2-22-2007

People v. Trujillo

SUPREME COURT, COLORADO 2 E. 14th Ave., 4th floor Denver, CO 80203 Appeal from the District Court for Water Division 5 109 8th St., Suite 104 Glenwood Springs, CO 81601	**Certification of Word Count:** **9,187** FILED IN THE SUPREME COURT FEB 22 2007 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
JOYCE C. McNICHOLS, KENNETH J. McNICHOLS, and GERALD LEWIS, **Appellants,** **v.** **SPRING CREEK RANCHERS ASSOCIATION, INC.,** **Appellee, and** **ALAN MARTELLARO, Division Engineer for Water Division 5, and HAROLD SIMPSON, Colorado State Engineer,** Appellees.	**▲ COURT USE ONLY ▲**
ATTORNEY FOR APPELLANTS: Alison Maynard, #16561 Attorney at Law P.O. Box 22135 Denver, CO 80222 tel: (303) 758-7038; fax: (303) 758-5001 E-mail: amaynard_1@juno.com	**Case No.: 05 SA 326** District Court, Water Division 5, Case No. 93 CW 213

OPENING BRIEF

RECEIVED
FEB 5 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ISSUES PRESENTED FOR REVIEW

A. Whether the award of fees and costs the water court entered in favor of the Applicant constituted reversible error;

B. Whether the holding in 04 SA 328 that Elk Dance was not entitled to attorney fees for our efforts to collaterally attack the judgment in 99 CV 277 has preclusive effect over SCRA's claim for fees in this case;

C. Whether Judge Petre could step down and be replaced by Judge Ossola, when no disability or cause was shown for Judge Petre's recusal; and whether the ground assumed by Judge Ossola as the reason for recusal is sufficient in law.

II. STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition in the court below.

This was originally the appeal of a decree issued in case 93 CW 213 on Sept. 22, 2005, in the district court for Water Division 5, approving a "readjudicated" plan for augmentation for Phase I of Spring Creek Ranch, a subdivision of seven homes in Summit County, Colorado. Exhibit A. The decree was issued after a one-day trial on Sept. 14, 2005, of Appellants' ("Homeowners'") protest to the ruling of the referee. The Applicant in 93 CW 213 ("SCRA" or "the Swenson Group") is

the putative board of directors of Appellants' homeowners' association, the Spring Creek Ranchers' Association.

The notice of appeal was amended on August 14, 2006, first because this Court had had before it some of the same issues in case 04 SA 328, which was decided June 26, 2006. Case 04 SA 328 was an appeal by Homeowners of two decrees issued by the same water court to another entity, Elk Dance Colorado, LLC, changing features of SCRA's original plan for augmentation. Elk Dance asserted *it* was the owner of that plan, based on a judgment of the Summit County district court in case 99 CV 277, to which it was not a party, but in which the Swenson Group had sued Homeowners and received that anomalous determination.[1] In their challenge to the two decrees Elk Dance had received changing the SCRA plan for augmentation, Homeowners attempted to collaterally attack the judgment in 99 CV 277 for jurisdictional defects. This Court in 04 SA 328 held that Homeowners' jurisdictional challenge was barred.

---

[1]We now know Robert Swenson and Clayton Beattie, two of the people who took over the board of directors of the SCRA, were being paid by Nelson Lane, one of the principals in Elk Dance.

Homeowners thus amended their notice of appeal in *this* case, which was pending when 04 SA 328 was decided, to withdraw their claim of jurisdictional defects in the judgment in 99 CV 277. They were permitted to amend for a second reason, as well, since the water court had, as of May 18, 2006, granted SCRA $15,877.93 in costs and attorney fees in 93 CW 213, because of Homeowners' attempts to collaterally attack the judgment in 99 CV 277. This Court then, in 04 SA 328, *denied* Elk Dance's claim for attorney fees, on June 26, 2006. Thus, we moved for summary disposition in the present appeal as to SCRA's claim for fees for the same activity, asserting preclusion; however, our motion was denied.

