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SUPREME COURT, STATE OF COLORADO  
Two East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

Appeal from the District Court,  
Weld County, Colorado  
Honorable Roger A. Klein, Judge  
Case No. 03CV1335

REINALDO GALLEGOS, MARIANNE GALLEGOS, HAROLD L. GALLEGOS, ELLEN GALLEGOS, AND GENE J. GALLEGOS,

Appellants,

v.

COLORADO GROUND WATER COMMISSION, an Administrative Agency of the State of Colorado, and Mr. HAROLD D. SIMPSON, in his capacity as the COLORADO STATE ENGINEER, and as *ex officio* Executive Director of the Colorado Ground Water Commission and as a non-voting member of the Colorado Ground Water Commission,

Appellees,

EDNA B. ANDERSON, WILLIAM ANDERSON, LARRY L. CROISSANT, JEAN L. CROISSANT, THE TOWN OF GROVER C/O RICK HAYES, HEREFORD FARMS, LLC C/O JERRY BURNETT, CARL A. JOHNSON, ANITA R. JOHNSON, ROD JOHNSON, JAMES M. KONIG, JANET F. KONIG, MICHAEL D. KONIG, LARRY LANG,

FILED IN THE  
SUPREME COURT

MAY - 8 2006

OF THE STATE OF COLORADO  
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case No. 05SA253

RICHARD L. PETTINGER AND LISA R. PETTINGER, RORY PETTINGER, ROCKY PLAINS, LLP, TR, INC., TENNICK LAND AND CATTLE CO., COLIN W. NICKLAS, CLARENCE W. TIETMEYER, VONDA J. TIETMEYER, CLARENCE E. TIETMEYER, SCOTT W. TIETMEYER, PAULA J. TIETMEYER, VONDA JEAN TIETMEYER AND TIETMEYER FARMS, INC., CHARLES E. NUSSBAUM, DOROTHY L. NUSSBAUM, JAMES L. KARST, JUDY KARST, KENNETH EVERITT, PENNY EVERITT, PHIL MCKINLEY, DIANE MCKINLEY, DAN LOYD, DEERCO, LLC, JESSE E. LOYD, EVELYN T. LOYD, LOYD FARMS, LOYD FARMS GENERAL PARTNERSHIP, LEE A. TAPPY, FRED D. MARRICK, ROXANNE L. MARRICK, F&R MARRICK AND FOUR DIAMONDS RANCH, LLC, ROSELLA JESSEN, BCK HEATH PROPERTY, LLC, GREEN VALLEY RANCH

Appellees.

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**ANSWER-REPLY BRIEF**

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Appellants Reinaldo Gallegos, Marianne Gallegos, Harold L. Gallegos, Ellen Gallegos, and Gene J. Gallegos (the “Gallegos Family”), acting by and through their attorneys, Timothy R. Buchanan, P.C., hereby file their Answer-Reply Brief, and state the following:

**I. INTRODUCTION**

This Answer-Reply Brief is filed in response to the Opening/Answer Brief of the Colorado Groundwater Commission (“Commission Brief”), Opening-Answer Brief of Defendants/Appellees/Cross-Appellants (“Anderson Brief”), Opening/Answer Brief of Charles Nussbaum, *et al.*, and the Amicus Curiae Brief of Marks Butte, *et al.* For purposes of this Answer-Reply Brief, the parties filing the foregoing briefs are collectively referred to as “Commission Parties,” and individually referred to by their respective briefs. Since several of the arguments in the respective briefs are duplicative or are different arguments on the same issue, this brief combines the answer to issues presented in the cross-appeal and the reply to the issues presented in the appeal.

**II. STATEMENT OF ISSUE PRESENTED FOR REVIEW IN CROSS-APPEAL**

The following issue is presented for review in the cross-appeal:

- A. Whether, as a matter of law, the District Court erred in determining that a senior surface water right owner within a designated basin is entitled under Colorado law to administration of junior groundwater rights

within the designated basin to prevent injury to the senior surface water right.

### III. **STATEMENT OF THE CASE ON CROSS-APPEAL**

#### A. **Nature of the Case**

The Nature of the Case described in the Gallegos Family Opening Brief is adopted by this reference.

#### B. **Disposition in the Court Below**

The description of the disposition in the District Court of Weld County described in the Gallegos Family Opening Brief is adopted by this reference.

#### C. **Statement of Facts Relevant to Issues Presented for Review**

The Statement of Facts described in the Gallegos Family Opening Brief is adopted by this reference.

### IV. **SUMMARY OF ARGUMENT**

The Gallegos Family Water Rights are protected by the Colorado Constitution, and creation of the Upper Crow Creek Designated Basin cannot divest the Gallegos Family Water Rights of the protections guaranteed by the Constitution. The District Court properly determined that the Gallegos Family Water Rights are entitled to the protections of the Colorado Constitution.

However, the District Court improperly determined that (1) senior surface water rights within a designated basin may not “assert an absolute priority against a junior well user with a valid permit;” (2) the owner of a senior surface water right

within a designated basin “has the burden to establish unreasonable injury by the junior;” (3) “A decrease in a senior’s yield is not sufficient evidence to establish unreasonable injury;” (4) a senior surface water right within a designated basin “may not employ an unreasonable method of diversion to the detriment of junior [well] appropriators;” and (5) a senior surface water right within a designated basin is subject to the “futile call doctrine” with respect to junior ground water well diversions. This Court is requested to reverse the determination of the District Court and direct that the junior ground water wells within the Upper Crow Creek Designated Basin be administered to ensure that water is available in Crow Creek for diversion pursuant to the Gallegos Family Water Rights.

