact, the Water Judge understood that the stream depletions caused by the project were the same waters as those captured from the streams by the SPCUP's cone of depression: "Mr. Jehn has now explained to me that what is depleted from the stream is what is induced into the aquifer." *(Tr. 8/28/00, p. 158, ll. 11 – 13).* Later, the Water Judge made the following specific finding to that effect: "The rate and volume of stream depletion will **necessarily** equal

4Senior well users in the aquifer are subject to the protective provisions of Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (Colo. 1961)

the rate and volume of recharge to the aquifer." [Emphasis supplied] *November 13, 2001, Order, p. 3.*

PCSR proposed to determine such stream depletions by measurement and monitoring. So long as PCSR were to pump out such net stream depletions, **necessarily** equal to the aquifer recharge as found by the court, the streams would also **necessarily** be made whole when PCSR was out of priority and would otherwise cause injury. This is the same mechanism recognized in *Cresson* as preventing injury to downstream users. Rather than pumping "additional" water from the aquifer to offset stream depletions as stated by the Water Judge (*p. 12 of his June 12, 2001 Order*), the Water Judge's November 13, 2001 Order recognizes just the opposite fact: by pumping out the aquifer recharge equal to the stream depletions, PCSR would necessarily replace the depletions in rate and volume, and the stream would be made whole. The Water Judge's dismissal was in error and the award of fees based thereon should be reversed.

4. **LEGITIMACY OF PCSR'S STORAGE ACTIVITIES.** PCSR would begin to exercise its constitutional right to store water in the aquifer after the initial creation of storage space therein. As noted above, no person would be injured so long as PCSR continued to maintain as necessary the normal outflows from the aquifer that contributed to surface streams. PCSR would store legally available water in the aquifer for later release. Pursuant to this Court's ruling in *PCSR II*, so long as PCSR only pumped out the stored water, along with needed portions of the aquifer's normal outflow, no person would be injured. There is no minimum delivery obligation. The project is self-regulating in this regard. The amount stored would be determined by measurement and monitoring. The Water Judge's dismissal of this claim was error and the award of fees based thereon should be reversed.

PCSR's application also contained a claim for a plan for augmentation. In order to assess the errors in the Water Judge's dispositive ruling and his resulting award of fees, this brief next discusses the Colorado law regarding augmentation plans.

5. **COLORADO LAW REGARDING AUGMENTATION PLANS.** Augumentation plans enable and encourage the creative use of water rights to allow new, out-of-priority uses to take place on over-appropriated stream systems. This is done by protecting senior users on the stream system from injury caused by the new project. The basic philosophy of augmentation plans is set forth in the legislative declaration in §37-92-102(1)(a), 10 C.R.S. (2002). This statute declares that it is Colorado's public policy to "integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all waters of the state." Toward that end, §37-92-302(5), 10 C.R.S. (2002), encourages municipalities to initiate plans for augmentation "for the benefit of all water users within their boundaries." §37-92-501(5), 10 C.R.S. (2002) establishes special procedures with respect to plans for augmentation and directs the state engineer and division engineers to "exercise the broadest latitude possible in the administration of waters under their jurisdiction to encourage and develop augmentation plans and voluntary exchanges of water and [to] make such reasonable regulations and take such other reasonable action as may be necessary in order to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state."

As this Court has stated: "The purpose of augmentation plan adjudication is to fix the conditions under which the State and Division Engineers may allow out-of-priority depletions of the waters of a natural stream to occur consistent with the administration of decreed priorities."

Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2002), citing *Williams v. Midway Ranches Prop. Owners Ass'n.*, 938 P.2d at 522.

The augmentation statutes impose duties on those involved in the augmentation process, including the applicant and the Water Judge. §37-92-304(3), 10 C.R.S. (2002) imposes on augmentation plan applicants "the burden of showing absence of any injurious effect." §37-92-305(3), 10 C.R.S. (2002) **requires** the Water Judge to approve augmentation plans if such plan will not injuriously affect other water users. This same statute directs applicants to propose a decree in advance of any hearing. The Water Judge is thus required to consider such a proposed decree in order to properly evaluate a potential plan. Such proposals typically entail changes to an applicant's original engineering because "the opinions must be modified to include any changes resulting from settlement negotiations with the objector's experts." Young and Helton, *"Developing a Water Supply in Colorado: The Role of an Engineer,"* 3 U. Denv. Water L. Rev. 373 (2000). It is undisputed that the Applicant engaged in intensive settlement negotiations with numerous Opposers's experts. The Water Judge expressly prevented PCSR from supporting its proposed decree with opinions in support of these modified terms and conditions resulting from settlement negotiations.

If the Water Judge determines that operations under the proposed decree would cause an injurious effect, then the Water Judge is obligated pursuant to §37-92-305(3), 10 C.R.S. (2002) to "afford the applicant or any person opposed to the application an opportunity to propose terms and conditions which would prevent such injurious effect." The Water Judge is thus required to consider at least **two** rounds of proposed terms and conditions: those found in the decree proposed before the first hearing and those submitted thereafter. As will be seen below, there

may be still further proceedings needed to shape an augmentation plan to establish that it will not cause injury. The obvious purpose of these proceedings is to provide an orderly process to assure the maximum beneficial use of the waters of the state while preventing injury. In cases where the Water Court cannot determine whether injurious depletions will occur, the court properly retains jurisdiction to assess injury based upon actual experience. *Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1114 (Colo. 1990) *citing* §37-92-304(6), 10 C.R.S. (2002).

6. THE COURT MISUNDERSTOOD THE PURPOSE OF RETAINED JURISDICTION.

Colorado statutory law provides additional guidance to the water judges regarding augmentation plans. Among these is the legislative recognition that the initial decree is merely intended to be conditional, subject to the water court's retained jurisdiction. Thus, §37-92-304(6), 10 C.R.S. (2002) requires the water judge's decision to include "the condition that the approval of such...plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury." This indefinite period of time is referred to as the period of "retained jurisdiction." It is evident from this provision that the legislature was aware of the uncertainties surrounding augmentation plans and did not intend the decisions to become final until after the parties had accumulated actual experience with the plan. The legislature appreciated the impossibility of applicants to predict the future, and established reliance on real-world experience as the measure of injury prevention. This philosophy is verified by the legislative history of this statute (Senate Bill No. 4 of 1977, "SB4"). Courts may make appropriate resort to such history in order to support their interpretation of a statute. *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 91 (Colo. 1995).

This Court recently made extensive use of the legislative history of SB4 of 1977 in *Farmers Reservoir and Irrig. Co. v. Consolidated Mut. Wtr. Co.*, 33 P.3d 799, 809-811 (Colo. 2001 ("*Con Mutual*"). In *Con Mutual*, this Court determined the proper function of the retained jurisdiction feature of Colorado law regarding augmentation plans. This Court quoted Senator Anderson, one of the sponsors of SB4 of 1977. In speaking in support of the Bill's retained jurisdiction provision, Senator Anderson stated:

> So what we're saying is that the judge can keep this plan for augmentation open as long as he deems necessary in order to determine if there is injury to a senior water user.

Con Mutual, 33 P.3d at 809. This Court then quoted David Brown, Esq. who addressed the House Agriculture Committee in support of the Bill. Mr. Brown, an experienced water law practitioner, emphasized that certain augmentation plans would present less data than others. In distinguishing experimental projects from those where significant experience had already been amassed, Brown stated:

> In other cases, *where we have very exotic augmentation plan doing something very experimental such as aquifer management or recharge program or things of this nature, it's probably important to have a retained jurisdiction* and the parties can argue about it in front of the judge, *and the judge will be required to make a decision and set it out in writing, so everyone knows what the period of retained jurisdiction is.*

Con Mutual, 33 P.3d at 809 [Emphasis in original].

Brown again commented on the importance of **time** to the process of determining future injury:

> So all issues other than future injury will be immediately appealable. The question of future injury will of course be open to retained jurisdiction for as long the water judge specifies. . . . *Retained jurisdiction is a tool to address one specific issue, which is future injury*, and we would like to separate that out and the other legal issues that are filed in an augmentation decree.

Con Mutual 33 P.3d at 810 [Emphasis in original].

The foregoing demonstrates that the Colorado legislature did not expect the water court, in initially determining an augmentation plan, to make any but a **preliminary** decision regarding injury. The legislature clearly understood that the water judge would set the date and time to determine if there is injury. This date would be extended indefinitely until the nonoccurrence of injury shall be conclusively established. §37-92-304(6), 10 C.R.S. (2002). In this case, however, as illustrated in PCSR's brief, the Water Judge required PCSR to prove the timing and amount of its future depletions in order to demonstrate the absence of injury with accuracy and reasonable certainty. This Court, however, has noted that the future effects of an augmentation plan "cannot always be accurately predicted." *City of Thornton v. City and County of Denver*, 44 P.3d 1019 (Colo. 2002). The Water Judge required this demonstration to occur **before** he considered PCSR's proposed decree, **before** he set the date required by statute, and **before** PCSR could collect the actual experience contemplated by the legislature as part of the process. In fact, the Water Judge criticized PCSR's future data collection plans as being merely "prospective" (*6/1/01, Order, p.6; 11/13/01, Order, p. 2*). Such future data collection is precisely what the Legislature intended, however.[5]

5Ironically, the Colorado legislature in 1977 considered language that would have required an applicant to establish a proposed plan's consumptive water use "by relevant hydrological and geological data..." and to do so "before such application is approved...." [Emphasis supplied] See Section 4, SB4 of 1977, attached hereto as Appendix B Although this language was before it, the Legislature did not incorporate it into the final bill. Instead, the Legislature required the use of actual experience to determine project impacts. The Water Judge's approach used the procedure the legislature chose not to adopt. Legislative intent may be reflected in the successive drafts of a bill. Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n, 758 P.2d 164 (Colo. 1988), citing Haines v. Colorado State Personnel Board, 39 Colo. App. 459, 566 P.2d 1088 (1977).

This Court declared in *Con Mutual*: "The retained jurisdiction provision addresses the Water Court's role in predicting, at the time of trial, the potential injurious effect of the change of water right or plan for augmentation and the measures estimated to prevent injury when the plan takes operational effect upon the stream system." *Con Mutual,* 33 P.3d at 811. The legislature intended "that the retained jurisdiction provision of the decree would function as a test period for operation of the ... augmentation plan, in order to test the prediction and finding of non-injury the Water Court made upon entry of the judgment and decree." *Con Mutual*, 33 P.3d at 811. The retained jurisdiction feature "reflects two stages of injury analysis, the first based *in some measure* on predicting future effects, and the second based on operational experience." *Con Mutual*, 33 P.3d at 812 [Emphasis supplied].

§37-92-304(6), 10 C.R.S. (2002) does not require that an applicant **conclusively establish** the nonexistence of injury before the reconsideration deadline. The statute plainly anticipates that proof of the nonexistence of injury would be based on actual operating experience. This interpretation is consistent with the legislative history, particularly in light of the comments on projects involving "something very experimental such as aquifer management or recharge programs...." *Con Mutual*, 33 P.3d at 809. PCSR's project is just such a program. Dismissal of plans for such programs is simply not part of the statutory structure. The failure of the Water Judge to follow these statutory requirements was error, and the resulting award of fees should be reversed.[6]

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6 In Con Mutual and City of Thornton v. City and County of Denver, 44 P.3d 1019 (Colo. 2002)("Denver"), this Court had occasion to correct the fundamental misunderstanding of the purpose of retained jurisdiction made by the same water judge who ruled in the case below. In reversing the water judge in Denver, this Court noted that the future effects of an augmentation plan "cannot always be accurately predicted," and stated that retained jurisdiction "temporarily preserves the question of injury notwithstanding the Water Court's initial determination of non-injury."

The legislature in 1981 underscored the nature and importance of the retained jurisdiction process with the enactment of HB 1055. That bill added the express condition that the period allowed for reconsideration shall be determined by the Water Judge "after making specific findings and conclusions including...the proposed future use of the water rights involved." As noted in PCSR's opening brief, its proposed decree described a careful phasing in of the construction and use of its wells and recharge facilities. PCSR combined this measured approach with a very long (40 years minimum) period of retained jurisdiction.

At no time did the Water Judge discharge his statutory obligation to make "specific findings and conclusions" regarding the future use of the water rights reflected in PCSR's proposed decree. By requiring PCSR to prove the impossible in advance (the project's depletions in time, location and amount) the Water Judge elevated the process of mathematical modeling above the process established by the legislature for preventing injury. Moreover, there are simply no recognized standards established in Colorado for the evaluation of technical evidence offered in an augmentation plan. Indeed, this court has even affirmed a trial court's initial findings in an augmentation plan where "none of [the determinations] was done with mathematical precision" and where they were based upon "estimates, assumptions and rules of thumb." *Public Svc. Co. of Colo. V. Willows Water District*, 856 P.2d 829, 834-836 (Colo. 1993).