B. Statement of Facts.

The applicant is the putative board of directors of the Spring Creek Ranchers' Association ("SCRA"), also referred to here as "the Swenson Group." The application had been pending for four years when the Swenson Group took over in 1997. See Vol. I at 1 (original application, filed Oct. 1, 1993) and 7 (amended application, filed Aug. 31, 1995). The Swenson Group stipulated with other parties in the case to a ruling of the referee, which entered on June 11, 2003. Vol. II at 253 *et seq.* Appellants ("Homeowners")–the other lot owners in Spring Creek Ranch–timely protested the ruling. Vol. II at 268 *et seq.*

We challenged both the necessity of "readjudicating" the augmentation plan for the subdivision–since an augmentation plan was already decreed for Spring Creek Ranch, in case 80 CW 504--as well as the sufficiency of the substituted plan, since, on its face, it is inadequate to keep Homeowners' water supply from being curtailed when their water rights are not in priority. In particular, because the ruling treats Elk Dance as the owner of the plan for augmentation decreed in 80 CW 504–even though the application filed by SCRA in 93 CW 213 was to *amend* its *own* plan for augmentation, decreed in 80 CW 504--basing Elk Dance's claim on the judgment of the Summit County district court in 99 CV 277, as mentioned, we attempted to collaterally attack that judgment. The judgment in 99 CV 277 (Vol. II at 274 et seq.) had also ordered Homeowners to acquiesce in the ruling of the referee the Swenson Group had stipulated to in case 93 CW 213, thus foreclosing Homeowners' ability to be heard in the *water court*. It ordered the clerk of the court to sign Homeowners' names to a "2000 Addendum to 1989 Settlement Agreement." This "addendum" materially changed Homeowners' rights in an agreement they had made with Elk Dance's predecessor Nelson Lane in 1989, without their consent.

There were many strong grounds for collaterally attacking this judgment in the water court, but Judge Ossola refused to consider our jurisdictional challenge on the

merits. He ordered, conclusorily, that we were "barred from relitigating" 99 CV 277. I attempted to inform him that we were *re*litigating nothing, since the issue whether the district court had jurisdiction to enter the judgment in 99 CV 277 had *never* been litigated; but Judge Ossola refused to decide the issue. Without basis, he found that I had been "stubbornly litigious" and had relitigated issues in 99 CV 277 in violation of orders he had previously entered, and made my clients and me jointly and severally liable for $15,877.93 in attorney fees.

Judge Ossola should, in fact, not have sat on this case. He retired in 2003, assigning the matter to Judge Craven. Vol. IV, at 552. Judge Craven revealed a conflict, Vol. IV at 553, which we, unfortunately, did not waive, so he disqualified himself and assigned Judge Petre to the case. Vol. IV at 556. Without any reason shown of record or opportunity to us to respond, Judge Petre disqualified himself, Vol. IV at 557, and Judge Ossola came back on the case as a senior judge. Vol. IV at 558. The order of disqualification states no reason. Id.

We moved to reinstate Judge Petre, Vol. IV at 559-61. At a telephone conference, Supp. III, at 1-7,[2] Judge Ossola found, even though no reason for

---

[2]A supplemental record was transmitted to this Court on Oct. 10, 2006, the volumes of which are numbered I, II, III, etc., without the words "Supplemental

recusal was of record, that Judge Petre had a conflict, having been previously involved as the referee; and denied our motion. Supp. III at 7, lines 7-12.

III. SUMMARY OF ARGUMENT

The order granting attorney fees to SCRA for our attempts to challenge the jurisdiction of the Summit County district court to enter the judgment in 99 CV 277 must be reversed. I violated no court order in attempting to have this issue determined: the court's findings have no basis in the record. Also, the issue whether the Summit County district court had jurisdiction to enter the judgment in 99 CV 277 has never been litigated. Asking the water court to determine that issue did not constitute "relitigation," therefore. Moreover, the court has a duty to decide motions. It was an act in excess of its jurisdiction to punish me, an attorney--and my clients--simply for bringing an issue to it, in good faith, for its determination. There is abundant case authority where similar challenges have been successful.

Record" on the cover–and there were pre-existing volumes I, II, and III, etc., from the record originally filed on May 5, 2006. Thus, the volumes which bear the Court's date stamp "Oct. 10, 2006" will be denominated "Supp." The undersigned further notes that this particular transcript contains many errors. My statement at p. 3, line 18, reading "Your Honor was hired," is corrected to read "Your Honor *retired*". I do not know what is meant by the words in the line above that, however, "As John and me recall..."

The decision of this court in 04 SA 328, which denied attorney fees to Elk Dance for our challenge to the district court's jurisdiction to enter the judgment in 99 CV 277, precluded the award of fees for the same activity by the water court in 93 CW 213.

