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SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
Denver, CO 80203

APPEAL FROM THE DISTRICT COURT,
WATER DIVISION 1, 00CW72
APPEAL FROM THE DISTRICT COURT,
WATER DIVISION 1, 02CW200

05SA120

CONCERNING THE APPLICATION FOR
WATER RIGHTS OF CENTRAL COLORADO
WATER CONSERVANCY DISTRICT AND
GROUND WATER MANAGEMENT
SUBDISTRICT OF THE CENTRAL
COLORADO WATER CONSERVANCY
DISTRICT IN WELD COUNTY.

Applicants/Appellants/Cross-Appellees:

CENTRAL COLORADO WATER
CONSERVANCY DISTRICT and GROUND
WATER MANAGEMENT SUBDISTRICT OF
THE CENTRAL COLORADO WATER
CONSERVANCY DISTRICT,

and

Opposer/Appellant:

CACHE LA POUDRE WATER USERS
ASSOCIATION,

v.

FILED IN THE
SUPREME COURT

FEB - 3 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Consolidated Cases

Case No. 05SA120

Case No. 05SA121

<p>Opposers/Appellees:</p> <p>CITY OF GREELEY acting by and through its Water and Sewer Board, GREELEY IRRIGATION COMPANY, IRRIGATIONISTS ASSOCIATION, and CITY OF THORNTON,</p> <p>and</p> <p>Opposers/Appellees/Cross-Appellants:</p> <p>CITY OF BOULDER and CENTENNIAL WATER AND SANITATION DISTRICT,</p> <p>and</p> <p>Appellee:</p> <p>JAMES HALL, Division Engineer for Water Division No. 1.</p>	
<p>* * * * *</p>	

05SA121

CONCERNING THE APPLICATION FOR
WATER RIGHTS OF CENTRAL COLORADO
WATER CONSERVANCY DISTRICT AND
GROUND WATER MANAGEMENT
SUBDISTRICT OF THE CENTRAL
COLORADO WATER CONSERVANCY
DISTRICT, IN WELD COUNTY,

Applicants/Appellants/Cross-Appellees:

CENTRAL COLORADO WATER
CONSERVANCY DISTRICT and GROUND
WATER MANAGEMENT SUBDISTRICT OF
THE CENTRAL COLORADO WATER
CONSERVANCY DISTRICT,

and

Opposer/Appellant:

CACHE LA POUDRE WATER USERS
ASSOCIATION

v.

Opposers/Appellees:

CITY OF GREELEY acting by and through its
Water and Sewer Board, GREELEY
IRRIGATION COMPANY, CITY OF
THORNTON, AGGREGATE INDUSTRIES, -
WCR, INC.,

<p>and</p> <p>Opposers/Appellees/Cross-Appellants:</p> <p>CITY OF BOULDER, CENTENNIAL WATER AND SANITATION DISTRICT, and THE HARMONY DITCH COMPANY,</p> <p>and</p> <p>Appellee:</p> <p>JAMES HALL, Division Engineer for Water Division No. 1.</p>	
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<p style="text-align: center;">REPLY BRIEF</p> <p style="text-align: center;">OF CITY OF BOULDER, CENTENNIAL WATER AND SANITATION DISTRICT, AND THE HARMONY DITCH COMPANY</p>	

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I. INTRODUCTION.

The City of Boulder, Centennial Water and Sanitation District, and the Harmony Ditch Company (collectively referred to as “Opposers”) hereby file their Reply Brief regarding the issues presented in the cross-appeal and in reply to the Answer-Reply Brief filed by Central Colorado Water Conservancy District and Ground Water Management Subdistrict of the Central Colorado Water Conservancy District (collectively referred to as “Central”). Central’s Answer-Reply Brief (“Central Brief”) did not respond to all of the Opposers’ arguments on the cross-appeal contained in the Opening-Answer Brief of City of Boulder, Centennial Water and Sanitation District, and the Harmony Ditch Company (“Opposers’ Opening Brief”), and those unaddressed arguments are incorporated in this Reply Brief.

II. SUMMARY OF THE ARGUMENT.

Central asserts that it should be allowed to transfer additional consumptive use of the Jones Ditch Water Right as defined in the Opposers’ Opening Brief. Central admits that such transfer will be more than Central’s proportionate ownership of the Jones Ditch Water Right. In Case No. 88CW127, Central was allocated more historical consumptive use to be changed for other purposes than Central’s proportional ownership of the Jones Ditch Water Right, including Central’s portion

of the Jones Ditch Water Right at issue in the present cases. By failing to consider this previous decree and to impose limitations in these cases on the use of the subject portion of the Jones Ditch Water Right, the Water Court erroneously authorized an unlawful expansion of use of the Jones Ditch Water Right and authorized injury to other vested water rights.