There was no evidence before the Water Court that operations under PCSR's proposed decree would in fact deprive any senior water right holder of a lawful entitlement or otherwise produce injury. The court cannot "consider" or evaluate the question of injury unless a *prima facie* case thereon has been presented by the opposition, since an objector "has the burden of

going forward to show injury." *Danielson, supra*, 791 P.2d at 1115. The Applicant met its burden to show noninjury, and the court did not hear from any opponents regarding claimed injury. The Water Court thus could not "assess the credibility of competing evidence presented by the parties" regarding injury as set forth in *Con Mutual*, 33 P.3d at 812, citing *City of Thornton v. Bijou Irrig. Co.*, 926 P. 2d 1, 88 (Colo. 1996).

The Water Judge's approach in this case established unrealistically high standards for an applicant's modeling, it nullified the statutory plan requiring the Court to review the proposed decree, and it reversed the process for an applicant to establish the nonexistence of injury. If affirmed, this approach would scuttle legitimate projects based upon hair-splitting disputes between experts regarding mathematics, rather than consider whether implementation of the proposed decree will actually prevent injury. Such a result would stand the statute on its head. It would certainly not meet the legislative mandate to "maximize the beneficial use of all waters of this state." §37-92-501(5), 10 C.R.S. (2002).

For all of these reasons, the order of dismissal must be reversed and the award of fees vacated.

C. THE COURT'S AWARD OF ATTORNEY FEES WAS CONTRARY TO THE EVIDENCE.

1. THE WATER COURT BASED ITS AWARD OF ATTORNEY FEES ON A MISINTERPRETATION OF EASTMAN'S MEMO AND A DISREGARD OF THE APPLICANT'S EVIDENCE.

a. The Standard Of Review For Interpretation Of The Memo Is *De Novo*.

An appellate court is not bound by a trial court's findings that are based on documentary evidence. *Jelen & Son, Inc. v. Kaiser Steel Corp.*, 807 P.2d 1241, 1244 (Colo. App. 1991); *Werner v. Baker*, 693 P.2d 385, 387 (Colo. App. 1984). This concept is closely related to the

doctrine that interpretation of a written contract presents a question of law reviewable *de novo*. *Doman v. Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo. 1996); *Union Insurance Co. v. Houtz*, 883 P.2d 1057, 1061 (Colo. 1994). The Water Court's interpretation of Eastman's 1998 Memorandum ("Memo") was critical to its award of attorney fees, but its interpretation was erroneous. This Court should review this finding *de novo*. A copy of the Memo is attached to Aurora's opening brief.

b. The Court's Interpretation of Eastman's Memo Was Error. In awarding attorney fees against Mr. Burke, the Court relied almost entirely on Eastman's 1998 Memo. The Water Court's interpretation of the Memo is contrary to its plain language. Eastman is a ground water expert who formulated the initial design of the ground water model with the assistance of other experts in the field. The Water Court cited alleged deficiencies by the Applicant both in formulating its model and in following recommendations of its expert. However, the Memo itself contradicts the Court's findings. In a key passage of the Memo, Eastman explained why he was suggesting that additional work be considered:

> The purpose of the following modifications [the additional work he was suggesting for consideration] are to improve the ability to make sensitivity analyses of storativity and to improve the interface between the Transient simulations and the Nocup and Spcup simulations of the model. *These changes will have little or no effect on the model results.*

(Exhibit P-526, p. 6, emphasis added.)

Specifically, as in many complex regional ground water systems, the Applicant used MODFLOW to predict the resources available to the project as well as the project impacts. The Applicant then confirmed the feasibility of the project based upon the results of the ground water model. The intent of the Applicant for post-decree operations was not to use the model unless

directed to do so by the Court, but to **measure** the depletions in the stream in order to administer the project and prevent harm to downstream users.

The Applicant worked with several experts in developing the model, and Eastman took a major role. In 1998, after the model had initially been developed, Eastman sent the Memo to Mr. Burke, discussing the status of the model and additional work that could be done to "enhance the model" and to "overcome any criticism" at trial. The Court found, contrary to the plain language of the Memo, that PCSR's model was "indefensible as of October 28, 1998." *(5/1/03, Order, p. 9). (11/13/01 Order, p. 10).* The Court then found that PCSR declined to follow Eastman's advice. *Id.* It was on that faulty premise that the Court awarded attorney fees against Mr. Burke.

Hesemann testified that like Eastman, he conducted many runs of the ground water model. Hesemann offered the opinion that the model was usable for predicting impact to ground water, for estimating stream depletions, and for judging project feasibility. *(Tr. 2/20/01, p. 47, ll. 10-48:9).* Hesemann further testified the model verifies feasibility of the project. *Id.* More importantly, Hesemann explained that the project is **also feasible without reliance upon the model.** *Id.* Hesemann used the ASTM guidelines regarding modeling and determined that the ground water model conformed to those guidelines. *(Tr. 2/20/01, p. 79, ll.17-80:16).*

Applicant's other experts, Jehn and Ault, testified that the ground water model was adequate to predict stream depletions and drawdowns. *(Tr. 8/24/00, p. 31, ll. 4-17;2/21/01, p. 269, l. 20- p. 270, l. 1).* Ault opined that the ground water model was adequate to determine feasibility of the project. *(Tr. 2/21/01, p. 269, ll. 20 -p. 270, l. 5).* PCSR's brief illustrates that Eastman's testimony, supported by the testimony of Applicant's other experts, Hesemann and

Ault, was uncontradicted by any testimony of Opposers' experts. Notwithstanding all of PCSR's testimony, the Court simply discarded it as unreliable and came to its own conclusions which were contrary to the evidence. The Court's determination that the model did not meet the accepted standards was contrary to this testimony.

In dismissing the Application, the Court referred at length to the American Society of Testing and Materials guidelines for ground water modeling ("ASTM Guidelines"). *(June 1, 2001, Order, pp. 3-5).* The Court failed to take into account that the ASTM guidelines are merely suggestions that defer to the ground water modeler's own judgment. Specifically,

> This guide offers an organized collection of information or a series of options and does not recommend a specific course of action. This document cannot replace education or experience and should be used in conjunction with professional judgment. Not all aspects of this guide may be applicable in all circumstances... .
>
> * * *
>
> This guideline is not meant to be an inflexible description of techniques for calibrating a ground water flow model; other techniques may be applied as appropriate and, after due consideration, some of the techniques herein may be omitted, altered, or enhanced.

(Exhibit P-569, ASTM Guideline D 5981-96 at ¶¶1.7; 5.3; See also Exhibit P-566, ASTM Guideline D5447-91 at ¶5.3).

Despite this specific statement in the ASTM Guidelines, the Court found that the modeling work done by the Applicant's experts did not meet the ASTM Guidelines and thus erroneously dismissed the Application.

Eastman testified that the ASTM guidelines were not intended to supplant professional experience and judgment. *Tr. 8/23/00, p. 27, l. 19 to p. 28, l. 6.* In referring to the version of ASTM guide 5447 earlier introduced by Opposers as Exhibit P-566, Eastman indicated that the

document had been updated since it was issued. *Tr. 8/23/00, p. 22, ll. 9-12.* PCSR's counsel offered to introduce the updated version and represented in his offer that the revision would clarify the nature of the standards themselves. In refusing the exhibit, the Water Judge declared:

> The question is, given the circumstance of this project, was sufficient data collected to run a reliable model and obtain reliable results? And the fact that the standard for collecting sufficient data may or may not be binding does not help me in the determination of whether sufficient data was amassed in order to generate reliable results.

(Tr. 8/23/00, at p. 24, ll. 18-24). The Water Judge then ruled "I think it's irrelevant and sustain Mr. Culichia's objection. The question is specific to this case and not generally what the ASTM required or didn't require." In issuing his June 1, 2001 order of dismissal, however, the Water Judge relied on the express provisions of the ASTM documents. The Water Judge ruled that PCSR should have utilized the modeling techniques set forth in the ASTM guides, particularly ASTM guide 5447. *(June 1, 2001 Order at 3).* By relying on these documents rather than the testimony of the witnesses regarding the sufficiency of the data, the Water Judge prejudiced PCSR. Based upon the Water Judge's ruling, PCSR had concentrated upon presenting evidence of the extensive field work, data collection, analysis and collective professional experience and opinions of its experts, not upon the precatory statements in the non-binding ASTM guidelines Rather than treating them as "irrelevant," the Water Judge treated the ASTM guidelines as requirements. ASTM itself makes it clear that the guides do not represent the standard of care. *See Paragraph 1.7 of Exhibit P-569.* The Water Judge's order did not follow his earlier pronouncements, on the basis of which PCSR tried its case. The prejudice to PCSR deprived it of a fair trial.

2. THE COURT'S REFUSAL TO ADMIT EXPERT EVIDENCE WAS CONTRARY TO THE STANDARD OF DISCOVERY IN THIS TYPE OF SPECIAL PROCEEDING.

Colorado water determinations are special statutory proceedings. *Huston II, supra; Colorado River Water Cons'n Dist. v. Rocky Mt. Power Co.,* 174 Colo, 139, 486 P.2d 438 (1971) *cert. denied,* 405 U.S. 996. The Colorado Rules of Civil Procedure apply to water cases only when they are not inconsistent with the applicable statutes. *See CRCP 81(a).* The Water Court's procedural duties under the statute were discussed above. The Water Court failed in every instance to follow the statutory procedures. More particularly, the Water Court did not honor the statutory plan requiring it to consider an applicant's proposed decree and to determine whether operations under that proposed decree would cause injury. Instead, the Water Court focused on the Eastman Memo, but misinterpreted it, and failed to allow additional testimony of experts with regard to actions taken in response to the Memo, including extensive proffered testimony from Hesemann and Ault. In excluding the additional expert testimony, the Water Court rigidly applied disclosure deadlines based on the Rules of Civil Procedure which are not applicable to this special statutory proceeding.

After completing the first two months of trial, and prior to the conclusion of the applicant's case-in-chief, the trial was continued until February 2001. PCSR planned on presenting two additional experts, Messrs. Hesemann and Ault. The Court entered orders on October 30, 2000 and February 14, 2001, holding that PCSR could not utilize expert testimony regarding certain terms and conditions set forth in the new *Exhibit Z,* which was part of the final proposed decree submitted pursuant to Uniform Local Rules for all State Water Court Divisions

("Water Rules"), §37-92-305(3), 10 C.R.S. (2002), and Section VIII of the case management order, 3/29/99 ("CMO"). The contents of the new *Exhibit Z* had been previously and timely disclosed to Opposers in expert reports which were submitted by May 1, 2000. *See February 14, 2001, Order, p. 3.* The expert reports and the new *Exhibit Z* expanded the earlier provisions designed to prevent injury. *(Exhibit A-1609).* Until the Court's February 14, 2001 Order, Applicant expected to be able to introduce the expert reports, incorporated into the new *Exhibit Z*, in its case-in-chief.

Hesemann's newer sensitivity analysis was concluded after PCSR submitted its initial expert disclosures, partially in response to criticism by the Opposers' experts. This newer analysis by Hesemann was precluded by the Court from being presented during the trial. This preclusion was based upon the timing of the disclosure, even though the Opposers' expert reviewed Hesemann's sensitivity analysis and considered same in preparing their surrebuttal disclosures. *See Opposers's Surrebuttal Disclosures, 6/19/01, copy attached to Aurora's opening brief.* Although the Water Court knew the evidence existed (by having expressly ruled to exclude it) the Court later found that the MODFLOW ground water analysis was unreliable because "no sensitivity analysis was conducted on the model." *(June 1, 2001 Order, p. 5).* As discussed below, this is simply not true.

In determining the application was groundless, the Court also erred in excluding evidence of a *Glover* analysis and not taking into account the existence of that analysis. The *Glover* formula has been widely utilized in Colorado to evaluate stream depletions. For example, the State Engineer's Office, an objector in this case, routinely applies the *Glover* formula to ground water applications. The purpose of the *Glover* analysis was to evaluate the consistency between

estimated depletions calculated by the simpler, but widely accepted *Glover* formula and those generated by PCSR's more complex ground water model. Rocky Mountain Consultants ("RMC") performed a *Glover* analysis, the results of which were attached to Applicant's expert disclosures filed in May 2000. Ault of RMC undertook a *Glover* analysis in response to certain criticisms made by Opposers' experts. As set forth above, Ault concluded that the *Glover* analysis and PCSR's ground water model were consistent; thus, the *Glover* analysis supported PCSR's model. Ault's analysis was timely filed pursuant to statutory procedures for augmentation plans, under which an applicant has the opportunity to respond to criticism of the Opposers to formulate terms and conditions that prevent injury. *See* §37-92-305(3), 5 C.R.S. (2002). Since such proposals also involved negotiation with other experts and stipulations approved by the Water Court, the rules requiring proposed decrees to be submitted shortly before trial obviously contemplates that the revised terms and conditions would be supported by an applicant's experts. *(Water Rule 2(f)).*

A party is entitled to introduce in rebuttal any competent evidence that explains, refutes, counteracts or disproves the defendant's proof, even if such evidence tends to support the plaintiff's case in chief. *Deeds v. People*, 747 P.2d 1266, 1274 (Colo. 1987), *citing Taylor v. Mazzola*, 375 P.2d 96 (Colo. 1962); *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27 (Colo. App. 1994) (reversed on other grounds). Even where such evidence may be considered improper rebuttal, if it is otherwise material and competent it should not be rejected merely because it is offered out of regular order, especially where there is no unfair advantage to the opponent and the opponent is not prejudiced. *Mazzola*, 375 P.2d at 99. PCSR's *Glover* analysis was

erroneously excluded and not taken into account when the Court found the application to be groundless.