A judge has a duty to sit on a case unless he has a disability or a conflict. Judge Petre abused his discretion in disqualifying himself, since no reason for it is shown of record and we had no opportunity to respond to it. The excuse which Judge Ossola *assumed* was the reason for recusal–that Judge Petre had a conflict, in having sat as the referee and then becoming the judge–was insupportable as a matter of law, since the statutes provide that the judge may function as the referee.

IV. ARGUMENT

A. The sanction of attorney fees was unjustified, either as a matter of fact or a matter of law.

1. Applicable standard of appellate review. "[J]udicial determinations are divided into three categories for the purposes of the standard of review: (1) questions of law which are reviewable de novo; (2) questions of fact which are reviewable for clear error; and (3) matters of discretion which are reviewable for abuse of discretion." Valdez v. People, 966 P.2d 587, 590 (Colo. 1998).

Whether I was "stubbornly litigious" is an issue of fact which must be supported by competent evidence in the record. If not, clear error exists requiring reversal. Also, whether we were "relitigating" an issue is a question of law.

2. The record reveals that I violated no court order, and was not "stubbornly litigious."

In his Nov. 4, 2005, order, attached as Exhibit B, the court made findings as to my conduct, to support his award of attorney fees, which are unsupported by the record. He said:

> Prior to trial, this Court entered an order determining that the decree in the Summit County case was *res judicata* in this case and that the protesters would be allowed to proceed to hearing on the protest in their individual capacities only. The Court cautioned the protesters not to attempt to re-litigate the status of officers of the homeowners' association or the settlement agreement, and that if they did so, they may be liable for attorney fees.
>
> Notwithstanding the Court's order, the protesters continued to raise these issues at every opportunity *as documented in applicant's motion*. When confronted with this Court's prior order, protesters would politely move on to other issues and when they felt an opportunity presented itself, they returned to already resolved issues, often with the explanation that they needed to make a record for appeal.
>
> While this Court appreciates the need of vigorous advocacy and the need to make an appellate record, the record in this case indicates that protestants were so vigorous and persistent as to disregard the clear orders of the Court and were stubbornly litigious. ... In so doing, they unnecessarily prolonged the proceedings and caused applicants to incur more attorney fees than they should have been reasonably expected to incur. In so doing, they have made

> themselves liable for those fees incurred in unnecessarily defending against issues that had already become law of the case. ...

(Emphasis added). The order issued "prior to trial" referred to by the court in the foregoing order is apparently its July 27, 2004, order, a copy of which is Exhibit C. This order states in pertinent part:

> The Court concludes that the Eagle County [sic] District Court final order and judgment does act as a bar to protestant's protest as it resolves issues fully litigated among the same parties. While protestants are *barred from representing themselves as the homeowners association and raising issues in this case that were determined in the previous lawsuit, they may protest this application as individuals on other grounds. By their protest, they may put applicant to strict proof on its claims for relief in the application before the Water Judge.* In doing so, however, they must be mindful not to assert frivolous and groundless defenses and that by doing so, may subject themselves to an assessment of attorney fees pursuant to C.R.S. 13-71-101 [sic], *et seq.* ... Applicants will be required to go forward with a hearing before the Water Judge at which they will be put to strict proof as to the matters alleged in the application. *Protestants will be estopped from*
>
> *asserting that applicant does not have the authority to act as the homeowner's association.*

(Emphasis added.)

The court rests its Nov. 4, 2005, order granting attorney fees, Exhibit B, entirely on conduct violative of its July 27, 2004, order *"as documented in applicant's motion,"* therefore. Applicant's motion did not document any violations, however.

a. Seven of the nine filings Applicant contended "violated" the July 27 court order were made before that order entered, and the other two did not constitute "litigation" of the prohibited subject.

Applicant's motion is at Supp. I, pp. 1-9. As I pointed out to the court in my response to it, *seven of the nine* pleadings I filed which opposing counsel recites as violations of the July 27, 2004, order were filed *before* July 27, 2004. These are dated June 30, 2003; August 7, 2003; Feb. 27, 2004; March 21, 2004; April 20, 2004; July 12, 2004; and July 27, 2004. My clients and I are thus being punished for violating a court order which did not exist.