## V. ARGUMENT

### A. **The District Court Determination That a Senior Surface Water Right Owner Within a Designated Basin Is Entitled to Protection from Material Injury Caused by the Pumping of Junior Groundwater Well Rights Is Supported by the Colorado Constitution and Statutory Provisions.**

This is a case of first impression. In previous decisions, this Court has held (1) where there is a dispute between surface water right owners and groundwater permit holders in a designated basin, the Colorado Groundwater Commission (“Commission”) has jurisdiction to determine whether the water in question is “designated ground water,” *Pioneer Irr. Dist. v. Danielson*, 658 P.2d 842, 844-846 (Colo. 1983); and (2) as between two groundwater permit holders in a designated basin, the local groundwater management district has the authority to administer the

groundwater to prevent injury to the senior groundwater permit holder. *Upper Black Squirrel Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1181 (Colo. 2000). However, this Court has not issued an opinion regarding a claim by the owner of a senior surface water right within the boundaries of a designated basin for administration of groundwater well use which reduces the flow of surface water that would otherwise be available for diversion by the senior surface water right. This Court has recently held that as between senior surface water rights and groundwater rights outside the boundaries of a designated basin, the groundwater rights must be administered to protect the diversion of water by senior surface water rights. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 59 (Colo. 2003)

Unlike the situation in *Goss*, where the “Commission and the Management District refused to take action on Goss's demand for enforcement of his priority, each claiming that the other agency had authority over the matter,” 993 P.2d at 1180, the Commission Parties assert that no one has authority within a designated basin to regulate groundwater well use to protect senior surface water rights within the designated basin. The Commission Parties further assert that the prior appropriation doctrine, which is expressly referenced in and protected by the Colorado Constitution art. XVI, §5 and §6, and the “modified” prior appropriation system established by the *Colorado Ground Water Management Act*, Section 37-90-101, *et seq.*, C.R.S.

(“Management Act”) are “incompatible systems.” Commission Brief, Page 7<sup>1</sup>. Based on that unsupported assertion, the Commission Parties assert that the Gallegos Family Water Rights, as defined in the Gallegos Family Opening Brief, are not entitled to protection by administration of groundwater wells withdrawing water from the same source.

The District Court determined that the Gallegos Family was “correct in their assertion that their surface water rights stem from the Colorado Constitution. R. Vol. 4, p. 1150, *see also* Colo. Const. art. XVI, §§ 5-6. In contrast, rights to use designated ground water arise legislatively. [*Upper Black Squirrel Ground Water Mgmt. Dist. v. Goss*; 993 P.2d 1177, 1181 (Colo. 2000)]” R. Vol. 4, p. 1150. Moreover, the District Court determined the following:

**The Commission must administer designated ground water in accordance with the prior appropriation system. § 37-90-102(1), C.R.S.; *see also* *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50,59 Colo. 2003; *Jaeger v. Colo. Ground Water Comm’n*, 746 P.2d 515, 519 (Colo. 1987); *Fellhauer*, 167 Colo. at 339, 447 P.2d at 996. As applied to designed ground water, the prior appropriation doctrine is modified only to ensure that diversions result in no more than a reasonable depletion of the aquifer. *See Kerbs Ag., Inc.*, 646 P.2d at 370, 371; *Colo. Ground Water Comm’n v. Dreiling*, 198 Colo. 560, 565, 606 P.2d 836, 839 (1980) The court is unable to find any statutory or judicial mandate stating that, as applied to designated ground water, the doctrine of prior appropriation does not protect senior surface appropriators diverting water in a designated ground water basin. [Bold emphasis added]**

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<sup>1</sup>The Commission Brief does not have any page numbering. For reference purposes, the page number references to the Commission Brief begin with the first page of the caption and continue to the end of the Commission Brief.

R. Vol. 4, p. 1151. The District Court's determination that the Gallegos Family Water Rights are entitled to protection by administration of groundwater wells within the Upper Crow Creek Designated Basin is correct and should be upheld.

The right to administration of junior water rights is a fundamental element of a water right. In *Empire Lodge Homeowners' Ass. v. Moyer*, 39 P.3d 1139 (Colo. 2002), this Court reviewed the protected rights associated with a water right:

The objective of the water law system is to guarantee security, assure reliability, and cultivate flexibility in the public and private use of this scarce and valuable resource. **Security resides in the system's ability to identify and obtain protection for the right of water use. Reliability springs from the system's assurance that the right of water use will continue to be recognized and enforced over time.** Flexibility emanates from the fact that the right of water use can be changed, subject to quantification of the appropriation's historic beneficial consumptive use and prevention of injury to other water rights. [Bold emphasis added]

39 P.3d at 1147. In addition, this Court discussed the property right associated with an adjudicated water right and the protections afforded by Colorado law to such water rights:

The property right we recognize as a Colorado water right is a right to use beneficially a specified amount of water, from the available supply of surface water or tributary groundwater, that can be captured, possessed, and **controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right.** *Santa Fe Trail Ranches*, 990 P.2d at 53. [Bold emphasis added]

39 P.3d at 1147. Direct flow water rights and storage water rights are entitled to administration based on their priority, regardless of the type of beneficial use for which the appropriation was made. *People ex rel. Park Reservoir Co. v. Hinderlider*,

98 Colo. 505, 515, 57 P.2d 894, 898-99 (1936) (Butler, J., concurring) and *Empire Lodge Homeowners' Ass. v. Moyer*, 39 P.3d 1139, 1149 (Colo. 2002). The “interlocking nature of appropriation, adjudication, and administration,” 39 P.3d at 1149, was discussed in *Empire Lodge* as follows:

**Adjudication and administration are essential to protection of water rights. The reason for adjudicating a water right, whether an appropriative water right under state water law or a water right created under federal law, is to realize the value and expectations that enforcement through administration of that right's priority secures.** [Footnotes and citations omitted; Bold emphasis added]