3. THE APPLICATION WAS NOT SOLELY DEPENDENT UPON MODFLOW.

As set forth in PCSR's Opening Brief and above, the Application was modeled using MODFLOW but did not **depend** upon MODFLOW, as explained by Hesemann in assessing all of PCSR's and Aurora's work in supporting the feasibility of the project. *(Tr. 2/20/01, p. 13, l. 15 to p. 15, l.9.).* Because the application was not dependent on MODFLOW, the Water Judge's criticism of MODFLOW does not support a finding that the application was groundless.

D. THE COURT ERRONEOUSLY BASED ITS FINDING OF GROUNDLESSNESS ON THE APPLICANT'S PURPORTED FAILURE TO FOLLOW THE RECOMMENDATIONS OF ITS EXPERTS.

In its award of attorney fees, the Court concluded that one of the bases for its finding of groundlessness was a failure by PCSR to do "any" of the items listed in the Eastman Memo. This is simply incorrect. The Water Court incorrectly concluded that the experts failed to show the model was calibrated in accordance with acceptable standards, that sensitivity analysis was conducted, that they could explain anomalous results produced by the model, and finally that an independent peer review was not completed.

Evidence Showed The Model Was Properly Calibrated. The Court found that the model was not calibrated in accordance with accepted standards. This, again, was contrary to the evidence. Eastman testified to this issue, and the model itself identified the calibration method used. *(See Tr. 8/5/00, p. 60, ll. 12-25; 8/22/00, p. 41 ll. 7-25; p. 53, ll. 1-24; p. 94, ll. 6-12; p. 104, l.16; p. 121, ll. 11-p. 126, l.18; See also Exhibit A-700, Appendix B, Section 5 and A-800, Section 7.5.1; 8.1.1.)* He testified that he conducted approximately seventy runs during the

calibration process. *(Tr. 8/15/00, p. 130, ll. 3-23).* Based upon the model calibration, Eastman concluded that the model was well calibrated and that the results of the model indicated that the project was feasible. *(Tr. 7/27/00, p. 24, ll. 16-21; 8/ 7/00, p. 15, ll. 6-13).*

Evidence Showed That Sensitivity Analysis Was Performed. Of key concern to the Court was PCSR's failure, in its opinion, to conduct "sensitivity analysis." The Court dismissed the Application partly on the grounds that "no sensitivity analysis was conducted on the model." *(June 1, 2001, Order, p. 5, ¶2).* However, the evidence is clear that sensitivity analysis had been performed. Eastman's uncontradicted testimony was that he conducted sensitivity analysis during the calibration of the model. *(Tr. 8/22/00, p. 106, ll. 16-22). (Tr. 8/15/00, p. 60, ll. 11-18; p. 6, l. 14; 8/22/00, p. 76, ll. 4-25; p. 77, ll. 16-23).* The model report itself identifies the sensitivity analysis performed. *(Exhibit A-700, Appendix B, Section 6).* Several exhibits demonstrated the sensitivity analysis conducted on the model including that done by Hesemann in 1998 (see for example *Exhibits P-555, P-1609, A-700, A-800.)* Further, Hesemann did additional sensitivity analysis in 2000, which the Court excluded. The Court's statement that no sensitivity analysis was conducted is completely contrary to the evidence.

Evidence Presented Which Explained Anomalous Results. The Court also commented that the model produced anomalous results the experts were unable to explain. *June 1, 2001, Order, p. 5.* As set forth in PCSR's Opening Brief, pp. 43 and 44, Eastman explained the so-called anomalous results in his testimony. *(Tr. 8/15/00, p. 76, ll. 4-25; p. 77, ll.16-23; 8/22/00, p. 54, ll. 1-13; p. 110, l. 12 – p. 118, l.6).* Eastman testified that even though those errors did exist, they were statistically insignificant. *(Tr. 8/16/00, p. 24, ll. 17-18).* He testified these were isolated data points that would not impact the reliability of the model.

Eastman also explained the residual error analysis in the model report entered into evidence *(Exhibit A-700, Appendix B, Section 5)*. Further, Opposers's experts did not address the statistical significance of the errors and did not recalibrate the model to see if the errors they found had any significance. Clearly, Applicant presented explanations by its experts of the anomalous results found in the model, and the Court's conclusion to the contrary was incorrect.

Peer Review Was Conducted. Contrary to the court's statement, the Applicant conducted peer review. Hesemann testified that his peer review of the model demonstrated that it was adequate. *(Tr. 2/20/01, p. 47, ll. 10-25)*. Not only did Eastman testify the model was reliable, he completed additional work to support the model. *(Tr. 8/15/00, p. 26, ll. 7-8; p. 107, ll. 2-10)*. Even though the Court mentions lack of peer review in its Order dismissing the Application, the court based its award of attorney fees on lack of peer review. Moreover, peer review was not identified in Eastman's 1998 Memo as necessary.

E. THE COURT ERRED BY REJECTING ALL OF THE APPLICANT'S EXPERT TESTIMONY, WHICH IT HAD PREVIOUSLY ADMITTED WHEN EXERCISING ITS GATEKEEPER ROLE UNDER C.R.E. 702.

Expert testimony is admissible under C.R.E. 702: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Such evidence is admissible if: (1) the scientific principles underlying the testimony are reasonably reliable; (2) the expert is qualified to opine on such matters; and (3) the expert testimony is useful to the fact finder. *Masters v. State of Colorado*, 58 P.3d 979, 988 (Colo. 2002) *("Masters")*. A trial court

exercises significant discretion in deciding how to perform its gatekeeper role. *Kumho Tire v. Carmichael*, 526 U.S. 137, 158; 119 S.Ct. 1167, 143 L.Ed. 238 (1999).

In carrying out its gatekeeper duties, the Water Court accepted several witnesses as qualified experts in several relevant fields. Thus, the court previously determined that the testimony was "reasonably reliable" and "helpful to the court." *Masters.* In determining fees, however, the Water Court inexplicably changed position and ruled that the expert testimony was so unreliable the application was groundless. As set forth above, the experts, who testified for weeks, established that the model was reliable, as set forth above. Eastman testified that the model was reliable. *(Tr. 8/10/00, p. 37).* Jehn testified that the model was reliable. *(Tr. 8/24/00, pp. 18-19).* Ault testified that the model was reliable. *(Tr. 2/21/01, p. 269, l.20-270).* Hesemann testified that the project was feasible. *(Tr. 2/20/01, p. 47, ll. 10-48:9).* Even if the Water Court disagreed with the weight of the testimony, it committed reversible error when it found the application groundless.

The 10th Circuit held that reasonable reliance on a qualified expert obviates any attorney fee award:

> As long as the reliance is reasonable under the circumstances, the Court must allow parties and their attorneys to rely on their experts without fear of punishment for any errors in judgment made by the expert.

Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir., 1993).

In *American Federation of State, County and Municipal Employees, AFL-CIO v. County of Nassau*, 96 F.3d 644 (2nd Cir. 1996), the Second Circuit discussed the issue of groundlessness

in a way that is instructive.[7] After a bench trial, the district court awarded fees to the defendant on several claims because the court found that those claims were groundless. The Second Circuit reversed the award of fees. "[A] claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial." *Id.* at 652. "Generally, where evidence is introduced that, if credited, would suffice to support a judgment, fees are unjustified." *Id.* Assuming *arguendo* that the Water Court was justified in dismissing the application because it did not credit the testimony of expert witnesses, this is not a sufficient basis for an award of attorney fees. Because there was substantial evidence offered in support of the application, the Court erred in awarding fees and its order should be reversed.

F. IN DETERMINING WHETHER THE APPLICATION WAS GROUNDLESS THE COURT SHOULD HAVE TAKEN INTO ACCOUNT THE SUPPORTING EVIDENCE WHICH IT EXCLUDED.

The rebuttal opinions of PCSR's experts that were erroneously excluded by the trial court (see section C.2. above), should have been taken into account in determining groundlessness. When an attorney files a complaint on behalf of a client, the attorney cannot expect to know exactly how the claims will be proved in court:

> The course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing the suit.

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7 Although American Federation was based on a federal statutory scheme, since the court discussed how to interpret "frivolous, unreasonable or without foundation," Id. at 650, the case involved a bench trial, and it is helpful here. In cases concerning the awarding of attorney fees for groundless or frivolous claims, the Colorado Supreme Court has looked for guidance to federal court decisions in civil rights actions. Western United Realty, Inc v. Isaacs, 679 P.2d 1063, 1068 (Colo. 1984).

Western United Realty, Inc., 679 P.2d at 1069. "Inasmuch as credible evidence was extant and offered, albeit in improper form," the court should have denied the motion that the claim was groundless. *Harrison v. Smith*, 821 P.2d at 836 (Colo. App. 1991) (Tursi, J., dissenting).[8] The same is true for the Applicant's case here.

The Applicant had good cause to believe that the court would allow this testimony of Hesemann and Ault as it had granted the Opposers' request to admit testimony and evidence, disclosed after the deadline, *nunc pro tunc. (Tr. 7/20/00, p. 75).* Although the court did not extend the same lenience to the Applicant, this does not mean that the Applicant was unreasonable in expecting such treatment.

Assuming *arguendo* that this Court affirms the Water Court's ruling that the application was groundless, the water judge erred when he found that the application was groundless as of October 28, 1998. The award of fees starting from the date of the Memo was inappropriate since, at that time, Mr. Burke had a reasonable belief that he would be able to support his case with appropriate evidence. *Harrison,* 821 P.2d at 835. Applying the *Harrison* rationale to the case at bar, Mr. Burke could not have recognized that his claim might be deemed groundless until the court ordered on February 14, 2001 that the "rebuttal evidence" would not be admissible in the case in chief. Mr. Burke had no reason to expect the Court's ruling that the rebuttal expert evidence would not be admissible, as the special statutes pertaining to water cases contemplate

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8 In Harrison v. Smith, 821 P.2d 832 (Colo. Ct. App. 1991), the Colorado Court of Appeals wrongly affirmed the trial court's holding of groundlessness when trial court denied admission of affidavits that amounted to Plaintiff's only evidence on one of its elements. The court confused the difference between credibility and admissibility of evidence. See id. at 836 (Tursi, J., dissenting) (nothing in Colo. Rev. Stat. §13-17-101, et. seq. makes an otherwise supportable claim groundless merely because counsel erred in the manner in which he proffered credible evidence of supporting facts).

that an applicant's final opinions will not be developed until shortly before trial. Section VIII of the CMO in this case is to the same effect. At the very least, the fees award should be modified to disallow fees incurred prior to the February 14, 2001 ruling which excluded the additional supporting evidence.

G. COURT ERRED IN FINDING FRIVOLOUS PCSR'S CLAIMS TO USE PRECIPITATION, IRRIGATION RETURN FLOWS AND SALVAGED WATER.

In addition to finding the entire Application groundless after the Eastman Memo, the Court found a portion of the Applicant's claim to be frivolous from inception. Although the attorney fees associated with this particular section were extremely small, the Court's error was not. At page 7 of his June 1, 2001 order, the Water Judge ruled on PCSR's prospective use of water from three diffuse sources: precipitation, irrigation run-off and water salvaged by a reduction in evaporative and vegetative losses ("Three Diffuse Sources"). In finding PCSR's reliance on the Three Diffuse Sources to be untenable, the Water Judge relied upon §37-92-103(10.5), 10 C.R.S. (2002). This statute provides that waters found in aquifers are not "in storage" or "stored" except to the extent that they are "placed there by other than natural means with water to which the person placing such water in the underground aquifer has a conditional or decreed right." In denying PCSR's claims to use water from the Three Diffuse Sources, the Water Judge reasoned that (1) these sources recharged the aquifer by natural means, (2) they did so with water that belongs to the stream system and (3) PCSR had no decreed recharge right. These rulings are erroneous; consequently, the finding of frivolousness should be reversed and the award of fees based thereon vacated. *(Order 6/01/01, p. 7).*

1. STATUTORY PURPOSE. The Water Judge relied upon the requirement of §37-92-103(10.5), 10 C.R.S. (2002) that water be placed in an aquifer with water to which the storing

party has a conditional or decreed right. The Water Judge, however, ruled that PCSR's claim should be denied because it did not **then** have a decreed right to the water in question. The statute imposes no such requirement.[9] The Water Judge's ruling is also wholly at odds with the decision of this court in *PCSR II*, 45 P.3d at 704-705 and fn. 19, which construes the General Assembly's intent and sets out the steps to follow in order to receive a decree for underground storage. Upholding the Water Judge's ruling would therefore: 1) run counter to the statute's plain language, 2) violate the legislative intent behind §37-92-103 (10.5), 10 C.R.S. (2002), 3) disregard controlling precedent, and 4) virtually preclude the award of future decrees for recharge projects throughout the state.

2. PCSR'S IDENTIFICATION OF SOURCES IS APPROPRIATE. The Water Judge's ruling on precipitation, irrigation run-off, and salvaged water has a profoundly negative effect on well users throughout the state. It would no doubt come as a shock to most well users in Colorado to learn that these traditional sources of well water had become illegal to use. The following analysis will demonstrate that the Water Judge's ruling was erroneous and must be reversed.