III. ARGUMENT CONCERNING CROSS-APPEAL

A. **Opposers Are Only Seeking to Prevent Injury to Their Water Rights by Appropriate Terms and Conditions in These Cases, and Are Not Seeking to Re-open the Proceedings in Case No. 88CW127.**

The fundamental premise of any change of use proceeding is prevention of injury to other vested water rights. *Farmers Reservoir and Irrigation Co. v. Consolidated Mutual Water Co.*, 33 P.3d 799 (Colo. 2001). In implementing the non-injury standard to protect other vested water rights, this Court has consistently held that expansion of use of a water right will result in injury to other vested water rights, and the Water Court may not enter a change of water right decree that perpetuates an unlawful expansion of use. *See, e.g. Steffens v. Rinebarger*, 756 P.2d 1002, 1007(Colo. 1988). However, notwithstanding Colorado's long-standing precedent of non-injury, Central claims that it should be allowed to transfer more than its proportionate ownership of the Jones Ditch Water Right to new uses.

Central has not responded to either (1) the applicability of Section 37-92-305(4), C.R.S. as a limitation on Central's change of additional interests in the Jones Ditch Water Right, or (2) the opinions of this Court regarding appropriate limitations regarding the change of water rights. Instead, Central has attempted to characterize Opposers' position as an attack on the decree entered in Case No. 88CW127. As described in detail in the Opposers' Opening Brief, Pages 22-26, Opposers are not seeking any modification of the decree entered in Case No. 88CW127, and are not attacking the terms and conditions of the decree entered in Case No. 88CW127. If Opposers were making such claim, the Opposers would be requesting a reduction in the consumptive use allocated to Central in Case No. 88CW127 from 401.4 acre feet per year to 361 acre feet per year. Therefore, Central's arguments and claims of "relitigation of the historical consumptive use determinations" in Case No. 88CW127 miss the point and are without merit.

B. These Cases Are the Appropriate Forum to Address the Expansion of Use of the Jones Ditch Water Right in Order to Prevent Injury to Other Vested Water Rights.

The present cases before the Court are the appropriate forum and time to address an expansion of use of the Jones Ditch Water Right. The factual basis giving rise to the expansion of use is quite simple. In Case No. 88CW127, the Water Court

determined and decreed that Central's ownership of 62 shares of stock in the Jones Ditch Company entitled Central to 401.4 acre-feet per year of consumptive use associated with the Jones Ditch Water Right. These 62 shares were used on 230 acres located within the 344 lawfully irrigated acres determined by the Water Court. *See* R., Vol. 6, p. 891 (February Order). In these present cases, the Water Court determined that the ditch-wide consumptive use of the Jones Ditch Water Right on the lawfully irrigated lands was approximately 520 acre-feet of water annually. R., Vol. 6, p. 892 (February Order). Central's ownership of 69.5% of the Jones Ditch Company stock therefore entitles Central to a total of approximately 361 acre-feet per year of transferable consumptive use. Since Central has already received 401.4 acre-feet per year of transferable consumptive use in Case No. 88CW127, Central is not entitled to receive any additional quantity of historical consumptive use of the Jones Ditch Water Right.

In response to Opposers' Opening Brief regarding the application of Colorado law to prevent injury to Opposers' water rights, *see*, Opposers' Opening Brief, Pages 19-21, Central asserts that additional limitations on its Jones Ditch Water Right interest could not happen if "two separate entities owned the shares at issue in these cases and the shares decreed in 88CW127 and nothing in the law authorizes this

result solely because the same entity owns the shares.” Central Brief, Page 24. Opposers do not agree with Central’s claim. *See, Farmers Reservoir and Irrigation Co. v. Consolidated Mutual Water Co.*, 33 P.3d 799 (Colo. 2001), in which the Water Court first determined the amount of Priority 12 water right on Clear Creek previously transferred by the City of Golden in order to determine the amount of the water right remaining for transfer by Consolidated Mutual Water Company.

Moreover, Central fails to address the provisions of Section 37-92-305(4), C.R.S. and the *Farmers Reservoir* opinion, both of which concern the precise issue of preventing injury to other vested water rights in situations involving the potential for transfer of consumptive use to a new use in amounts that exceed the total historical consumptive use of a particular water right.