39 P.3d at 1148, 1149. The *Empire Lodge* Court further stated:

**In times of short supply, water users depend on the State Engineer to curtail undecreed uses and decreed junior uses in favor of decreed senior uses.**(Footnote omitted) *See Zigan Sand & Gravel Inc. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 175, 185 (Colo. 1988) (holding that the State Engineer "has the authority pursuant to section 37-92-502 to order discontinuance of diversions that injure senior water rights, regardless of whether there is beneficial use"). To accomplish this, the amount and priority of rights drawing on the watershed's supply must be determined. **The security and reliability of water rights turn on the enforceability of priorities when natural supply is not adequate to fill all decreed water rights and administration of decreed rights is necessary to ensure the property value of water rights.** *People ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1253 (Colo. 1996) ("Security for the rights of Colorado water users largely depends upon the sound exercise of the Engineer's diversion curtailment enforcement power."). [Bold emphasis added]

39 P.3d at 1149. The right to obtain administration of junior water rights is a fundamental aspect of the Gallegos Family Water Rights, and the District Court should be upheld on that issue.

**B. Where Surface Water and Groundwater Are Interconnected, the Administration of the Surface Water Rights and Groundwater Permits Must Be in Accordance With the Doctrine of Prior Appropriation.**

Colorado law has long held that all water, both surface water and groundwater, is considered tributary, absent clear and convincing evidence to the contrary. *Safranek v. Town of Limon*, 123 Colo. 330, 334, 228 P.2d 975, 977 (1951) (“Under our Colorado law, it is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to appropriation as part of the waters of the stream. [citation omitted] The burden of proof is on one asserting that such ground water is not so tributary, to prove that fact by clear and satisfactory evidence. [citations omitted]”) *See, also, Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 59 (Colo. 2003)

In the recent opinion in *Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management Dist.*, 77 P.3d 62 (Colo. 2003), the differing nature of groundwater and the applicable law was discussed:

The General Assembly recognizes four categories of ground water: tributary ground water, designated ground water, non-tributary ground water, and Denver Basin ground water. *See Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Goss*, 993 P.2d 1177, 1182 (Colo.2000). **Tributary ground water is not visible from the earth's surface, but is hydraulically connected to the surface waters of a stream. *See Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 59 n. 7 (Colo.2003). [Footnote omitted] Because tributary ground water is connected to surface waters, use of this ground water may reduce available surface water that decreed appropriators would otherwise be able to divert in order of priority. *Id.* Thus, it is classified as if it were surface water, and like surface water, it is subject to the**



**constitutional right of prior appropriation as provided in Article XVI, sections 5 and 6 of the Colorado Constitution and its implementing statutes. See § 37-92-102. [Footnote omitted]** All ground water in Colorado, but not Denver Basin ground water, as we discuss below, is presumed to be tributary absent clear and convincing evidence to the contrary. *See Bijou Irrigation Co.*, 69 P.3d at 59 n. 7; *Safranek v. Town of Limon*, 123 Colo. 330, 334, 228 P.2d 975, 977 (1951). Rights to tributary ground water and surface waters are determined by Colorado's water courts and administered by the state engineer. See §§ 37-92-201 to -305. [Footnote omitted]

**Designated ground water, nontributary ground water, and Denver Basin ground water are similar in character in that they are not hydraulically connected to the flow of a natural surface stream.** These categories of ground water are allocated and administered pursuant to the General Assembly's plenary authority over ground water that is not tributary to a natural stream. *See, e.g., Upper Black Squirrel Creek*; 993 P.2d at 1182--1183; *Chatfield E. Well Co., Ltd. v. Chatfield E. Prop. Owners Ass'n*, 956 P.2d 1260, 1273 (Colo.1998). [Bold emphasis added]

77 P.3d at 69, 70. Although this Court stated in *Kiowa-Bijou* that designated ground water is “not hydraulically connected to the flow of a natural surface stream,” 77 P.3d at 70, the statutory definition of “designated ground water” does not contain such limitation. *See*, Section 37-90-103(6)(a), C.R.S. which defines designated ground water as “ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin[.]”

In this case, the designated ground water in the Upper Crow Creek Designated Basin is hydraulically connected to the flow of water in Crow Creek, and withdrawal of water from the aquifer does affect the flow of the natural stream. R. Vol. 3, p. 769. Moreover, the information relied on by the Commission for the creation of the Upper Crow Creek Designated Basin expressly acknowledged and recognized the existence of the Gallegos Family Water Rights and other surface water rights. Although the Commission Parties assert that the creation of the Crow Creek Basin terminated the right to administration of groundwater wells with respect to the Gallegos Family Water Rights, there is no indication of such termination in the documents creating the Upper Crow Creek Designated Basin. Conversely, there are several references to protection of the Gallegos Family Water Rights and other water rights. As discussed in more detail in the Gallegos Family Opening Brief, the Upper Crow Creek Designated Ground Water Basin was created by the Commission in 1987 in Case No. 86-GW-12 pursuant to the Report, Findings of Fact, Conclusions of Law and Initial Decision of the Hearing Officer in the Matter of the Creation of a Designated Ground Water Basin on Upper Crow Creek in the State of Colorado (“Upper Crow Creek Designation”). R. Vol. 3, pp. 767-778. The Upper Crow Creek Designation expressly recognized that senior surface water rights diverted water out of Crow Creek prior to the Upper Crow Creek Designation, and that the Commission was under a duty to prevent injury to senior surface water rights diverted from Crow Creek. The Upper Crow Creek Designation states the following at Paragraph 18:

The Ground Water Commission recognizes that there are existing decreed surface water rights located within the drainage of Crow Creek and Little Crow Creek. Therefore, in reviewing any new well permit application pursuant to Section 37-90-107, C.R.S. (1973, and 1986 supp.), the Commission shall determine whether the ground water to be pumped is tributary to the source of any such vested surface water right, and shall deny any application which would injuriously affect any such decreed surface water right.