As to the other two pleadings: opposing counsel quoted from my March 7, 2005, "Supplement to Joint Status Report, and Motion to Reinstate Judge," to support his request for sanctions, but omitted pertinent material. The portion of the quote he included makes it appear as though I was relitigating the prohibited issue. When the missing material is supplied, the quotation is seen, instead, to be an *admission* to the court that I knew its order barred me from litigating the issue of jurisdictional defects in the judgment in 99 CV 277. I am informing the court that the issue was pending in other courts and merely suggesting it wait until they had determined it, before holding trial in 93 CW 213, in the interest of judicial

efficiency. This was, therefore, not litigation of the issue itself. See my response to the motion at Supp. I, at 12-13, esp. par. 3.

As to the last pleading Mr. Houpt complained of, "Protesters' Terms and Conditions for Decree" of Sept. 9, 2005, Vol. V at 772 *et seq.*, that constituted an effective settlement offer. It was intended to expedite the trial and not an attempt to relitigate anything. We acknowledged that we would likely appeal the decree Applicant had proposed, because of its references to 80 CW 504's being "the Elk Dance water" and the like, since we had never received a judicial determination of our jurisdictional issues relating to 99 CV 277. Our proposed terms and conditions removing this language from the proposed decree were intended as a compromise obviating the need for appeal. This filing also did not constitute "litigation" or "relitigation" of any restricted issue.

Thus, Applicant's motion was unsupported by a single instance of bad faith conduct or violation of the court's order, as we pointed out in our response, Supp. I at 11-14, yet the court apparently did not read my response. It adopted what opposing counsel said, uncritically, to justify its imposition of this serious sanction. Applicant had the burden of proving, by a preponderance of the evidence, that our claims lacked substantial justification. Elrick v. Merrill, 10 P.3d 689 (Colo. App.

2000). The phrase "lacked substantial justification" includes conduct which is substantially vexatious, Mitchell v. Ryder, 104 P.3d 316 (Colo. App. 2004). A "vexatious" claim is one brought in bad faith, and "bad faith" may include conduct that is "arbitrary, vexatious, abusive, *stubbornly litigious*, aimed at unwarranted delay, or disrespectful of truth and accuracy." Id. My conduct was not any of those things, as the record shows. I behaved at all times responsibly and in good faith, and did not violate the court order.

Applicant failed to meet its burden of proof. As a consequence, the Nov. 5, 2004, order which relied exclusively on Applicant's motion, being unsupported by any competent evidence, must be reversed.

b. We did not "relitigate" any issue determined in 99 CV 277.

The July 27, 2004, order was a bar only as to those "issues fully litigated among the same parties." The issue of whether the district court had jurisdiction to issues its judgment in 99 CV 277 was not "fully litigated"; that issue has *never* been litigated, least of all in 99 CV 277. In addition, the same parties were not present in 93 CW 213, since both Clayton Beattie and Lisa Lindley–who, with Robert Swenson, were the plaintiffs in 99 CV 277–had, two years prior to July 27, 2004, sold their homes and been replaced by Bruce and Judith Anderson as directors. The

judgment in 99 CV 277 declares that "*Beattie, Lindley*, and Swenson [are] the duly elected members of the Board of Directors of the Spring Creek Ranchers' Association." Vol. II at 17, finding #1. It does not say "*Bruce and Judith Anderson* and Swenson " are the duly elected directors.

In addition, Judge Petre, the referee, who was appointed by Judge Ossola to function as a "case manager" issuing orders even after the protest was filed which removed the case to the court, had said, in an order dated August 4, 2003, "*Barring* a reversal of [the judgment in 99 CV 277], *a subsequent election changing the make-up of the Board of Directors of the Association*, or similar event occurring after the Judgment ... this Court concludes that the doctrines of collateral estoppel, res judicata, or both prevent Ms. Maynard's clients *from speaking for the Association* for purposes of the adjudication of the Protest." Exhibit D (attached).[3] We had shown that the make-up of the Board of Directors *had* changed, meaning that these doctrines did not apply.

Moreover, we never tried to "speak for the Association." In many of my filings, I pointed out that we were relying on Sec. 24-67-106(2), C.R.S., the Planned

---

[3]This minute order was designated to be included in the Supplemental Record, see Supp. II at 358, but was omitted. I have attached a copy from my file.