The provisions of Section 37-92-305, C.R.S. are discussed in Opposers’ Opening Brief at Pages 19-22, and the discussion notes the standards for judicial approval of a change of water right or plan for augmentation. As discussed in more detail in Opposers’ Opening Brief, Section 37-92-305(4)(b), C.R.S. provides that appropriate terms and conditions for change of a water right may include the following:

(b) **The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;** (Bold emphasis added).

The provisions of Section 37-92-305(4), C.R.S. are expressly designed to prevent injury to other water rights, and direct the Water Court to consider the interaction of previous decrees with the applications presently before the Court in fashioning terms and conditions to protect other water rights.

In Opposers' Opening Brief at Pages 17-19, the terms and conditions for a change of water right, such as the Jones Ditch Water Right, are discussed by reference to *Farmers Reservoir and Irrigation Co. v. Consolidated Mutual Water Co.*, 33 P.3d 799 (Colo. 2001). The similarity between *Farmers Reservoir* and the instant case justifies a detailed review of the facts in each case. In *Farmers Reservoir*, various portions of the water rights in question were owned in fractional parts by the City of Golden ("Golden"), Consolidated Mutual Water Company ("Consolidated"), and others. As a result of prior judicial changes of the fractional interests, both Golden and Consolidated had received an allocation of the historical consumptive use

associated with their respective ownership of the water right. During one of the proceedings regarding the determination of the historical consumptive use of the water right, the Water Court determined the ditch-wide historical use consumptive use of the water right to be changed and other water rights used in the same ditch, and the Supreme Court noted the following:

Under a ditch-wide methodology, each owner's consumptive use allocation depends upon its percentage ownership of the total historic consumptive use allocated to the ditch water rights. Once the Water Court has adopted a methodology for determining an appropriation's historic beneficial consumptive use and has made allocations of consumptive use based thereon, that methodology and those allocations are normally expected to govern future change proceedings involving the same water right. See *Midway Ranches*, 938 P.2d at 526. [Bold emphasis added]

33 P.3d at 807. *See, Concerning the Application for Water Rights of Midway Ranches Property Owners Assoc., Inc.*, 938 P.2d 515 (Colo. 1997) and *Santa Fe Trail Ranches Property Owners Association v. Simpson*, 990 P.2d 46 (Colo. 1997). The objectors asserted that due to previous change proceedings, Golden was receiving more than its proportionate share of the historical consumptive use of one of the water rights in question. Although the Supreme Court refused to allow reopening of a prior case, the Supreme Court expressly provided the following remedy:

Golden's pending change case is the forum for addressing the alleged overdraft. The Water Court intended its judgment and decree in this case to set the framework for future change cases:

The Court has adopted a ditch-wide method of analysis for the water rights that are the subject of this proceeding, because that method is both appropriate and consistent with the method used in previous transfers from this ditch, particularly those transfers made by the City of Golden. Any future transfers should be based on the same method of analysis to prevent injury to vested water rights.

As we held in *Midway Ranches*, the consumptive use methodology and allocations the Water Court adopts in a noticed and actually litigated change case normally apply to subsequent change cases involving the same water rights. *See id.* at 526. **The fundamental object of a change proceeding is to secure to owners their allocated share of historic beneficial consumptive use determined by an appropriate parcel-by-parcel or ditch-wide methodology, while protecting against injury to other water rights when the change of water right or plan operates in the surface and tributary groundwater stream system.** [Bold emphasis added]

33 P.3d at 814. The instant cases are precisely the “forum for addressing the alleged overdraft” with respect to the Jones Ditch Water Right. If they are not the appropriate cases for addressing the overdraft, the remedy described in *Farmers Reservoir* is meaningless.

The problem with Central receiving more than its proportionate share of the historical consumptive use is best illustrated by the following example. Other

shareholders of the Jones Ditch Company may seek a determination of the historical consumptive use of the portion of the Jones Ditch Water Right represented by their respective shares in the Jones Ditch Company. For example, Aggregate Industries, - WCR, Inc. ("Aggregate") is a party to this case and owns 30 shares of stock in the Jones Ditch Company, or 15% of the outstanding stock in the Jones Ditch Company. *See*, R., Vol. 7, p. 26, lines 1-3. Aggregate currently has an application pending in Case No. 90CW23 to change its interest in the Jones Ditch Water Right. R., Vol. 7, p. 32, lines 23-25. In accordance with the ditch-wide determination of the historical consumptive use of the Jones Ditch Water Right, Aggregate may seek a determination that 78 acre feet per year of historical consumptive is associated with its 30 shares, which is equal to 15% of the total historical consumptive use of 520 acre feet under the Jones Ditch Water Right. If Aggregate receives a determination that the 30 shares of stock in the Jones Ditch Company have a historical consumptive use of 78 acre feet per year, then the total consumptive use associated with the Jones Ditch Water Right will be 545.75 acre feet per year, which is 25.75 acre feet per year more than the total historical consumptive use of 520 acre feet per year determined in this case. The impact on other water users is illustrated by the following chart:

Applicant	Case No.	Consumptive Use (AF)
Central	88CW127	401.10
Central	00CW72 and 02CW200	66.65
Total		467.75
Aggregate	90CW23 (Pending)	78.00
Total		545.75
Total Consumptive Use	00CW72 and 02CW200	520.00
Shortfall		25.75

Under such circumstance, other water users will be injured by the expansion of use of the Jones Ditch Water Right and depletion of the South Platte River by the additional 25.75 acre feet per year. Conversely, if Aggregate does not receive its proportional allocation of the historical consumptive use in its change of use proceeding, Aggregate will be shorted by allocation to Central of more than Central's proportional amount of the historical consumptive use. The same analysis applies for the owners of the remaining 15.5 shares of the Jones Ditch Company, whose owners are not objectors in these cases.

The issue can be summarized as a question of whether the expansion of use that would result if Central's position prevails should be borne by (1) other shareholders in the Jones Ditch Company, or (2) Opposers and other water users on the South

Platte River. Opposers and other water users on the South Platte River should not be the ones adversely affected by expansion of use of the Jones Ditch Water Right; instead it should be either Central or the remaining Jones Ditch Company shareholders. Opposers assert that Central should bear this burden and be limited to the 401.4 acre feet determined in Case No. 88CW127, which is already more than Central's proportionate ownership of the Jones Ditch Water Right.

This is the very situation §37-92-305(4), C.R.S. and the remedy suggested by this Court in *Farmers Reservoir* is intended to address. The Jones Ditch Water Right decree is the decree for which the change is sought. The decrees entered by the Water Court in the instant cases indicate that the portion of the Jones Ditch Water Right that is the subject of these cases will be used "in conjunction" with the portion of the Jones Ditch Water Right decreed in Case No. 88CW127. Paragraph 4 of each of the decrees in these cases recites that Central owns a total of 139 shares in the Jones Ditch Company and that 62 shares have already been changed in Case No. 88CW127 in a similar manner. R., Vol. 3, p. 925; R., Vol. 6, p. 1058. Thus, the decree in Case No. 88Cw127 is owned by Central and intended to be used by it in conjunction with the Jones Ditch Water Right decree for which the change has been requested. Limitation of Central's transfer of additional historical consumptive use to new uses

is necessary to prevent enlargement upon the Jones Ditch Water Right historical use and diminution of return flows to the detriment of other appropriators. Central has already been allocated more consumptive use credit than the *pro rata* amount associated with its ownership of the Jones Ditch Water Right. The pending cases are the appropriate cases and forum for obtaining a resolution of the expansion of the Jones Ditch Water Right.

C. Preventing the Expansion of Use of Water Rights Promotes Certainty and Reliability of Vested Water Rights.

Central asserts that limiting changes of water rights to the proportion of the ownership of the party seeking the change of water right “has the potential of prompting litigation on other ditch systems with an even greater diversity of ownership where a portion of the shares have been changed and quantified and a portion have not.” Central Brief, Page 34. The converse of Central’s argument is more likely to occur. Under Central’s position, the first owner of shares in a ditch system that reaches the Water Court has the potential to claim more than the shareholder’s proportional interest in the historical consumptive use of the shareholder’s stock.

In *Great Western Sugar Company v. Jackson Lake Reservoir & Irrigation Company*, 681 P.2d 484 (Colo. 1984), this Court noted that the “rights of ownership defined by shares of stock in mutual ditch companies are qualified by the principle that a shareholder may not alter established usage of water rights if such alteration would result in injury to other users.” [Citations omitted] 681 P.2d at 492 Moreover, the Court stated that “[t]his principle ensures the ability of mutual ditch companies to carry out the fundamental purpose that distinguishes them from other forms of corporate endeavor---the spirit of mutual cooperation that is essential to ensure a **fair distribution of available water to all interested parties.**” [Citations omitted; Bold emphasis added] 681 P.2d at 492. Rather than ensuring a fair distribution of available water among shareholders, Central’s asserts that the first party to the Water Court should be able to obtain more than its proportionate share of the historical consumptive use. Instead of promoting mutual cooperation, Central’s position would promote more litigation regarding the proper distribution of water within a mutual ditch company.