R. Vol. 3, p. 772. The Commission Brief appears to acknowledge the Commission's duty to protect surface water rights within a designated basin, but only to the extent of denying new applications for well water rights and the Commission claims that it has no power "to curtail designated groundwater in favor of surface water rights." Commission Brief, Page 12. As discussed in more detail below, the Commission Parties misrepresent Colorado law. The Commission cannot stand idly by while groundwater wells deplete the streamflows relied on by senior surface water rights and claim there is nothing the Commission can do to prevent the injury.

The Anderson Brief asserts that in designating the Upper Crow Creek Designated Basin, the Commission found that there was a *de minimus* effect on the surface stream. Anderson Brief, Page 19. The Anderson Brief misrepresents the determination in the Upper Crow Creek Designation, and there is no evidence that the Commission made such determination. In fact, the Upper Crow Creek Designation determined that (5) aquifers meet the requirements set forth in the Management Act at Section 37-90-103(6), C.R.S. as being in an area "wherein ground water withdrawals have constituted the principal water usage for at least 15 years preceding

the date of the first hearing on the proposed designation of the basin.” R. Vol. 3, p. 772. It is significant that the Commission did not adopt the alternative basis for designation specified in Section 37-90-103(6)(a), namely, that “ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights.” If the Commission had found a *de minimus* impact on the flow of water in Crow Creek, the Upper Crow Creek Designation would have so stated.

The Commission expressly found that “the Upper Crow Creek alluvium and the quaternary fan aquifers act as a single aquifer,” and recharge to the Upper Crow Creek alluvium is “an average of 700 acre feet per year from surface water flows in Crow Creek.” R. Vol. 3, p. 769. The Upper Crow Creek Designation further states that there is interaction between the water in Crow Creek and the water in the Upper Crow Creek alluvium and the quaternary fan aquifers. R. Vol. 3, p. 769. Contrary to the allegations of the Commission Parties, at the time of the Upper Crow Creek Designation there was a direct relationship between the flow of water in Crow Creek and the Upper Crow Creek alluvium, and a direct relationship between the flow of water in Crow Creek and the approximately fifty-six (56) high-capacity irrigation wells in the Upper Crow Creek Basin that withdraw water from the alluvium and the quaternary fan of Crow Creek, depleting the flow of water in Crow Creek. R. Vol. 3, p. 790. The withdrawal of water by junior groundwater wells from the Upper Crow Creek alluvium and the quaternary fan aquifers impacts the flow of water in Crow

Creek, which is the source of supply for the Gallegos Family Water Rights. Since the Gallegos Family has been unable to divert the full amount of the Gallegos Family Water Rights from Crow Creek, R. Vol. 3, pp. 729-730, the Commission is required to administer junior groundwater well rights to ensure that the senior Gallegos Family Water Rights are protected.

The Commission Parties assert various arguments regarding economic impacts associated with administration of designated basin wells, and assert that the General Assembly enacted the Management Act to enhance economic development. While one of the purposes of the Management Act is to promote economic development, *Danielson v. Vickroy*, 627 P.2d 752 (Colo. 1981); there is nothing in the Management Act that indicates that such economic development is to occur at the expense of and divestiture of surface water rights. As discussed below, the Colorado and United States Constitutions prohibit the taking of property rights, such as the Gallegos Family Water Rights, even if there is an economic impact on junior wells. There is no basis to deprive the Gallegos Family of their vested property right based on a claim of economic development and Colorado law does not permit such action. Moreover, if a claim of economic impact were to prevail in this case, no senior water right would be safe or secure, *see, Empire Lodge Homeowners' Ass. v. Moyer*, 39 P.3d 1139 (Colo. 2002); and every junior water right would tout the economic impact of responding to a call for water by a senior water right.

**C. The General Assembly Is Prohibited by the Colorado Constitution and United States Constitution from Divesting Citizens of Their Property Rights by Legislative Fiat.**

The essence of the Commission Parties' argument is that the General Assembly has divested the Gallegos Family of their property rights by enactment of legislation. If this position prevails, then all property rights can be terminated at will by the General Assembly without regard for the Colorado Constitution and United States Constitution. In order to reach the conclusion proposed by Commission Parties, the provisions of the Management Act must clearly and definitively provide that by the simple act of designation of the Upper Crow Creek Basin all senior surface water rights were no longer effective and no longer had the right to administration. As discussed below, the Management Act does not contain the support sought by the Commission Parties. Moreover, the constitutionality of the Management Act can only be upheld if the application of the Management Act does not violate the Colorado or United States Constitution.

The Management Act has been subject to two opinions regarding its constitutionality with respect to groundwater that is claimed to be tributary to a surface stream. *See, Larrick v. N. Kiowa Bijou Management Dist.*, 181 Colo. 395, 510 P.2d 323 (1973) and *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974)<sup>2</sup>. Contrary to the Anderson Brief, Anderson Brief, Page 10, this Court does have the

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<sup>2</sup>In both cases, the Supreme Court also determined that delegation of the approval of groundwater rights within a designated basin to the Commission was not unconstitutional.

power to rule on the constitutionality of the Management Act and its application to specific water rights. In *Larrick*, the owner of a well located within a designated basin asserted that since the water withdrawn from the well was tributary to the South Platte River, the water in question was subject to determination pursuant to the *Water Right Determination and Administration Act of 1969*, Section 37-92-101, *et seq.* (“1969 Act”) and not the Management Act. In considering the constitutionality of the Management Act, the Supreme Court stated:

The appellants' appropriation of the ground water at issue appears to have been made prior to the adoption of the [Management] Act. They do not argue that they are or have been unable to obtain a proper priority date under the [Management] Act. They have not shown that they would be injuriously affected by having a priority among Basin appropriators instead of among so-called surface decrees, *i.e.*, in the Weld County adjudication. In the absence of such a showing we will not consider the question of whether there is a violation of Colo. Const. art. XVI, § 6.