Unit Development Act of Colorado, which gives the residents, occupants, and owners in a P.U.D. acting individually or jointly the ability to enforce any provision in the P.U.D., "at law or in equity"–which includes via a protest in water court. We were attempting to keep the plan for augmentation decreed for Spring Creek Ranch in case 80 CW 504 for the *use* of Spring Creek Ranch, since it was an express term and condition of the P.U.D.. That aspect of illegality of the judgment in 99 CV 277 was also never litigated. We also relied on the nonprofit corporation statutes, which give members of the corporation the right to bring an action in behalf of the corporation, as well. See our motion for summary judgment, Vol. III at 407-443. Homeowners did not act *as* the SCRA, but for its benefit, which they could do as individuals, given these statutes, as well as the court order.

We did not, in this case, *ever* challenge the authority of the Swenson Group to act as the board of directors of the Spring Creek Ranchers' Association or attempt to relitigate the status of officers of the homeowners' association or the settlement agreement. We were challenging the ruling of the referee in 93 CW 213 which acknowledged ownership in the water augmentation plan in *Elk Dance* and substituted an inferior plan for the use of Spring Creek Ranch, in violation of Homeowners' rights under the P.U.D. See the motion for summary judgment

referenced above, as well as our "Response to 'Motion for Confirmation of Ruling of the Referee,'" Vol. III at 448-453, also solely concerned with the jurisdiction of the district court to enter this judgment which affected Homeowners' rights to the use of water in their subdivision.

c. The order was not violated by my conduct at trial.

As further grounds for its finding that I was "stubbornly litigious," according to the court, during the trial:

> When confronted with this Court's prior order, [I] would politely move on to other issues and when [I] felt an opportunity presented itself, [I] returned to already resolved issues, often with the explanation that [I] needed to make a record for appeal.

Exhibit B. This is absolutely untrue. The transcript of the trial reveals, to the contrary, that the Applicant repeatedly brought the prohibited subjects up, using the judgment in 99 CV 277, as well as the numerous changed organizational documents that judgment authorized, to prove that it had authority to act for the SCRA, as well as the intent to file the application. The judge permitted me to respond. For example, since all the changed documents were prepared in 1997 or later, I objected to them as irrelevant. The application was filed in 1993 and amended in 1995. Vol. VII at 33, line 22, through 39, line 21; 45, lines 10-20. The court said, "They'll be

admitted. *You can argue the relevance of them or the legal effect of them."* Vol. VII at 39, lines 22-23. Also, when the Applicant offered the so-called "2000 addendum to the 1989 settlement agreement," I stated:

> Maynard: I – I– I dispute this, Your Honor. I object to this because, number one, we've been barred from bringing up the ownership issue. If we're going to be litigating this agreement, we should have the opportunity to respond because in fact it has never been litigated. My clients had no knowledge that this was coming up before the district court. So we would like the ability to fully respond. Otherwise, I mean, he's got the judgment in 99 CV 277, which speaks for itself, and all this stuff, like the 1989 settlement agreement, should not come in, in addition to that.
>
> ...
>
> [I]t's only that we–we already have been barred by orders of this Court, as I understood it, from challenging the authority of these individuals to ... do what they're doing in this case, and it is putatively based on 99 CV 277. I don't see how I can avoid 99 CV 277 coming in and it is already in the record, but this other stuff, I do object.
>
> Court: It's properly identified. I'll allow the exhibits to come in.

Vol. VII at 52-53. I then was permitted to voir dire on this agreement, and the court said:

> Court: ... [O]n prior motion in this case by both sides substantial reference has been made to these documents. They are before the court. I referred to them in my – in my orders. They are

before the Court for consideration. *You can argue what they mean. You can argue whether I should disregard them or not take them into consideration*, but they are before the Court, and let's not spend a whole lot of time on this.

Then, when Mr. Houpt asked the court to take judicial notice of the judgment issued in 99 CV 277, the court said:

> Court: I don't think I can take judicial notice of a decree issued by a court outside the jurisdiction in which I sit, but ... [t]here's no denying that it exists. *The question is, What's the legal effect of it? So what? That's the question, not its existence.*

Vol. VII, at 57, lines 17-24.

The court did not understand why Homeowners could not still make use of 80 CW 504–it believed that plan was still available to them, even after all our efforts to explain that it was not--so I responded to its questions:

> Court: [Mr. Houpt said] the augmentation plan here is separate from 80 CW 504, and he expressed the opinion that the augmentation plan could be any one of a variety of augmentation plans but this is the one that they were offering. Were this to be approved, I don't understand how that may diminish the rights of your clients in another augmentation plan.
>
> ...
>
> You're taking the position that they have an existing right in 504 ... So, if this one is less than 504, so what? They can still go back to 504.