IV. CONCLUSION.

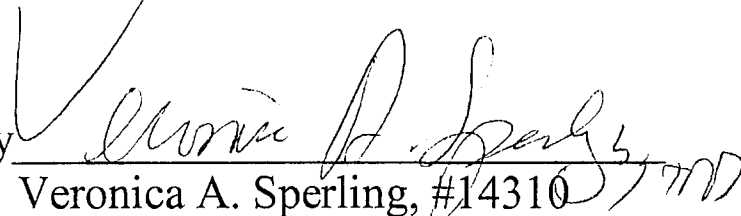
In Case No. 88CW127, Central received more than it's proportional ownership interest in the Jones Ditch Water Right historical consumptive use. As a result, Central has no remaining transferable consumptive use associated with the shares of stock at issue in the instant cases. Therefore, the Opposers request that this Court reverse the determination by the Water Court that the 77 shares of stock in the Jones Ditch Company in Case Nos. 00CW72 and 02CW200 have transferable consumptive use of approximately 66.65 acre feet per year, and remand these cases to the Water Court with directions to enter an order that the transferable consumptive use associated with the shares of stock at issue in the instant cases has already been allocated to Central in Case No. 88CW127 and no transferable consumptive use is associated with the portion of the Jones Ditch Water Right associated with the 77 shares in Case Nos. 00CW72 and 02CW200.

V. CERTIFICATE OF COMPLIANCE WITH C.A.R. 28(g).

In accordance with Rule 32(a)(3) of the Colorado Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with the applicable word limit set forth in C.A.R. 28(g) and that this brief, exclusive of the items listed in Rule 28(g), contains 3020 words.

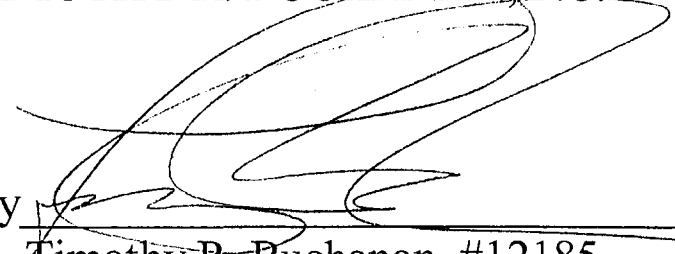
Respectfully submitted this 3rd day of February, 2006.

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I hereby certify that the foregoing was served on the following by placing true and correct copies thereof in the United States Mail, first-class postage prepaid, this 3rd day of February, 2006, addressed as follows:

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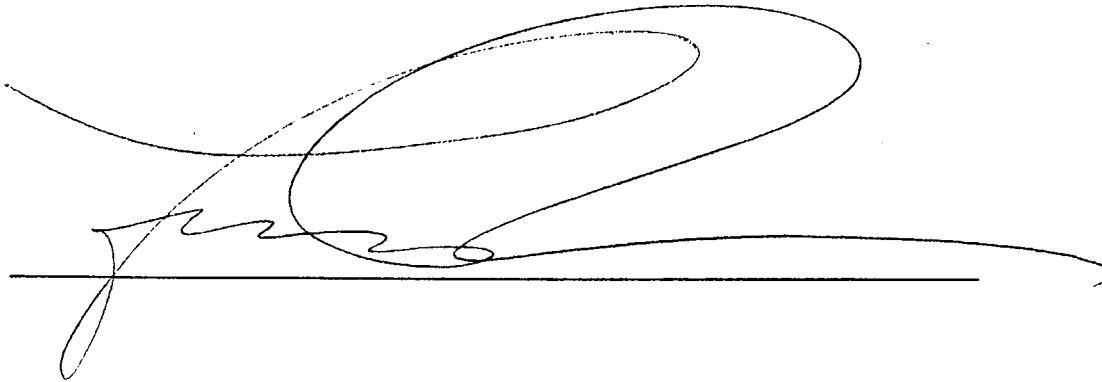
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A handwritten signature in black ink, appearing to be 'Timothy Flanagan', is written over a horizontal line. The signature is stylized with a large, looping 'T' and 'F'.