510 P.2d at 328. Hence, this Court did not decide the constitutionality of the Management Act with respect to whether a groundwater well located within a designated basin was subject to the Management Act.

One year later, in *Kuiper v. Lundvall*, 187 Colo. 40, 529 P.2d 1328 (1974), the constitutionality of the Management Act was again considered by this Court. In *Lundvall*, an application for a well permit was filed with the Commission and the Commission denied the application. On appeal to the district court, the evidence indicated that the water to be withdrawn by the proposed well was tributary to the Republican River and Arikaree River, and moving at a rate between 175 feet per year

and 300 feet per year. 529 P.2d at 1330. The District Court concluded that the water in question was tributary to a natural stream and the Management Act violated Colorado Constitution, art. XVI, §5 and §6. 529 P.2d at 1331. On appeal, the Supreme Court assumed a rate of flow of the groundwater and calculated that the depletions to the surface stream would not occur within over one hundred years. 529 P.2d at 1330. After discussing the opinion in *Larrick* and based on the Supreme Court's calculations, the Supreme Court stated:

[W]e think the time has come to rule as to the effect of the tributary character of this water upon the constitutionality of the Act. To protect decreed surface rights and the terms of an inter-state compact, the Commission is attempting to protect the flows of the two rivers by preventing the drilling of wells within the three miles thereof. It is managing the use of the water in the basin so that 40% of the present storage will be depleted within a 25-year period. We hold that as to the water taking over a century to reach the stream, the tributary character is *de minimis* and that this is not a part of the surface stream as contemplated by our Constitution.

529 P.2d at 1331. Through its own calculations, the Supreme Court determined that the groundwater in question was “non-tributary.” *See*, Section 37-90-103(10.5), C.R.S. for the current statutory definition of “non-tributary” groundwater. Moreover, since the Supreme Court defined the groundwater in question as “non-tributary,” the Supreme Court held that “[w]ith our treatment of the tributary character of this water, the underground water in this case meets both definitions” 529 P.2d at 1332, of groundwater that may be included in a designated basin. *See*, Section 37-90-106(a), C.R.S. The conclusion of the Supreme Court does not reach the question of whether



a surface water right diverting water from a surface stream is entitled to regulation of groundwater wells diverting water from the aquifer interconnected to the surface stream.

1. **The Colorado Ground Water Management Act, Section 37-90-101, et seq., C.R.S. Expressly Provides for Protection and Administration of All Vested Water Rights**

The briefs filed by the Commission Parties contain extensive discussion of the differences between the Management Act and the 1969 Act, and conclude that because there are differences between the two legislative acts there is no remedy for a surface water right located within a designated basin, such as the Gallegos Family Water Rights. In fact, the Management Act expressly provides that all water rights are to be protected and provides the remedy for protecting the water rights.

A trial court's interpretations of Colorado statutes or case law are reviewed *de novo*. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 58 (Colo. 2003) In the absence of statutory guidance, the Court applies well-settled rules of statutory construction to construe the statute in a manner that effectuates the intent of the General Assembly and the "beneficial purpose of the legislative measure." *Matter of Estate of Royal*, 826 P.2d 1236, 1238 (Colo.1992) *See, also, Arvada Urban Renewal Authority v. Columbine Professional Plaza Ass., Inc.*, 85 P.3d 1066 (Colo. 2004) In construing a statute, the Court must read it in context and in a manner that gives effect to the statute as a whole. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 435 (Colo. 2000). Moreover, the Court may not read the

statute in a manner that renders it unconstitutional. *Buckley v. Chilcutt*, 968 P.2d 112, 116 (Colo.1998). Courts should give effect to the words contained in the statute according to their plain and ordinary meaning. *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 422 (Colo.1991).

The specific provisions of the Management Act indicate that surface water rights and other water rights were to be protected by administration of junior groundwater wells. The legislative declaration to the Management Act provides, in part, as follows:

**It is declared that the traditional policy of the state of Colorado, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are defined in section 37-90-103 (6). While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All designated ground waters in this state are therefore declared to be subject to appropriation in the manner defined in this article. [Bold emphasis added]**

Section 37-90-102(1), C.R.S. The legislative declaration does not indicate that surface water rights are to be terminated or otherwise not acknowledged and protected. Conversely, the legislative declaration does provide that the appropriation doctrine is “affirmed” and “recognized” and that only as between designated groundwater well rights is the prior appropriation doctrine “modified.” The basis for the modification of the prior appropriation doctrine as between designated ground

water rights is that no one person could command the entire aquifer to satisfy their rights and that there may be some decline in the groundwater aquifer. *See, e.g., City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961)

The General Assembly established conditions and procedures for determination of designated basins. *See*, Section 37-90-106, C.R.S. None of the conditions and procedures for determination of designated ground water basins contain any indication or provision that surface water rights will not be fully protected by the creation of a designated basin. If the General Assembly sought to divest constitutionally protected water rights in conjunction with the creation of a designated basin, then the General Assembly would have expressly so provided.