Colorado statutory law expressly **requires** that water court applications include "a description of the source of the water...." §37-92-302(2)(a), 10 C.R.S. (2002). PCSR went to great pains to specify all of the water sources available to its well fields, its underground water

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9 In its Brief In Opposition To Motion For Summary Judgment Denying Applicant's Claimed Underground Storage Right, filed with the Water Court on November 2, 1999 ("Brief"), PCSR traced the legislative history of the statute relied upon by the Water Judge (SB 79-481). The legislative history cited by PCSR in the Brief confirmed the intent of Colorado's legislature to enact SB 79-481 in order to protect future underground storage programs. In doing so, the Colorado legislature intended that aquifer water already present underground would not be regarded as "stored." The legislative history of this statute, particularly that cited by PCSR at pages 19 through 30, inclusive of the Brief, places beyond dispute the fact that the statute was enacted to facilitate the awarding of future conditional decrees in order to develop such projects.

storage facilities, and its surface collection and storage systems. (*See Application, ¶3 of PCSR's 1st Claim for Relief, ¶ 3 of PCSR's 2nd Claim for Relief and ¶ 9 of PCSR's 3rd Claim for Relief.)* Moreover, in order for the decree requested by PCSR to be properly administrable, it would also have to include all of the sources of water that are to be diverted and administered.

If PCSR is correct in its contention that such sources are properly claimed for use in its project, their inclusion in the application and the decree is proper. Even if the Opposers are correct that PCSR must **bypass** the water available from the Three Diffuse Sources, it would still be proper for the decree to specify them as sources to be withdrawn and administered. Accordingly, PCSR would still be required to identify them both in the application and in the decree. As will be demonstrated next, PCSR's inclusion of these sources was fully consistent with Colorado law, and the Water Judge's contrary order should be reversed along with the resulting award of fees.

3. **AQUIFER RECHARGE NECESSARILY INCLUDES SUCH SOURCES.** Colorado statutory law expressly recognizes the right of wells to withdraw water that would lower local water tables. §37-92-301(3)(d), 10 C.R.S. (2002). The only condition on this statutory provision is to preclude water table lowering to the degree it would "prevent the water source to be recharged or replenished under all predictable circumstances to the extent necessary to prevent injury to senior appropriators in the order of their priorities, and with due regard for daily, seasonal, and longer demands on the water supply." *Id.* This statute does not require artificial recharge of such aquifers. In fact, in most instances, the aquifers are "recharged or replenished" naturally. Wells in such aquifers receive water from every physical mechanism contributing to

local ground water flows. Such mechanisms obviously include precipitation. They also include return flows. They even include return flows from other wells.[10]

The Water Judge's order indicates that PCSR will be granted no credit for the water flowing to its wells from the Three Diffuse Sources. As a practical matter, this requires one of two equally absurd results. The project could either keep the water in the aquifer (and make stream replacement as if that water were nonexistent) or PCSR could pump out its recharge water for use by downstream seniors. In the former situation, the project's water budget will get hopelessly out of balance and would never reflect the actual recharge to the system. In the latter case, PCSR would be compelled to waste its recharge water. Such waste would violate §37-92-301(3)(d), 10 C.R.S. (2002), which protects the aquifers' ability to be "recharged or replenished." PCSR would also assume a higher augmentation burden than any other Colorado water user and would presumably have to maintain this burden forever. In fact, if all well owners were compelled to waste their recharge water, the use of wells would become prohibitively expensive. This would occur because well owners would either have to permanently sustain the expense of well rehabilitation, maintenance, and repair or they would be forced to construct an expensive, artificial aquifer recharge system. Appellant is aware of no authorities requiring well owners to act in this manner.

4. **INCLUSION OF THE THREE DIFFUSE SOURCES IN PCSR'S CLAIMS WAS APPROPRIATE.** All waters of Colorado's natural streams are subject to its constitutional doctrine

10 See §37-92-602(3)(b)(II)(A), 10 C.R.S. (2002) referring to return flows from wells used for household, stockwatering, and irrigation purposes, and requiring that "the return flow from such uses shall be returned to the same stream system in which the well is located." The statute does not preclude new wells from capturing such return flows on their way to the stream. Indeed, it would be impossible to prevent wells from capturing such return flow water.

of prior appropriation. §37-82-101, 10 C.R.S. (2002); §37-92-102(1)(a) and (b), 10 C.R.S. (2002). Such sources necessarily include streams, springs, rainfall, and percolating ground water. Precipitation, the source of nearly all surface and ground water in Colorado, has been recognized as constituting a source of water available in Colorado for withdrawal by man-made structures. *Cresson Consolidated Gold Mining and Milling Co. v. Whitten*, 139 Colo. 273, 338 P.2d 278 (1959). If return flow water is taken out-of-priority, however, stream depletions caused thereby can injure other water users. *Comstock v. Ramsay*, 55 Colo. 244, 133 P. 1107 (1913). PCSR proposed to replace any such injurious, out-of-priority stream depletions.[11]

PCSR's expert testimony was consistent with Colorado law. Jehn stated clearly when being cross examined that:

> to the extent that that seepage is intercepted by the cone of depression and to the extent it is not injurious, it would be claimed as water that is maintained in storage. Otherwise, it would have to be returned to the stream.

(Tr. 8/28/00, p.90, ll. 12-16, See also, p. 88, ll. 8-25 and p. 89, ll. 5-15).

Perhaps the Water Judge challenged PCSR's claims to such water because they were identified as sources in its application and because he felt that such sources would flow into PCSR's underground reservoir system by "natural" means. However, the Water Judge ruled on February 14, 2000 that PCSR would be able to establish that its manipulation of hydraulic gradients met the statutory requirement of placement of water by other than natural means. PCSR has established this. In any case, PCSR properly claimed such water as sources for its wells. In addition to other claimed uses, these wells would also be used to move water between

11 On the other hand, water may still be stored out-of-priority pursuant to express Colorado statutory law. See footnote 3.

reservoir zones for various purposes (*8/24/00, p. 85 ll. 3-22*). Thus, even if there is a requirement under the statute to divert such water into the underground reservoir by a metered well, PCSR has sought to do so. Finally, surface structures are allowed to store precipitation and irrigation return flows. Denying wells and underground reservoirs the same rights would violate Article XVI, Sec. 6 of the Colorado Constitution, which declares that the right to divert the unappropriated waters of the state shall never be denied.

For these reasons, the Water Judge's ruling should be reversed. The Court's errors in considering PCSR's claims for reduced evapotranspiration are discussed next.

5. CREDIT FOR REDUCED EVAPOTRANSPIRATION. To the extent that water percolates down into the aquifer directly from the surface, a portion of such water has to include water bypassing the root zone of the local vegetation. When the local water table has been lowered, it is evident that some of the water reaching the aquifer does so because that water is no longer either evaporating at the surface or being consumed by the overlying plants at the same rate as when the water table was higher. The Water Judge referred to this water, present in the aquifer as a result of reduced evapotranspiration, as "salvaged water."

In his order of June 5, 2000, the Water Judge ruled that PCSR may "obtain a junior priority in salvaged water." Notwithstanding this supportive statement, the Water Judge later ruled that PCSR's claims for augmentation credits for decreases in evapotranspiration losses were frivolous from their inception. *(November 13, 2001, Order, pp. 10-11)*. Appellant adopts PCSR's and Aurora's arguments regarding this water. Those arguments are supported by case

law[12], the State officials' deposition testimony, and the actions taken by the Colorado General Assembly. This last category bears some special emphasis.

In 1998, the Colorado legislature added a provision to the Colorado Ground Water Management Act which by its terms only applies to the confined aquifer in Water Division No. 3. That statute, now codified at §37-90-137(12), §37-92-103(9), and §37-92-305(6)(c), 10 C.R.S. (2002), imposes certain obligations on the Colorado State Engineer. The statute declares that in evaluating well permit applications affecting Water Division No. 3's confined aquifer, the State Engineer shall "recognize that unappropriated water is not made available and injury is not prevented as a result of the reduction of water consumption by nonirrigated native vegetation." §37-90-137(12), 10 C.R.S. (2002).

The legislature presumably does not pass legislation that is unnecessary. Accordingly, it was presumably necessary to articulate the statement contained in this statute in order to make it effective. By limiting its coverage only to a single aquifer in a single Water Division, it would

12 For at least the past 25 years, pertinent case law has recognized that Water Court's and Colorado administrative officials have allowed credits for reduced evapotranspiration: In the Matter of Amendment to Rules and Regulations in the Arkansas River, 581 P.2d 293, 295 (Colo. 1978)(declaring that the "reduction in evaporation and phreatophyte losses as a result of lowering the water tables are "countereffects which offset or modify the depletive use of well water."; In the Matter of Rules and Regulations Governing the Use, Control and Protection of Water Rights, 674 P.2d 914, 920, 928 n.26, 935 n.37(6) (Colo. 1983)(collectively showing a "relatively small" net augmentation burden [only 3.4 percent] after ground water withdrawals of one million acre feet were offset by nearly the same amount when wells are pumped, "lowering the water table below phreatophyte root zones."; Closed Basin Landowners Ass'n. v. Rio Grande Water Conservation District, 734 P.2d 627 (Colo. 1987); American Water Development, Inc., v. City of Alamosa, 874 P.2d 352 (Colo. 1994) cert denied, 513 U.S. 1015 (1994) (sustaining the trial judge's finding that the applicant had "overstated the potential for reducing loss of water by evapotranspiration by lowering the water table through pumping and thus eliminating vegetation."). Perhaps the most factually similar case to PCSR (regarding the issue of whether unappropriated water is made available as the result of reduced evapotranspiration caused by wells) is found in the discussion of the actions of the Colorado Ground Water Commission as discussed in Jaeger v. Colo. Ground Water Comm'n, 746 P.2d 515, 516-17 (Colo. 1987)("Jaeger"). Although the Colorado Ground Water Commission had approved the concept, this court did not reach the issue on appeal because it was not properly presented below. Jaeger, 746 P.2d at 523, fn 10.

leave the law in the remainder of the state unaffected. Where a statute "specifies certain situations in which it is to apply, it must be construed to exclude from its operation all other situations not specified." *Holdridge v. Bd. Of Education*, 881 P.2d 448, 450 (Colo. App. 1994) [Emphasis supplied]. PCSR's project is located in Water Division 1 and is therefore free of the constraints of this statute.

PCSR has dutifully pursued its constitutional right to utilize Colorado's waters. It has also expressly recognized its obligation to replace injurious out-of-priority depletions. So long as such depletions are replaced, PCSR may lawfully divert any and all stream components, including precipitation, irrigation return flows, and salvaged water. At the very least, PCSR's claims to use this water build upon all of the foregoing authorities and thus represent good faith efforts to extend, modify or reverse the law or develop a new theory of law, and thus fees should not be awarded. *See* §13-17-102(7), 5 C.R.S. (2002). *Western, supra.* The Water Judge's ruling that PCSR's claims to the Three Diffuse Sources is frivolous has no basis and should be reversed, along with the resulting award of attorney fees.

H. THE COURT VIOLATED MR. BURKE'S RIGHT TO DUE PROCESS BY FINDING THE OPPOSERS WERE ENTITLED TO ATTORNEY FEES WITHOUT A HEARING.

The Water Court erred in finding entitlement to attorney fees without conducting a hearing. The Supreme Court has previously reversed an award of attorney fees when the trial court failed to hold an evidentiary hearing on the issue of whether attorney fees were warranted. *Pedlow v. Stamp*, 776 P.2d 382, 388 (Colo. 1989). The Court stated

> Where, as here, a party places a claim for attorney's fees pursuant to §13-17-101... that party has the right to, and the trial court has a duty to conduct, a hearing upon that claim. [This section]...requires that the trial court then enter Findings of Fact, Conclusions of Law as to whether the claim is groundless or

> defense is "frivolous" or "groundless." And, if a claim or defense is deemed to be frivolous or groundless, the trial court must make Findings of Fact sufficient to justify the amount of attorney's fees awarded, if any.

The Supreme Court has made it clear that a trial court is required to provide an evidentiary hearing regarding the statutory criteria for awarding attorney fees. *Id.*

The order awarding attorneys fees must be set aside for failure to follow the requirements of due process.

VII. CONCLUSION

For these reasons, the award of attorney fees should be reversed.

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APPENDIX A

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH, IN PARK COUNTY	▲ COURT USE ONLY ▲ Case No. 96 CW 14

ORDER re: COSTS AND ATTORNEY FEES AWARD

This Order concerns the final determination of awards of attorney fees and costs as requested by:
(1) The Motion for Attorney Fees, filed August 10, 2001 by Center of Colorado Water Conservancy District, Park County Water Preservation Coalition, Park County, the Upper South Platte Water Conservancy District, and H.D. and Mary Catherine Coleman;
(2) The Motion for Award of Attorney Fees Incurred After July 31, 1998, filed August 10, 2001 by James T. Benes, James T. Benes, Jr. and Cassandra L. Benes Trust, and Tarryall Land and Cattle, LLC;
(3) The Motion for Award of Attorney Fees Incurred After July 31, 1998, filed August 10, 2001 by Centennial Water and Sanitation District;
(4) The Motion for Award of Attorney Fees, filed August 10, 2001 by Town of Fairplay, Indian Mountain Corporation, and James Campbell;
(5) The Motion in Support of Objectors' Bills of Costs, filed August 9, 2001 by the State and Division Engineers, Colorado Water Conservation Board, Colorado Division of Wildlife, City of Thornton, City of Englewood, Park County, Center of Colorado Water Conservancy District, Upper South Platte Water Conservancy District, Park County Water Preservation Coalition, the United States of America, Centennial Water and Sanitation District, James T. Benes, James T. Benes, Jr. and Cassandra L. Benes Trust, Tarryall Land and Cattle, LLC, Magness Land Holdings, LLC, Town of Fairplay, and Indian Mountain Corporation and James Campbell.[1] (hereinafter, all parties mentioned above will be referred to as "Opposers" unless specifically designated.).

In their initial motions concerning an award of attorney fees, Opposers asked the court to make a threshold determination as to whether Park County Sportsmen's Ranch's ("PCSR") Application was either frivolous or groundless. Because they only sought this threshold determination, Opposers did not submit itemized billing statements or attorney affidavits concerning attorney fees at the time the motions were filed. Opposers stated that quantification of the amount awarded could be resolved in a supplemental proceeding. In their motion supporting the Bills of Cost, Opposers supported a hearing if the reasonableness of the claimed costs was challenged. The court ruled on November 13, 2001 in its Order Concerning Post-trial

[1] Note: H.D. and Mary Catherine Coleman were not a listed party in this motion, but did file a Bill of Costs with the court.

motions that the application became groundless as of October 28, 1998, and also that the City of Aurora ("Aurora") was liable for costs and attorney fees assessed against PCSR pursuant to § 13-17-101, *et seq.* Pursuant to Aurora's motion to amend the November 13 order, the court absolved Aurora of liability for costs.

Center of Colorado Water Conservancy District, Park County Water Preservation Coalition, Park County, the Upper South Platte Water Conservancy District, H.D. and Mary Catherine Coleman, James T. Benes, James T. Benes, Jr. and Cassandra L. Benes Trust, and Tarryall Land and Cattle, LLC claim attorney fees jointly and severally against PCSR, Kenneth Burke, and Aurora. Centennial Water and Sanitation District claims attorney fees jointly and severally against PCSR and Kenneth Burke. Town of Fairplay, and Indian Mountain Corporation and James Campbell claim attorney fees only against PCSR.

Based on their final submissions, filed subsequent to the close of the costs and attorney fees hearing, Opposers claim the following amounts for costs and attorney fees in this case:
State and Division Engineers, Colorado Water Conservation Board, and Colorado Division of Wildlife – **Costs:** $15,427.47[2]
United States of America – **Costs:** $5,659.96[3]
City of Thornton – **Costs:** $235,775.87
City of Englewood – **Costs:** $101,067.10
Magness Land Holdings, LLC – **Costs:** $5,505.00
Park County and Upper South Platte Water Conservancy District – **Costs:** $476,218.78; **Attorney Fees:** $385,442.65
Center of Colorado Water Conservancy District – **Costs:** $210,582.78; **Attorney Fees:** $558,108.10
Park County Water Preservation Coalition – **Costs:** $17,933.30; **Attorney Fees:** $140,179.25
H.D. and Mary Catherine Coleman – **Costs:** $1,502.09; **Attorney Fees:** $11,132.75
Centennial Water and Sanitation District – **Costs:** $186,567.42; **Attorney Fees:** $137,469.00
James T. Benes, James T. Benes, Jr. and Cassandra L. Benes Trust, Tarryall Land and Cattle, LLC – **Costs:** $4,692.91; **Attorney Fees:** $9,674.25
Town of Fairplay – **Costs:** $681.48; **Attorney Fees:** $28,125.50
Indian Mountain Corporation and James Campbell – **Costs:** $589.63; **Attorney Fees:** $16,620.00[4]

At the costs and fees hearing and in their closing briefs PCSR, the City of Aurora ("Aurora"), and Mr. Burke generally argued the following: (1) That Opposers have not provided sufficient evidence of the reasonableness of the claimed costs and fees based on the statutory factors set forth in § 13-17-103;[5] (2) That Opposers are not entitled to costs and fees for work prior to the last date upon which Applicant could file disclosures; (3) That Opposers are not entitled to costs and fees incurred after the court's June 1, 2001 order dismissing the Application;

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[2] The State and Division Engineers, Colorado Water Conservation Board, Colorado Division of Wildlife, and PCSR filed a stipulation on October 11, 2002 in which PCSR agreed that the costs requested by the State entities are reasonable.

[3] The United States and PCSR filed a stipulation on October 17, 2002 in which PCSR agreed that the costs requested by the United States are reasonable.

[4] Town of Fairplay and Indian Mountain/James Campbell entered into a stipulation with PCSR, as presented to the court in testimony on October 18, 2002, in which PCSR agreed that the amounts claimed by these entities were reasonable and necessary.

[5] PCSR and Aurora also argued that the court should consider evidence related to the entitlement issue. The court declined to hear evidence on the entitlement because that issue had already been appealed.

(4) That Opposers are not entitled to costs claimed for non-subpoenaed witnesses; (5) That Opposers are not entitled to costs for work done by Isabella McGowan; and (6) That Opposers are not entitled to costs for work done by expert witness assistants. PCSR, Aurora, and Mr. Burke also generally argued that the billing statements submitted by numerous Opposers were insufficiently detailed to allow proper review of whether the amounts claimed were reasonable.

I. Applicable Legal Principles

A. Attorney Fees -

An award of attorney fees must be reasonable. *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143 (Colo. Ct. App. 1996); *Newport Pacific Cap. Co., Inc. v. Waste*, 878 P.2d 136 (Colo. Ct. App. 1994); *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo. Ct. App. 1990). The determination of the reasonableness of the attorney fee award is within the sound discretion of the trial court, and will not be disturbed on review unless it is not supported by the evidence. *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341 (Colo. Ct. App. 1999); *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143 (Colo. Ct. App. 1996); *Newport Pacific Cap. Co., Inc. v. Waste*, 878 P.2d 136 (Colo. Ct. App. 1994); *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo. Ct. App. 1990). The party seeking an award of fees has the burden of showing its entitlement to those fees by a preponderance of the evidence. *Brighton School District 27J v. Transamerica Premier Ins. Co.*, 923 P.2d 328 (Colo. 1996); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *Fountain v. Mojo*, 687 P.2d 496 (Colo Ct. App. 1984).

The proper starting point for a determination of attorney fees is the computation of a *lodestar* amount. This amount is determined by multiplying the number of hours reasonably spent on a claim or litigation, times a reasonable hourly rate for the services of the attorney providing the work. *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143 (Colo. Ct. App. 1996); *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo. Ct. App. 1990). *See also, Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (*Citing Hensley v. Eckerhart*, 461 U.S. 424 (1983)). Once this amount has been determined, the court may then adjust the amount based on consideration of other factors. *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143 (Colo. Ct. App. 1996); *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo. Ct. App. 1990). *See also, Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984).

Pursuant to § 13-17-102(4), 5 C.R.S. (2002), the court shall assess attorney fees for actions that it determines are substantially frivolous, substantially groundless, or substantially vexatious. Section 13-17-103, 5 C.R.S. (2002), requires the court to consider numerous factors when determining whether to assess attorney fees and the amount of attorney fees to be assessed. This section also requires the court to set forth the reasons for the award. Under Colorado case law, the court must make findings and conclusions as to whether a claim is frivolous or groundless, and the court must also consider and make findings and conclusions with respect to the factors from § 13-17-103. *See In re Aldrich*, 945 P.2d 1370 (Colo. 1997); *Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989). The court's determination of whether a claim is frivolous or groundless will not be disturbed if supported by the record. *City of Littleton v. State*, 832 P.2d 985 (Colo. Ct. App. 1991).

Colorado case law explicitly requires a court hearing with respect to the amount of any costs and fees award; however, it is unclear whether such a hearing is required, absent a party's request, prior to the court's determination of groundlessness. *See Board of County*

Commissioners v. Auslaender, 745 P.2d 999 (Colo. 1987); *Christian v. Westmoreland*, 809 P.2d 1105 (Colo. Ct. App. 1991); *Hunter v. Colorado Mountain Jr. College*, 804 P.2d 277 (Colo. Ct. App. 1990); *Zarlengo v. Farrer*, 683 P.2d 1208 (Colo. Ct. App. 1984) (These cases state or suggest that a hearing is necessary on the issue of whether a claim was frivolous or groundless.). *But see, Pedlow v. Stamp*, 776 P.2d 382 (Colo. 1989); *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987); *Maul v. Shaw*, 843 P.2d 139 (Colo. Ct. App. 1992); *Little v. Fellman*, 837 P.2d 197 (Colo. Ct. App. 1991); *City of Littleton v. State*, 832 P.2d 985 (Colo. Ct. App. 1991); *Irwin v. Elam Construction Co., Inc.*, 793 P.2d 609 (Colo. Ct. App. 1990); *Alessi v. Hogue*, 689 P.2d 649 (Colo. Ct. App. 1984) (These cases either generally state that a hearing must be held, or state only that a hearing must be held on the issue of amount and reasonableness.) This narrow issue has not heretofore been addressed directly on appeal. Whether a case is frivolous from its inception, or whether it becomes groundless for lack of evidence at trial, is apparent from the state of the record, and for all practical purposes is a question of law. On the other hand, the reasonableness of hourly rates and volume of work performed inherently turns upon questions of fact. Accordingly, the court concludes that its determination of frivolousness may be made *sua sponte*, without a hearing set, in the absence of a party's request. Here, neither PCSR nor Aurora requested a hearing on the issue of its liability for costs and fees until after their appeal was perfected and the court lost subject matter jurisdiction.

B. Costs -

Pursuant to Rule 54(d), the court shall award costs to the prevailing party, subject to the limitations set forth in the rule. Absent a specific prohibition in the statutes or rules, the court has discretion to award any reasonable costs. *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *Cherry Creek School District #5 v. Voelker*, 859 P.2d 805 (Colo. 1993); *Mackall v. Jalisco*, 28 P.3d 975 (Colo. Ct. App. 2001); *Roget v. Grand Pontiac, Inc*, 5 P.3d 341 (Colo. Ct. App. 1999); *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo. Ct. App. 1990). Such award will not be disturbed absent an abuse of discretion. *Harvey v. Farmers Insurance Exchange*, 983 P.2d 34 (Colo. Ct. App. 1998); *Lamont v. Riverside Irrigation Dist.*, 498 P.2d 1150 (Colo. 1972). The court is required to hold a hearing and make findings and conclusions concerning the reasonableness of the award if any party challenges the amount and reasonableness of the bill of costs, or otherwise requests a hearing. *Harvey v. Farmers Insurance Exchange*, 983 P.2d 34 (Colo. Ct. App. 1998); *Federal Ins. Co. v. Ferrellgas, Inc.*, 961 P.2d 511 (Colo. Ct. App. 1997); *Great Western Sugar Co. v. Northern Natural Gas Co.*, 661 P.2d 684 (Colo. Ct. App. 1982).

II. Analysis and Conclusions

A. Attorney Fees -

1. Standard of Review.

An initial area of dispute between the parties is the method the court should apply in its determination of *reasonableness* as applied to the determination of attorney fees. Applicants argue that the court should not use the *lodestar* method for this determination. Rather, they aruge the determination of a reasonable amount should be made based exclusively on the factors set forth in § 13-17-103, 5 C.R.S. (2002). Opposers argue that the court should initially determine a reasonable amount using the lodestar approach, and then may adjust that amount up or down as necessary based on the § 13-17-103 factors to arrive at a final award.

Section 13-17-102(2) allows the court to award reasonable attorney fees against an attorney or party that has brought a claim that lacks substantial justification. The court's determination of a reasonable award must be based on all circumstances surrounding the litigation. Applicants argue that § 13-17-103 provides a specific definition of reasonableness for the court, and thus, the court should reject the lodestar method. The court disagrees with Applicants' position. The guiding factors set forth in § 13-17-103 are not exclusive but are to be considered by the court "among others." Further, § 13-17-103(1) states that "the court shall exercise its sound discretion" when determining the amount of an attorney fees award.

The court's primary goal is to make a determination of what award is *reasonable*. In doing so, the court begins by applying the lodestar method as the starting point for its determination of a reasonable award. *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994); *Spensieri v. Farmers Alliance Mutual Insurance Co.*, 804 P.2d 268 (Colo.App.1990). The amount so determined provides the court with a base award that may then be adjusted based on the § 13-17-103 factors, the circumstances of the case, and any other evidence the court, in its discretion, believes is relevant to the determination. Based on the above conclusions, the court will first address issues related to Opposers' billing statements and the reasonableness of their claims for attorney fees. The court will then address issues related to Opposers' claims for costs. Finally, the court will address the statutory factors and make a final determination of the amounts to be awarded.