After creation of a designated basin, the General Assembly also provided that with respect to determinations of ground water rights, the Commission could only determine a ground water right “if it finds that the proposed appropriation will not **unreasonably impair existing water rights from the same source...**[Bold emphasis added]” Section 37-90-107(3), C.R.S. This Court has previously determined that the term “unreasonably impair,” as used in Section 37-90-107(3), C.R.S., has the same meaning as “material injury,” as used in Section 37-92-502(2)(a), C.R.S. *Danielson v. Kerbs AG, Inc.*, 646 P.2d 363, 372 (Colo. 1982), and discussion in Gallegos Family Opening Brief, Pages 18-19. Hence, the General Assembly expressly provided that the appropriations of ground water rights could not “unreasonably impair existing water rights from the same source,” and expressly did not provide that

surface water rights should be ignored or excluded from the determination of unreasonable impairment. In addition, Section 37-90-107(5), C.R.S. provides the following standards for determinations regarding ground water rights:

In ascertaining whether a proposed use will create unreasonable waste or **unreasonably affect the rights of other appropriators**, the commission shall take into consideration the area and geologic conditions, the average annual yield and recharge rate of the appropriate water supply, the priority and quantity of existing claims of all persons to use the water, the proposed method of use, and all other matters appropriate to such questions. **With regard to whether a proposed use will impair uses under existing water rights, impairment shall include the unreasonable lowering of the water level, or the unreasonable deterioration of water quality, beyond reasonable economic limits of withdrawal or use.** [Bold emphasis added]

The General Assembly did not exclude surface water rights from the statutory provisions regarding “unreasonably affect the rights of other appropriators” or “impair uses under existing water rights.” No reading of the statutory provisions can lead to the conclusion that the creation of the designated basin included divestiture of senior surface water rights or precluded administration of groundwater rights for the benefit of senior surface water rights.

The most definitive statement regarding applicability of the prior appropriation doctrine within designated basins is in Section 37-90-109(1), C.R.S., which provides as follows:

**Priority of claims for the appropriation of designated ground water shall be determined by the doctrine of prior appropriation. All claims based on actual taking of designated ground water for beneficial use prior to May 17, 1965, shall be determined by the doctrine of prior appropriation and shall relate back to the date of**

**placing designated ground water to beneficial use.** All claims for the beneficial use of designated ground water initiated after May 17, 1965, shall relate back to the date of filing of an application with the commission, unless such application is rejected. [Bold emphasis added]

Section 37-90-109(1), C.R.S. expressly does not exclude surface water rights, and further expressly provides that “[a]ll claims based on actual taking of designated ground water for beneficial use prior to May 17, 1965, shall be determined by the doctrine of prior appropriation and shall relate back to the date of placing designated ground water to beneficial use.” [Bold emphasis added] Section 37-90-109(1), C.R.S. Since the Gallegos Family Water Rights date from 1885 and were created by diversion and placing the water to beneficial use prior to May 17, 1965, the Gallegos Family Water Rights are entitled to administration of other water rights on the basis of the doctrine of prior appropriation. The 1965 Act protects the priorities of those appropriating such ground water prior to its effective date. *Larrick v. District Court*, 177 Colo. 237, 240, 493 P.2d 647, 648 (1972).

With respect to administration of designated ground water, the General Assembly also provided that vested water rights are to be protected. Section 37-90-111(1), C.R.S. provides in pertinent part:

In the administration and enforcement of this article and in the effectuation of the policy of this state to conserve its designated ground water resources and **for the protection of vested rights** and except to the extent that similar authority is vested in ground water management districts pursuant to section 37-90-130 (2), the ground water commission is empowered:

(a) To supervise and control the exercise and administration of all rights acquired to the use of designated ground water. In the exercise of this power it may, by summary order, prohibit or limit withdrawal of water from any well during any period that it determines that such withdrawal of water from said well would cause **unreasonable injury to prior appropriators**; except that nothing in this article shall be construed as entitling any prior designated ground water appropriator to the maintenance of the historic water level or any other level below which water still can be economically extracted when the total economic pattern of the particular designated ground water basin is considered; and further except that no such order shall take effect until six months after its entry.

(b) To establish a reasonable ground water pumping level in an area having a common designated ground water supply. **Water in wells shall not be deemed available to fill the water right therefor if withdrawal therefrom of the amount called for by such right would, contrary to the declared policy of this article, unreasonably affect any prior water right** or result in withdrawing the ground water supply at a rate materially in excess of the reasonably anticipated average rate of future recharge. [Bold Emphasis added]

Contrary to the position asserted by the Commission Parties, the General Assembly has expressly directed the Commission to administer ground water rights to protect the senior water rights, including, but not limited to, senior surface water rights. The State Engineer is also required to protect vested water rights. Section 37-90-110(1), C.R.S. The Commission is charged with establishing priority dates for wells within designated ground water basins and is empowered, in the absence of a management district, to supervise and control the exercise and administration of all rights acquired

for the use of designated ground water, including limiting or prohibiting the withdrawal of water from wells when necessary to protect prior appropriators from unreasonable injury. *Upper Black Squirrel Creek v. Goss*, 993 P.2d 1177, 1184 (Colo. 2000).

2. **Any Construction of the Proceedings in Designation of the Upper Crow Creek Designated Basin Must Comport With the Requirements of the United States and Colorado Constitutions.**

The Commission Parties assert that the mere fact of creation of the Upper Crow Creek Designated Basin, coupled with the allegation that the predecessor in ownership of the Gallegos Family was a party to the proceedings regarding designation, means that the Gallegos Family Water Rights have been divested of the right of administration. There is no basis in Colorado law for such claim and any such claim would be violative of the United States and Colorado Constitutions. As discussed above, there is no provision in the Management Act which indicates or provides any notice that the act of designation would adversely affect or modify any surface water rights.