2. Opposers' evidence supporting the amount claimed –

Applicants argue that Opposers' claims for attorney fees should be dismissed, or substantially reduced. As grounds for this assertion Applicants claim: (1) That Opposers' billing statements were not sufficiently detailed to allow the court to make any determination of reasonableness; (2) That Opposers did not provide any evidence with respect to the statutory factors set forth in 13-17-103; (3) That Opposers did not provide any evidence at the hearing explaining how it was reasonable that they spent in excess of one million dollars defending against a groundwater model that was "fatally flawed"; (4) That Opposers failed to segregate from their billing statements work done on other cases; (5) That Opposers failed to mitigate their damages.

a. Sufficiency of Billing Statements –

Aurora asserts that the Opposers' billing statements were insufficiently detailed to enable the court to make an informed determination of whether the work done by Opposers' attorneys was reasonable. As grounds for this argument, Aurora cites *American WaterDevelopment, Inc. v. City of Alamosa*, 874 P.2d 352, 383 (Colo. 1994) ("*AWDI*"), in which the Court states that although an attorney "is not required to record in great detail how each minute of his time was expended," he should at least "identify the general subject matter of his time expenditures." Aurora argues that Opposers' billing statements are, in many instances, so devoid of subject matter that it is impossible for Aurora to effectively ask questions on cross-examination as to the nature and reasonableness of the work done. Opposers argue that the language in *AWDI* is not relevant to this case. Opposers assert that, because they are entitled to all attorney fees incurred after October 28, 1998, the court does not have to segregate out work done on some claims or issues, as was the case in *AWDI*. Opposers argue that their billing statements are sufficient because they generally show that the subject matter of the work done was this case. Opposers further argue that their counsel testified at the hearing as to the reasonableness of the work done and the amounts claimed.

The court concludes that Opposers' billing statements are sufficient in this instance to make a determination of reasonableness. The language from *AWDI* does not specifically address the degree of detail necessary to make billing statements sufficient for purposes of an award of attorney fees. The case does, however, provide general guidelines for the court. Although *AWDI* specifically deals with an award of attorney fees pursuant to C.R.C.P. Rule 41(a)(2), the opinion sets forth the basic elements necessary for determination of a reasonable lodestar amount. In *AWDI*, the Supreme Court ruled that in making its determination of reasonableness, a court could consider both evidence and testimony, that allocations made after the fact concerning work on different claims can provide proper evidence for the court, and that reconstructed time records are admissible. 874 P.2d at 383-384.

The court's reasonableness inquiry need not dissect every second of Opposers' counsels' time to determine if their work was *reasonably* performed. *See, e.g.*, 874 P.2d at 387. Rather, the court's job is to look at the overall work done by the claimants to determine whether it was reasonable based on the nature of the application and the complexity of the legal and factual issues. *Id.* At 383-384. This is especially true in a case where the entire application was determined to be groundless, and thus, no segregation of work is necessary. Applicants stipulated to the rates charged by Opposers' counsel. Thus, the court's only job in its initial determination of the reasonableness of the amounts claimed is to determine whether the time spent by Opposers' counsel was reasonable.

In this case, Opposers followed the same general approach as was used in *AWDI*. Opposers provided billing statements, and testimony in support of those statements and the work done on the case. Applicants were aware of the general nature of the pleadings and progress of the litigation. These parties could have presented evidence challenging the reasonableness of the work done or the time spent on any issue. Other than a bare allegation by Aurora that Opposers spent too much time defending against a model that was "flawed," Applicants did not present evidence that Opposers spent too much time litigating the matter or did work that was completely unnecessary. Rather, they focused their questions and arguments on the lack of evidence provided by Opposers. The lack of specific detail in each billing itemization is not dispositive of the reasonableness of Opposers' work on this case. Although Opposers did review their billing statements after the fact to segregate out work done on other matters, these statements were contemporaneous billing records, rather than reconstructions. Although some recollection was involved, Opposers' counsel were not relying on their memories as to the amount of hours billed. Opposers testified that their claims related solely to the work on this case, and made corrections where necessary to remove improper claims. The evidence presented by Opposers was sufficient so that Applicants could inquire about, and/or challenge, the overall reasonableness of the amounts claimed, in light of the claims and issues, the length of the proceedings, and the nature of the application. Although the court may adjust the claims in its discretion and based on the factors from § 13-17-103, it concludes that the evidence submitted by Opposers is sufficient to determine an initial lodestar amount.

b. Whether Opposers provided evidence related to § 13-17-103 –

PCSR argues that the § 13-17-103 factors provide the measure of reasonableness with respect to the attorney fees claimed in this proceeding, and that Opposers have failed to substantiate their claims because they did not provide any evidence related to the factors. This argument is unpersuasive. The court will first make a determination of reasonable amount based on the lodestar method, and will then adjust that amount, in its discretion, based on consideration of the statutory factors. Opposers' burden is to provide the court with the information necessary

to make this initial determination. Both sides are entitled to present evidence showing why and to what extent, if any, the lodestar amount should be adjusted. The court must then make findings based on the evidence presented and the statutory factors. The court advised the parties, during the costs and fees hearing that it would consider evidence from both the hearing and from the trial when analyzing the factors. *See Transcript*, December 16, 2002, at 173, lines 8-15. The court also stated that the evidence was sufficient for it to make a determination with respect to the statutory factors.

c. Whether Opposers failed to segregate work done on other cases –

Aurora and Mr. Burke argue that Opposers did not segregate out work done on other cases, despite the fact that they knew from the outset that the application was groundless. Aurora's closing brief argues that several counsel in this proceeding also represented the same clients in other cases, and that these counsels' allegedly vague billing statements could include work done for those clients on cases other than 96 CW 14.

The court finds that Opposers' billing statements do not charge for work done on other cases. Opposers' attorneys testified that they thoroughly reviewed the billing statements prior to submission, and that the work claimed was all related to the 96 CW 14 litigation. During this review, and upon cross-examination, Opposers amended their billing statements where necessary to correct for inappropriate billing. Aurora cross-examined the attorneys, who testified under oath that the billing statements were accurate. There is nothing in the record to suggest that Opposers intentionally included claims for work done on other cases. Where a billing was shown to be erroneous, it was corrected by Opposers without any argument.

The court is also not persuaded by the argument that Opposers should have segregated their billing statements from the beginning because they knew that the Application was groundless. Opposers' billing practices are not relevant to resolution of this matter. What is relevant is whether Opposers' billing statements accurately reflect billing for work done in this case. It is not important that Opposers did not segregate out work on other cases at the time the billing statements were completed, provided this work was removed before Opposers totaled their claims for attorney fees in this case. The court concludes that Opposers did remove billing for work on other cases, and thus, the submitted statements are an accurate reflection of work done on 96 CW 14.

d. Whether Opposers failed to mitigate their damages –

The court will address this issue in its analysis of the statutory factors.

3. Attorney fees for work done prior to Applicant's last chance for disclosure –

Aurora, PCSR, and Ken Burke argue that the court may not award attorney fees for any work done prior to the last date upon which Applicant could make disclosures or designate witnesses. As grounds for this argument, they cite to the ruling in *Harrison v. Smith*, 821 P.2d 832 (Colo. Ct. App. 1991). Aurora argues that the pertinent date should be February 14, 2001, the time as of which the court issued its order ruling on the motion to reconsider and clarify its October 31, 2000 order concerning the testimony of Tom Hesemann. PCSR argues that the court should not award attorney fees until at least May 1, 2000, the last date available to the Applicant to disclose the sensitivity analysis performed on the model.

The court concludes that *Harrison v. Smith* is not applicable to this case. In *Harrison*, the trial court determined that the plaintiff's claims were groundless because she did not present any credible evidence on the issue of damages. Although the Court of Appeals upheld the trial

court's determination, it ruled that the claims did not become groundless until the last point at which the plaintiff or her counsel could have designated witnesses to testify concerning the damages element of her claims. The Court of Appeals reasoned that attorney fees should not be awarded for work done by the defendants prior to the plaintiff's last opportunity to support the claim and produce available credible evidence, and concluded that plaintiff lost the opportunity to present this evidence as of the deadline for designating witnesses. The distinguishing difference between *Harrison* and this case is that credible evidence was in existence that could have been produced at trial but for counsel's failure, in their pre-trial efforts, to obtain and designate witnesses upon this issue.

On the other hand, in this case, Applicant's modeling was due on July 31, 1998, and its project feasibility report was due on August 31, 1998. The court determined that as of October 28, 1998, Applicant knew or should have known that it did not have a reliable groundwater model, and that it needed to perform more tests. Although Aurora's experts eventually decided to put together a sensitivity analysis of the model, there was no representation by Applicant to the court or to the parties as of October 28, 1998 that it wanted to revise or do more work on the model. In fact, a sensitivity analysis was begun, but was aborted prior to its completion. Applicant stated at the November 6, 1998 Case Management Conference that it was ready to proceed to trial. The Applicant also did not disclose any potential flaws in the model at the July 26, 1999 status conference and hearing on Opposers' motion to continue. Although the date of trial was eventually changed from May 1, 2000 until July 1, 2000, Applicant at no point made any representation that it needed to do more work on the groundwater model.

The court rejects Applicants' argument that they had until either May 1, 2000 or February 14, 2001 to rectify the model. Applicant filed 26(a)(2) disclosures on January 4, 1999, and 26(a)(2) expert rebuttals on May 1, 2000. Although these disclosures provided expert opinions concerning the application, and rebutted the disclosures of Opposers' experts, they did not revise the groundwater model. Following Dr. Eastman's October 28, 1998 letter to the Applicants, they could have petitioned the court for additional time to revise the model and provide the revisions to Opposers for comment and review. Such a request was never lodged with the court, and Applicants chose to stand upon their flawed groundwater model. Unlike *Harrison*, there is no credible evidence that could have been produced but for an oversight. Applicant did not assert that such evidence was available, and did not seek an opportunity to amass such evidence prior to trial. Therefore, May 1, 2000 is not the date upon which attorney fees began to accrue. Nor do the court's October 31, 2000 and February 14, 2001 orders establish the first date upon which the court could make a determination of groundlessness. These orders only provided (in part) that Tom Hesemann would not be able to testify concerning the terms and conditions of new Exhibit Z. The February 14 order suggests that more disclosure and discovery would be allowed if any party sought to present additional expert testimony concerning existing or new terms and conditions necessary to prevent injury. Such disclosure and discovery would be limited to these terms and conditions, and the terms and conditions would have to be based on the data provided by the groundwater model. Such disclosures could not have cured the shortcomings of the model.

The court did not determine that the application was groundless because Applicant could have, but did not, endorse witnesses who could provide testimony concerning the model. Nor did it find the application groundless because Applicant's experts' opinions were not disclosed. The court determined that the application was groundless because the Applicant did not have a reliable groundwater model that provided evidence of the amount, timing, and location of depletions, or the amount of replacement water that would be necessary to offset injurious

depletions created by the pumping plan. The Applicant knew, or should have known, that its model was indefensible as of October 28, 1998. The fact that the Applicant later represented that it was prepared for trial, with no disclosure to the court that the model was insufficient, and with no request for an extension of time to rehabilitate it, warrants the award of fees from October 28, 1998, forward.

4. Attorney fees (or costs) for work done after the court's June 1, 2001 Order –

Applicants generally argue that Opposer's are not entitled to any attorney fees for work done after June 1, 2001. Aurora specifically argues that it should not have to pay attorney fees for work done on the costs claims after this date because it is not liable for costs. PCSR argues that Opposers are not entitled to any attorney fees incurred from June 1, 2001 through November 13, 2001, because the court has not ruled that the Motion to Reconsider was frivolous or groundless. PCSR further argues that Opposers are not entitled to attorney fees for work done on the motions for costs and attorney fees, absent a future finding that Applicants' challenge to the claimed costs and fees lacked substantial justification. The court stated during the October hearing dates that the cut-off for costs and attorney fees would be November 13, 2001. On that date, the court ruled on Applicant's Motion to Reconsider and the Motion to Join Aurora, and also determined liability with respect to the motions for costs and attorney fees.

Having considered the closing arguments and other evidence, the court now refines that statement and limits Opposers' costs and attorney fees award to work done related to the merits, including work on the Motion to Reconsider. Opposers argue that the court should impose no such limitation, because all the work done, including work on both the joinder motion and the costs and attorney fees motions, was necessitated by Applicant's continued pursuit of a groundless application. Although this argument is appealing, the court concludes that a reasonable award should not include any work after June 1, 2001 on the Motion to Join Aurora or the Motions for Costs and Attorney Fees.

An award of costs and fees on the Motion to Reconsider is appropriate and therefore granted. The Applicant brought the motion, and all work done on this motion was related to the merits of the Application. In addition, the court has scrutinized the billings from June 1, 2001 forward, and has eliminated invoices and claims that do not unequivocally relate to Applicant's Motion for Reconsideration.

Opposers chose to join Aurora for purposes of recovering costs and fees, and this action was collateral to the merits of the case. Hence, it would be unreasonable to tax Applicants for that work. The court draws the same conclusion with respect to work done on the costs and attorney fees motions. Section 13-17-102(4) requires the court to assess attorney fees if it finds that an action lacked substantial justification. There has been no such finding as of this point. Further, it was Opposers who asserted that the application was groundless. Thus, Opposers' own action led to this extra work. Although Opposers were clearly within their rights to pursue costs and attorney fees, it would be unreasonable to reimburse them for this work.

Any costs associated with the Motion to Join Aurora or the motions for costs and attorney fees would be awarded, if at all, pursuant to C.R.C.P. Rule 54(d). An award of costs under Rule 54(d) is within the court's discretion. The court concludes that costs incurred in the preparation of pleadings to recover costs are not recoverable. Notwithstanding this conclusion, it would be inequitable to award costs to the Opposers, which they expended in joining Aurora, whose liability for attorney fees is vicarious.

5. Whether work was duplicative or unnecessary –

Aurora and Ken Burke assert that several law firms did work for the same entities, and thus, that Opposers claim fees for unnecessary or duplicative work. Aurora appears to argue that because both James Gardner and Daniel Drucker are members of the Park County Water Preservation Coalition ("PCWPC"), and are also Board members for the Center of Colorado Water Conservancy District ("CCWCD"), that these organizations are essentially the same entity, and that this entity hired two different firms to handle the same case.

The evidence in this case shows that PCWPC and CCWCD, although sharing common interests, are distinct entities. Although in certain circumstances it may be unreasonable for one party to have several attorneys doing duplicate work on a case, it is not unreasonable for each of several parties to hire a firm or attorney to represent its individual interests, even if the work done by the different firms or attorneys is somewhat duplicative. In this case, counsel for Opposers made a considerable and commendable effort to consolidate the litigation effort amongst the parties to avoid duplicative work. This effort is illustrated by the Opposers identifying issues common to the several Opposers, and allocating duties among them, so that the individual Opposers did not duplicate one another's work. Further, counsel for several Opposers reduced their hourly rate, did not bill for certain work, billed for no more than eight hours a day (although more than eight hours were spent during certain days), and otherwise gave discounts. The court finds that no party has claimed attorney fees for duplicative or unnecessary work, and in many cases, are seeking recovery for less than they would be entitled.

6. Work related to Legislators –

Aurora and Ken Burke argue that certain Opposers should not be compensated for work related to the lobbying of Legislators. Aurora argues that this work was not directly related to, or a necessary part of, the defense of the Application. The court agrees with Aurora, and has eliminated from its cost and fees summary the amounts claimed for this work.

7. Good-faith attempt to establish a new theory of law –

PCSR argues that no fees should be assessed because the application was a good-faith attempt to establish a new theory of law. Although this argument goes to the issue of liability rather than the amount of costs and attorney fees to be awarded, the court notes that PCSR's reliance on this argument is misplaced. The Application was not determined to be frivolous because the Applicant brought claims that had no basis in law. If that were the case, Applicants argument that the claims were a good-faith attempt to establish new law would have some merit. In this situation, the court determined that the Application was groundless because the Applicant could not provide sufficient evidence to support its claims. As Opposers correctly point out, use of a groundwater model to support an augmentation plan is not a new concept, and is scientifically defensible. The plan for augmentation does not involve a new theory of law, but rather concerns factual issues turning on such questions, among others, as rainfall patterns and recharge rates. The law is well established regarding the Applicant's burden, when seeking approval of a plan for augmentation. Thus, this argument does not support a reversal of the court's previous determination of liability, and is not grounds for lessening the amount of costs and attorney fees awarded.

8. Whether certain parties have waived payment of attorney fees by PCSR by not seeking fees against Aurora –

PCSR argues that certain parties have waived any claim of attorney fees against PCSR by not seeking fees against Aurora. Opposers generally respond that the attorney fee statute allows a claimant to seek fees against fewer than all potentially liable parties, and that no "release" of the other parties occurs under these circumstances.

The court concludes that PCSR is not released from liability as a result of certain Opposers not seeking attorney fees against Aurora. The court determined in its June 13, 2000 order that PCSR and Aurora were in a principal-agent relationship for the limited purpose of pursuing the water rights application. Under Colorado law, the principal is liable for the acts of the agent provided these are within the scope of the agency. *Restatement (Second) of Agency*, § 439 (1958); *Montoya v.Grease Monkey Holding Corp.* 883 P.2d 486 (Colo. Ct. App. 1994).

In its November 13, 2001 order, the court determined that Aurora was liable, as PCSR's principal, for any attorney fees awarded against PCSR as a result of its pursuit of groundless or frivolous claims. Under § 13-17-102(3), the court shall allocate the payment of attorney fees against the offending attorneys and parties, jointly or severally, as it deems most just. Because of the principal-agent relationship, PCSR and Aurora are essentially the same entity for purposes of the award of attorney fees. Thus, the court need not make any allocation between these two entities. Therefore, whether an Opposer has sought fees against Aurora is not dispositive of either Aurora's or PCSR's liability. Aurora had the opportunity to cross-examine Opposers' witnesses, but chose to waive this opportunity. Aurora has known, since its 1996 written agreement with PCSR, that it was PCSR's principal for purposes of pursuing this Application.

The court also concludes that no allocation is necessary between PCSR and Ken Burke. The court has discretion to determine the relative liabilities between an offending party and its attorney. In this case, the attorney was also a general partner of the offending party, and thus, the two can be considered one entity for purposes of liability. Thus, PCSR, Ken Burke, and Aurora shall be jointly and severally liable for any award of attorney fees in this matter.

9. Frivolous Claims.

The court determined in its November 13, 2002 order that certain claims brought by the Applicant were frivolous from their inception. Opposers' have itemized the work done with respect to these claims prior to October 28, 1998, and the court finds that this work is reasonable based on the nature of the claims and the overall circumstances of the litigation. Thus, Opposers are entitled to their claimed amounts as set forth below.

B. Costs -

1. Costs related to non-subpoenaed witnesses –

PCSR asserts that Opposers are not entitled to receive an award for those costs related to the mileage, lodging, and meals of either the Opposers themselves, or their attorneys, as a part of trial participation. In support of this assertion, PCSR argues that neither the cost statute nor any case of record permits the prevailing party to recover its own subsistence payments and that of its attorneys.

Although the Colorado Court of Appeals has ruled that costs may not be awarded unless authorized by the statute (*See Perkins v. Flatiron Structures Co.*, 849 P.2d 832 (Colo. Ct. App. 1992)), this ruling has at least been impliedly overruled by the Colorado Supreme Court in later opinions. *See Cherry Creek School District #5 v. Voelker*, 859 P.2d 805 (Colo. 1993) ("The list of expenses that may be awarded as costs under section 13-16-122, however, is illustrative and

not exclusive. (citation omitted) . . . In general, absent a specific prohibition, the trial court has discretion over the awarding of costs." (citation omitted)); *American Water Development, Inc v. City of Alamosa*, 874 P.2d 352 (Colo. 1994). The Court of Appeals has adopted the rulings of the Colorado Supreme Court. *See Mackall v. Jalisco*, 28 P.3d 975 (Colo. Ct. App. 2001) ("In construing C.R.C.P. 54(d), the supreme court has held that unless there is a statute or rule that specifically prohibits an award of costs, trial courts may exercise their discretion to award any reasonable costs to a prevailing party."); *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341 (Colo. Ct. App. 1999).

With the exception of the decision in *Welch v. George*, 19 P.3d 675 (Colo. 2000)[6], PCSR has not pointed to any statute or rule that specifically forbids the awarding of mileage, lodging, or meals to the prevailing party. The *Welch* opinion deals with § 13-16-122(e), which authorizes the court to award costs attributable to witnesses, including mileage. The opinion limits mileage awards to subpoenaed witnesses. It does not address any limitation on the award of costs not incurred by witnesses. Thus, this court has discretion to award these costs. Case law generally limits cost awards to those expenses incurred as a necessary aspect of the litigation, and has not allowed costs where the work or expense was part of the general overhead of the billing party. *See Cherry Creek School District #5 v. Voelker*, 859 P.2d 805 (Colo. 1993); *Harvey v. Farmers Insurance Exchange*, 983 P.2d 34 (Colo. Ct. App. 1998); *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341 (Colo. Ct. App. 1999); *Mackall v. Jalisco*, 28 P.3d 975 (Colo. Ct. App. 2001).

The court concludes that Opposers are entitled to costs for the lodging of their attorneys, but are not entitled to costs for the lodging of any other person attending trial on a voluntary basis and who was not essential to the conduct of the trial. Opposers are also entitled to costs for the mileage of their attorneys if this was separately billed. Finally, Opposers are entitled to costs for their attorneys' meals during the trial period. The court has considered, but rejected, reducing *per diem* reimbursement by the ordinary living expenses that are incurred in the absence of out-of-town travel.

2. Costs for work done by expert assistants –

The court concludes that Opposers are entitled to costs for work done by expert assistants, provided such work was a necessary part of the expert's preparation for trial. *Cherry Creek School District #5 v. Voelker*, 859 P.2d 805 (Colo. 1993), and *American Water Development, Inc v. City of Alamosa*, 874 P.2d 352 (Colo. 1994). PCSR has not cited any authority precluding an award of costs for work done by expert assistants. Thus, the court has wide discretion to award costs for this work, provided this award is reasonable and does not compensate for work that is part of general overhead. It is reasonable that an expert would delegate some of the work related to his trial preparation to others on his staff. Absent this staff involvement, the expert would have to type his own reports, compile all his own data, etc. Having others do the work results in a savings to the client, as well as to a party who becomes liable for a costs award, and it is reasonable to include this work in a costs award.

[6] In *Welch v. George*, the Supreme Court recognized that the list set forth in § 13-16-122 was illustrative, rather than exclusive. The court held, however, that mileage costs for a non-subpoenaed witness were not awardable under the reasoning that § 13-16-122 referred specifically to § 13-33-103, which only allowed an award of mileage costs to a subpoenaed witness. The court further concluded, however, that because § 13-33-103 only limited the award of mileage costs to subpoenaed witnesses, the court had discretion under §13-16-122 to award other costs to non-subpoenaed witnesses attending trial.

3. Costs for work done by Isabella Mcgowan –

PCSR argues that Opposers are not entitled to any costs for the work done by Isabella McGowan during the pendency of this application. PCSR correctly asserts that Ms. McGowan was operating under an expired engineering license, and thus, was in violation of § 12-25-105(1). PCSR argues that the contract for services between Ms. McGowan and numerous Opposers is unenforceable, and that Opposers are improperly seeking judicial assistance to enforce the contract.

The court concludes that Opposers are entitled to costs for the work performed by Isabella McGowan. The nature of Ms. McGowan's work in this matter was review and consultation. Further, she could have been qualified as an expert for purposes of trial testimony without holding a valid license. As counsel for Centennial Water and Sanitation District points out, numerous experts involved in the production and analysis of the surface and groundwater models were not licensed as professional engineers. Finally, Ms. McGowan has been licensed in the past, and the evidence shows that her failure to renew was an excusable mistake.

The fact that a contract with a non-licensed engineer may be unenforceable means only that neither party is obligated to perform, and one party cannot seek assistance from the court to make the contract enforceable. In this case, neither party to the contract raised the issue of enforceablility or asserted that performance was not due because of Ms. McGowan's lack of a license. If Opposers were content with the services of Ms. McGowan, and paid her bill, then PCSR is liable, no matter whether Ms. McGowan was licensed or not. Neither Opposers nor Ms. McGowan are seeking the assistance of the court to enforce the contract against the other. The contract has been performed to the satisfaction of both parties. At this point, Opposers are merely seeking reimbursement for costs expended during the pendency of the litigation.

C. Statutory factors set forth in 13-17-103 -

Section 13-17-103 states:

> In determining the amount of an attorney fee award, the court shall exercise its sound discretion. When granting an award of attorney fees, the court shall specifically set forth the reasons for said award and shall consider the following factors, among others, in determining whether to assess attorney fees, and if so, the amount of attorney fees to be assessed against any offending attorney or party.

5 C.R.S. (2002). The court now considers those factors, below.

1. The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted. -

The court has already made its determination that the Application became groundless as of October 28, 1998, and that certain claims by Applicant were frivolous from their inception. Thus, it has already concluded that the Application, as a whole, was valid and contemplated by law at the time of filing. No further discussion or consideration of this factor is required.

2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action. -

Relying upon a prior ruling of this court in the *Kiowa I* case, Aurora asserts that once a party becomes aware of a fatal defect in an Application, it is unreasonable for that party to incur further attorney fees without seeking a dispositive ruling on the Application. Aurora asserts that

Opposers were apparently aware from the outset that the groundwater model was deficient, and thus, should have moved for a dispositive ruling on the model and mitigated any further damages.

This argument is unpersuasive. In *Kiowa I*, the application became groundless as a matter of law when the applicant no longer had a firm end-user for its appropriated water, and thus, could not satisfy can and will with respect to the claimed water rights. The court determined that the opposers should have mitigated their attorney fees by moving for summary judgment as of this point, rather than continuing to litigate. In this case, the viability of the groundwater model was an issue of fact. Although Applicant was told by its expert that the model was not defensible at trial, Applicant insisted that it was ready to go to trial. A motion for summary judgment at this juncture would have been denied because of the genuine dispute about the reliability of Applicant's groundwater model. Rather than mitigating damages, summary judgment litigation at this point would only have increased the costs and fees incurred by both the Applicant and the Opposers. Applicant's insistence on proceeding to trial in the face of Dr. Eastman's October 28, 1998 letter compelled the Opposers to prepare to defend their position at trial. In the period before trial, Applicant was also aware that Opposers strenuously contested the admissibility of the model. The duty to mitigate was on Applicant's, not Opposers', shoulders.