In *Watso v. Dept. Of Social Services*, 841 P.2d 299 (Colo. 1992), this Court discussed the protection of property interests from governmental action:

The Fourteenth Amendment to the United States Constitution and article II, section 25 of the Colorado Constitution protect individuals from arbitrary governmental restrictions on property and liberty interests. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Coleman v. Darden*, 595 F.2d 533 (10th Cir.), *cert. denied*, 444

U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 184 (1979); *People v. Chavez*, 629 P.2d 1040 (Colo.1981). In addressing due process issues, courts employ a bifurcated analysis requiring an initial delineation of the nature and extent of the asserted interest and, in the event that interest is constitutionality protected, an evaluation of the adequacy of the challenged process. *Chavez*, 629 P.2d at 1045.

841 P.2d at 304. Under the United States and Colorado Constitutions, a statute violates due process protections when it "forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application." *Watso v. Department of Social Servs.*, 841 P.2d 299, 309 (Colo.1992). Statutes must "contain language that provides fair notice of what conduct is prohibited and provides enforcement authorities with sufficiently definite standards to ensure uniform, non-discriminatory enforcement of those prohibitions." *Id. See, also, Loonan v. Woodley*, 882 P.2d 1380, 1389 (Colo. 1994) As discussed above, a review of the provisions of the Management Act indicates that water rights, including senior water rights, were to be protected, and any argument that senior surface water rights were terminated or no longer effective, or that groundwater wells would not be administered to protect such senior surface water rights, is without merit and contrary to Colorado law, the Colorado Constitution, and the United States Constitution. Moreover, there is no evidence in the record that notice was provided to anyone that the creation of the Upper Crow Creek Designated Basin would result in termination of the surface water rights.



3. **The Proceedings in Designation of the Upper Crow Creek Designated Basin Do Not Give Rise to Application of Res Judicata or Collateral Estoppel.**

The Commission Parties claim that because the predecessor of the Gallegos Family participated in the proceedings leading up to the designation of the Upper Crow Creek Designated Basin, the Gallegos Family is barred from objecting to the Commission' failure to administer well water rights. Neither the General Assembly nor this Court has previously conditioned the right of administration of water rights on the support of the party seeking administration for creation of the governmental entity. *Cf. Larrick v. N. Kiowa Bijou Management Dist.*, 181 Colo. 395, 510 P.2d 323 (1973).

The Commission engages in both quasi-judicial and quasi-legislative actions. *Ground Water Comm. v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 220-221 (1996) A quasi-judicial action involves "determination of the rights, duties, or obligations of **specific individuals** on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question. [Bold emphasis added]" *Cherry Hills Resort Dev. Co. v. Cherry Hills Village*, 757 P.2d 622, 625 (Colo.1988). "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it; while adjudication operates concretely upon individuals in their

individual capacity." *Ground Water Comm. v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (1996), quoting 2 Davis & Pierce, *Administrative Law Treatise* § 6.1 at 228. The creation of a designated basin is a quasi-legislative action, *i.e.*, the proceeding "affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it" and no particular individual's water rights are affected by the designation. *See*, Section 37-90-106, C.R.S. The fact that the creation of a designated basin is a quasi-legislative action bars the application of the judicial doctrines of *res judicata* and collateral estoppel.

The District Court correctly concluded that the proceedings leading to the Commission's creation of the Upper Crow Creek Designated Basin did not give rise to the application of the doctrines of *res judicata* or collateral estoppel with respect to administration of surface water rights within the Upper Crow Creek Designated Basin. R. Vol. 4, p. 1148. As discussed above, the proceedings pertaining to creation of a designated basin do not pertain to or involve actual administration of the designated basin. Section 37-90-106, C.R.S. Therefore, the equitable doctrines of *res judicata* or collateral estoppel cannot apply with respect to administration of surface water rights within the Upper Crow Creek Designated Basin

When faced with a contention that a claim is barred from being relitigated in the case before it, a Court must determine whether: (1) the court entering the prior judgment possessed subject matter jurisdiction; (2) the same subject matter and cause

of action are involved in both cases; and (3) the party seeking to litigate an issue or claim should be bound by the prior determination. *See State Eng'r v. Smith Cattle, Inc.*, 780 P.2d 546, 549-51 (Colo. 1989); *see also Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 637 (Colo. 1987). The designation of the Upper Crow Creek Designated Basin was not a judicial or quasi-judicial proceeding giving rise to any issue or claim preclusion. The Gallegos Family Water Rights were not the subject matter or the cause of action in the designation proceeding. Therefore, the issue of administration of other groundwater rights for the protection of specific surface water rights, *i.e.*, the Gallegos Family Water Rights, was not the subject matter or the cause of action in the designation proceeding.

*Res judicata*, or claim preclusion, bars subsequent claims by identical parties based on the same claim for relief after there has been a final judgment on the merits. *See Kuhn v. State of Colorado, Department of Revenue*, 897 P.2d 792, 795 (Colo. 1995). “Claim preclusion bars a subsequent action only if, as between prior and present suits, there exists an identity of subject matter, claim or cause of action, parties to the action, and capacity in the persons for which or against whom the claim is made. Claim preclusion bars a subsequent action only if, as between prior and present suits, there exists an identity of subject matter, claim or cause of action, parties to the action, and capacity in the persons for which or against whom the claim is made.” *Farmers High Line Canal and Reservoir Co. v. Golden*, 975 P.2d 189, 199 (Colo., 1999); *See Weibert v. Rothe Bros.*, 200 Colo. 310, 318, 618 P.2d 1367, 1372