3. The availability of facts to assist a party in determining the validity of a claim or defense. -

Aurora and Ken Burke argue that the facts available to the Applicant prior to trial were sufficient to justify the pursuit of the Application. Aurora's closing brief asserts that:
a) Several experts for the Applicant did work on the Application and were accepted by the court as experts for purposes of testimony;
b) Dr. Eastman did perform some sensitivity analysis on the groundwater model;
c) Dr. Eastman testified that a sensitivity analysis was not always done on the models in water rights cases;
d) Opposers' experts admitted that they have used computer models in prior cases where the model was not peer reviewed and no sensitivity analysis was performed;
e) Determining aquifer constants through pumping tests is generally too expensive to be justified; and,
f) The State Engineer testified at deposition that the Applicant might be able to take credit for evapotranspiration salvage.

Opposers argue that although Dr. Eastman may have performed some sensitivity analysis on the model during the calibration phase, he did not perform any sensitivity analysis on the predictive simulations. Both the Anderson & Woessner treatise on modeling and the ASTM guidelines state that both types of sensitivity analysis are important to the reliability of a model. Opposers argue that Dr. Eastman recognized this fact in his October 28, 1998 memo. Opposers assert that Dr. Eastman admitted at trial that no sensitivity analysis was done on the predictive model. Opposers finally argue that what their own experts said or did with respect to models for other water rights applications is not relevant to Applicant's conduct in this case.

The purpose of looking at the "available facts" factor under § 13-17-103 is to determine whether there were facts or evidence available to the Applicant that would justify pursuing a claim. Whether the above facts were available to the Applicant did not lessen its obligation to determine that it had the necessary evidence and data to satisfy its burden of proof at trial. As of October 28, 1998, Applicant knew or should have known that its model did not provide reliable

information with respect to depletions of, or replacement to, the aquifer and the stream system, and could not do so without further analysis and refinement. Applicant had information that it chose to ignore. Thus, because the necessary data could have been amassed, Applicant was not justified in pursuing the claim without first refining the model.

4. The relative financial positions of the parties involved. -

No evidence of the financial positions of either party was presented at the hearing, and thus, the court assumes that this factor is not relevant to its determination of amount of costs and attorney fees to be awarded.

5. Whether or not the action was prosecuted or defended, in whole or in part, in bad faith. -

The court has already determined at the hearing that the Application was not brought in bad faith. This is only one factor to be considered, however, and thus is not dispositive of either liability or the amount of costs and fees to be awarded.

6. Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict. -

Aurora and Ken Burke argue that issues of fact were reasonably in conflict throughout the proceeding. In support of this argument, Aurora's closing brief cites to numerous instances where Applicant's experts opined that the model was valid and could be used to predict depletions, available replacement water, and overall project feasibility. Despite the fact that all of Applicant's experts may have opined at trial that the model was potentially useful, the court finds that these experts' opinions were not based upon either an independent analysis of the model or a refutation of Dr. Eastman's opinion that addressed the specific concerns he expressed. Assuming that there were issues of fact determinative of the validity of Applicant's claim, such issues were not framed nor supported, either prior to or during trial.

7. The extent to which the party prevailed with respect to the amount of and number of claims in controversy. -

Aurora and Ken Burke claim that Opposers "lost" on the issue of underground storage, and thus, are not entitled to attorney fees for work on this issue. (*Citing City of Wheat Ridge v. Cerveny*, 913 P.2d 1110 (Colo. 1996), for the proposition that a litigant cannot recover costs and fees for a claim upon which it did not prevail). This argument is fanciful at best, groundless at worst. Aurora's closing brief states that Opposers lost on the underground storage issue in the "trespass case" (99CW129/01SA56) (*Citing Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (Colo. 2002)), and thus, their victory on the underground storage issue in this case is illusory. The trespass case turned on the issue of whether a party seeking to store water in an underground aquifer needed the consent of overlying landowners, and did not consider the technical requirements for underground storage. Additionally, the trespass case was separately litigated, such that an award for costs and attorney fees to the prevailing party (Applicants) should have been addressed in that proceeding. Opposers' loss in the trespass case is not germane to its prevailing in this case.

8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court. -

Aurora and Ken Burke argue that the court should consider the offers of settlement that Applicant made toward certain Opposers. The court believes this is a misreading of this factor.

Section 13-17-103(h) does not say that the court should consider offers of settlement, as Aurora implies in its closing brief. Rather, it states that the court should consider the amount and conditions of settlement *as they relate to the ultimate relief granted by the court*. Thus, under this factor, the court may look to see if the party seeking attorney fees for a frivolous or groundless claim would have been better or worse, financially, had it accepted an offer of settlement prior to trial. In this case, Opposers succeeded in having the entire Application dismissed at trial. It is unlikely that this result is worse than they would have done in a settlement. Opposers argue that Applicant did not file an offer of judgment with the court, as that term is defined in § 13-17-202(3). Opposers also point out that Applicant did not make offers of settlement to the parties now seeking attorney fees. This factor weighs in favor of the Opposers.

D. Final Determinations and Summary -

Having examined the Opposers' claims and evidence in support thereof, and having subtracted all cost and fee claims incurred after June 1, 2001, the court now enters judgment for costs and fees, as follows:

The State of Colorado	Costs	**$ 15,427.47**
The United States of America	Costs	**$ 5,659.96**
Thornton	Costs	**$ 235,775.87**
Englewood	Costs	**$ 98,908.84**
Magness Land Holdings, LLC	Costs	**$ 5,505.00**
Minke	Costs	**$ 1,176.68**
Park County, and Upper South Park Water Conservancy District	Costs	473,916.31
	Fees	373,676.15
	Total Judgment	**$ 847,592.46**
Center of Colorado Water Conservancy District	Costs	206,687.69
	Fees	522,278.60
	Total Judgment	**$ 728,966.29**
Park County Water Preservation Coalition	Costs	14,107.07
	Fees	133,977.95
	Total Judgment	**$ 148,085.02**
H. D. and Mary Catherine Coleman	Costs	1,502.09
	Fees	133,494.75
	Total Judgment	**$ 134,996.84**

Benes Interests, and Tarryall Land & Cattle, LLC, Interests	Costs	4,692.91
	Fees	8,834.25
	Total Judgment	**$ 13,527.16**
The Town of Fairplay	Costs	681.48
	Fees	20,553.50
	Total Judgment	**$ 21,234.98**
Indian Mountain Corp., and James Campbell	Costs	589.63
	Fees	16,026.00
	Total Judgment	**$ 16,615.63**
Centennial Water and Sanitation District	Costs	186,547.42
	Fees	131,915.25
	Total Judgment	**$ 318,462.67**

Ordered by the court, May 1, 2003:

Jonathan W. Hays
Senior District Court Water Judge
Water Division No.1

This Order was filed electronically pursuant to Rule 121, § 1-26. The original signed order is in the Court's file.

	Benes Int's.	THORNTON	E-WOOD	PARK COUNTY	CCWCD	COLEMAN
	13,527.16	**235,775.87**	**98,908.84**	**847,592.46**	**728,966.29**	**134,996.84**
% reduction						
Fees Claimed	9,764.25		0.00	385,442.65	558,108.10	137,469.00
Fees Denied	930.00		0.00	11,766.50	35,829.50	3,974.25
Net Fee Award	**8,834.25**		**0.00**	**373,676.15**	**522,278.60**	**133,494.75**
Costs claimed	4,692.91	235,775.87	101,067.10	476,218.78	210,582.78	1,502.09
Costs Denied	0.00	0.00	2,158.26	2,302.47	3,895.09	0.00
Net Cost Award	**4,692.91**	**235,775.87**	**98,908.84**	**473,916.31**	**206,687.69**	**1,502.09**

	MINKE	CENTENNIAL	PCWPC	FAIRPLAY	Ind.Mtn/Cmpbl	MAGNESS
	1,176.68	**318,462.67**	**148,085.02**	**21,234.98**	**16,615.63**	**5,505.00**
% reduction						
Fees Claimed	0.00	137,469.00	140,179.25	28,125.50	16,782.00	0.00
Fees Denied	0.00	5553.75	6,201.30	7,572.00	756.00	0.00
Net Fee Award	**0.00**	**131,915.25**	**133,977.95**	**20,553.50**	**16,026.00**	**0.00**
Costs claimed	1,176.68	186,547.42	17,933.30	681.48	589.63	5,505.00
Costs Denied	0.00	0.00	3,826.23	0.00	0.00	0.00
Net Cost Award	**1,176.68**	**186,547.42**	**14,107.07**	**681.48**	**589.63**	**5,505.00**

	State Engineer	United States
Net Fee Award		
Net Cost Award*	**15,427.47**	**5,659.96**
* By stipulation	with PCSR	

Grand Total	**Fees:**	**1,340,756.45**
Grand Total	**costs:**	**1,251,178.42**

APPENDIX B

STAFF SUMMARY OF MEETING

SENATE COMMITTEE ON AGRICULTURE,
NATURAL RESOURCES AND ENERGY

ATTENDANCE:

Kinnie X
Woodard X
Anderson X
Fisher X
Cooper X
Hatcher X
McCormick X
Soash X
Munsch X

Date: Jan. 27, 1977

Time: 1:45 p.m. to 3:25 p.m.

Place: 320 B

The meeting was called to order by Sen. Kinnie.

This report was prepared by Stanley Elofson.

Others in Attendance:

Robert Welborn, Attorney, Denver.
John Dickson, Attorney, Denver
John Rayburn, Secretary- Manager, Central Water Conservation District (South Platte River)

Bills Considered:

S.B. 4

Item I distributed to committee.

Motion of Senator McCormick that Item I be amended by restoring the struck language on lines 28 and 29.

Motion carried without objection.

Date

Agriculture, Natural Resources, and Energy Committee

Chairman

The committee recommends that S.B. 4 be amended as follows and, as so amended, be referred to the Committee of the Whole with favorable recommendation:

Amend printed bill, strike everything below the enacting clause, and substitute the following:

"SECTION 1. 37-92-103 (9), Colorado Revised Statutes 1973, as amended, is amended to read:

37-92-103. Definitions. (9) "Plan for augmentation" means a detailed program to increase the supply of water available for beneficial use in a division or portion thereof by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, OR by the development of new sources of water. or by any other appropriate means. "Plan for augmentation" does not include the salvage of tributary waters by the eradication of phreatophytes, nor does it include the use of tributary water collected from land surfaces which have been rude impermeable, thereby increasing the runoff but not adding to the existing supply of tributary water.

SECTION 2. 37-92-301 (2), Colorado Revised Statutes 1973, as amended, is amended to read:

37-92-301. Administration and distribution of waters. (2) In accordance with procedures specified in this article, the referee in each division shall in the first instance have the authority and duty to rule upon determinations of water rights and conditional water rights and the amount and priority thereof, INCLUDING A DETERMINATION THAT A CONDITIONAL WATER RIGHT HAS BECOME A WATER RIGHT BY REASON OF COMPLETION OF THE APPROPRIATION, determinations with respect to changes of water rights, PLANS FOR AUGMENTATION, approvals of reasonable diligence in the development of appropriations under conditional water rights, and determinations of abandonment of water rights or conditional water rights; and

[illegible] uses, any diversion or combination of points or methods of diversion, and any place or alternate places of storage and may approve any change of water right as defined in this article. ~~Plans for augmentation shall be subject to the special provisions of section 37-92-307.~~

SECTION 3. 37-92-302 (1) (d) and (3) (b), Colorado Revised Statutes 1973, are amended to read:

37-92-302. Applications for water rights or changes of such rights - plans for augmentation. (1) (d) The fee for filing an application shall be twenty-five dollars; and for filing a statement of opposition, the fee shall be fifteen dollars. If more than one water right is requested in any application OR IF MORE THAN ONE WATER RIGHT IS SOUGHT TO BE APPROVED IN A PLAN FOR AUGMENTATION, a fee of five dollars for each additional right shall be assessed AT THE TIME SUCH APPLICATION OR PLAN FOR AUGMENTATION IS FILED. No fee shall be assessed to the state of Colorado or any agency of its executive department under this subsection (1).

(3) (b) Not later than the end of such month, the water clerk shall cause such publication to be made of each resume or portion thereof in a newspaper or newspapers as is necessary to obtain general circulation once in every county affected, as determined by the water judge. IF AT THE REQUEST OF AN APPLICANT THE RESUME OF AN APPLICATION IS REPUBLISHED, THE APPLICANT SHALL PAY THE COST OF SUCH REPUBLICATION.

SECTION 4. 37-92-305, Colorado Revised Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (8) If a proposed change of water right or plan for augmentation involves a question of consumptive use of water, the rate of such consumptive use shall be established by relevant hydrological and geological data pertaining to the specific change or plan as presented in the application and such rate of consumptive use shall be so established before such application is approved pursuant to subsections (3) and (4) of this section.

SECTION 5. Repeal. 37-92-307, Colorado Revised Statutes 1973, as amended, is repealed.

SECTION 6. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.".

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