(1980); *City of Westminster v. Church*, 167 Colo. 1, 8, 445 P.2d 52, 55 (1968). The same claim or cause of action requirement is determined by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. *See State Eng'r v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989). "The best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, according to the authorities, is whether the same evidence would sustain both, and if it would, the two actions are the same, and this is true although the two actions are different in form . . . ." *Pomponio v. Larsen*, 80 Colo. 318, 321, 251 P. 534, 536 (1926). *See also Green v. Chaffee Ditch Co.*, 150 Colo. 91, 371 P.2d 775 (Colo. 1962) On the other hand collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) the issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. *See Maryland Casualty Co. v. Messina*, 874 P.2d 1058, 1061 (Colo. 1994). Since the Gallegos Family Water Rights (1) were not subject matter of the proceedings pertaining to designation of the Upper Crow Creek Designated Basin, (2) the issues pertaining to administration of the Upper Crow Creek Designated Basin were not actually litigated, (3) the issues pertaining to administration of the Upper Crow Creek Designated Basin were not

actually determined, and (4) there has not been a full and fair opportunity to litigate the issues pertaining to the administration of surface water rights in the Upper Crow Creek Designated Basin, the doctrines of *res judicata* and collateral estoppel cannot apply to the issues presented in this case.

**D. Surface Water Rights Located in a Designated Basin Should Not Be Subject to Greater Burdens in the Diversion of Water than Other Surface Water Rights.**

As discussed in more detail in the Gallegos Family Opening Brief, the District Court imposed additional terms and conditions on the use of the Gallegos Family Water Rights. The terms and conditions include (1) demonstrating the injury caused by the pumping of junior groundwater rights, (2) demonstrating whether a reduction in water available from the surface stream constitutes unreasonable injury to the senior surface water right, (3) demonstrating that surface diversions by a senior water right do not constitute an unreasonable method of diversion, and (4) demonstrating that a call for water for the senior surface water rights is not a “futile call” when applied against junior ground water rights. The Commission Parties support the additional burden on the Gallegos Family Water Rights. Each of the arguments raised by the Commission Parties are addressed in the Gallegos Family Opening Brief.

However, with respect to the issues pertaining to the reasonableness of the method of diversion, an additional response is merited. In *Alamosa-La Jara Water Users Protection Association v. Gould*, 674 P.2d 914 (Colo. 1983), this Court reviewed a Water Court determination regarding rules and regulations promulgated

by the State Engineer. The Water Court held “that, under certain circumstances, surface stream appropriators may be required to withdraw underground water tributary to the stream in order to satisfy their surface appropriations,” 674 P.2d at 935, and this Court affirmed the legal conclusion. However, the Supreme Court did not determine what would be appropriate circumstances for withdrawal of the underground water to satisfy a surface water rights, or who would bear the economic cost of such action. The potential economic impacts of such determination are significant. For example, the five direct flow water rights owned by the Gallegos Family have a total rate of diversion of 413 cubic feet of water per second of time, which is equal to approximately 185,000 gallons per minute. However, assuming that the wells could be constructed to pump at a rate of 1000 gallons per minute, it would take 185 wells to satisfy the Gallegos Family Water Rights. Since there are presently approximately 56 high capacity wells that withdraw water from the alluvium and the quaternary fan of Crow Creek, R. Vol. 3, p. 790, it would take three times as many wells to satisfy the Gallegos Family Water Rights. This example does not consider the pumping costs and construction costs associated with the construction of 185 wells. Nevertheless, the example illustrates the impact of attempting to consider alternative methods of water deliveries. Before such action is required with respect to surface water rights, the General Assembly should adopt a uniform standard and procedures for all surface water rights.

## VI. CONCLUSION

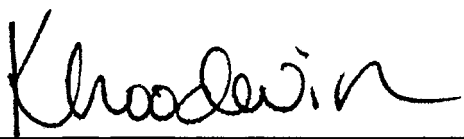
The Gallegos Family have been deprived of the ability to divert water pursuant to their senior surface water rights. The Constitutional protections associated with the Gallegos Family Water Rights requires administration of junior ground water wells in order to ensure water is available to the senior water rights. During the same time, junior wells within the Upper Crow Creek Designated Basin have continued to divert water and deplete the water supplies in Crow Creek, and thereby deprive the Gallegos Family of their Constitutionally protected water rights.

The Gallegos Family Water Rights are protected by the Colorado Constitution, and creation of the Upper Crow Creek Designated Basin cannot divest the Gallegos Family Water Rights of the protections guaranteed by the Constitution. This Court is respectfully requested to reverse the determinations by the District Court in the Order that (1) senior surface water rights within a designated basin may not “assert an absolute priority against a junior well user with a valid permit;” (2) the owner of a senior surface water right within a designated basin “has the burden to establish unreasonable injury by the junior;” (3) “A decrease in a senior’s yield is not sufficient evidence to establish unreasonable injury;” (4) a senior surface water right within a designated basin “may not employ an unreasonable method of diversion to the detriment of junior [well] appropriators;” and (5) a senior surface water right within a designated basin is subject to the “futile call doctrine” with respect to junior ground water well diversions, and direct that the junior ground water wells within the Upper

Crow Creek Designated Basin be administered to ensure that water is available in Crow Creek for diversion pursuant to the Gallegos Family Water Rights.

Respectfully submitted this 8<sup>th</sup> day of May, 2006.

TIMOTHY R. BUCHANAN, P.C.

By:   
\_\_\_\_\_  
Timothy R. Buchanan  
Kara Godbehere Goodwin



**VII. 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 8,616 words.

Respectfully submitted this 8th day of May, 2006.

TIMOTHY R. BUCHANAN, P.C.

By: 

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Timothy R. Buchanan  
Kara Godbehere Goodwin

## CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing **ANSWER-REPLY BRIEF** was served on this 8th day of May, 2006, via U.S. Mail, postage prepaid on the following:

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