Maynard: [Explaining how 80 CW 504 is different from the new plan we are in court adjudicating, and how we can't "go back" to 80 CW 504 because the irrigation water rights and storage pond site dedicated to that plan had been conveyed to Elk Dance] ... So there were these components necessary to make 80 CW 504 work. They were all required as part of the approval of my clients' subdivision. They've been conveyed away, ... to Lane and Elk Dance ... they're taking the aug plan for the original P.U.D. ... So my clients have no control or input at all ...

And the problem is they have a so-called board of directors who is working for the other side, and I realize that ... I know that Your Honor has barred us from making these arguments, but that's what's going on here.

Vol. VII at 22-26.

Later, I established, through cross-examination of Robert Swenson, that Bruce and Judith Anderson had taken the place of Beattie and Lindley on the board. Beattie and Lindley were declared, with Swenson, to be the "duly elected directors" in 99 CV 277. Mr. Houpt's objection as to relevance was sustained, but my questioning was directly in line with the order of Referee Petre on August 4, 2003, Exhibit D, establishing that I could show there had been new directors, *in which case the doctrines of res judicata or collateral estoppel did not apply*. Vol. VII at 60, line 21, through 61, line 11.

The transcript reveals that I did not do any other questioning or make any other comments than have been set forth above, relating to the matters I was not

supposed to mention, and on those occasions I was permitted or invited to do so by the court. There is no support for its statement that when "confronted with its prior order" I would "politely move on to other issues" but then keep coming back to the issues litigated in 99 CV 277. I also *never* said that I was making a record for appeal.

In the trial, we were concerned about the inadequacy of the substituted plan for augmentation. In our "Second Motion for Summary Judgment" filed August 1, 2005, Vol. IV at 609 *et seq.*, I had detailed our objections to that plan on the basis of its adequacy, since, if the plan is inadequate, my clients' use of water will be curtailed. The homes will become uninhabitable and their value plummet to zero. None of these issues constituted "relitigation" of any issue brought up in 99 CV 277. They were wholly new and germane to the case. The court had said that we could "put applicant to strict proof on its claims for relief in the application before the Water Judge." Homeowners would have that right independent of the court's order, under the 1969 Water Rights Determination and Administration Act, and have it even if they did not own property in Spring Creek Ranch.

In point of fact, several of the problems in that decree which we pointed out were nonsense or on their face insufficient were addressed and changed by the

Applicant, so that the final decree is different from the ruling of the referee. See the admissions of Robert Swenson about the "inaccuracies" of the contract for Green Mountain Reservoir water (discussed below), which *we* brought to light, Vol. VII at 50, line 11, through 51, line 9; and the admissions of Bill Lorah that there was no "Spring Ditch," Vol. VII at 116, lines 1-21; and 127, lines 8-20, and more problems with the Green Mountain contract. The changes are all due to *us*, and show that our participation was valuable to the homeowners' association as a whole.

The rest of this subsection will be devoted to explaining in more detail the "inadequacy" issue we went to trial on, and our proof for it. As originally decreed in 80 CW 504, the well in Spring Creek Ranch was to be augmented by senior irrigation rights, a portion of which were to be stored in a pond for later release to cover wintertime depletions from the well. Because Elk Dance had asserted it owned all the irrigation rights, and that it had no responsibility to construct the pond–even though those water rights were *dedicated by court decree and the P.U.D.* to those purposes, and *the P.U.D. was approved based on that decree,* as an essential condition of approval–it got the Swenson Group to agree to move Spring Creek Ranch Phase I to a 40-year contract for water from Green Mountain reservoir for augmentation, with Elk Dance committing only a small portion of "*its*

water" as back-up in the event Green Mountain water were ever unavailable.

The ruling of the referee approving this new plan for augmentation is at Vol. II, pp. 253-267. At par. 7, it states the consumptive use of Spring Creek Ranch is 14.97 AF annually, and at par. 4(F), that the uses are "domestic and irrigation." This is appropriate. The problem is that the sources of augmentation water do not permit these uses, or are insufficient to augment for this consumptive use. Par. 6(B)(1) states that the Green Mountain contract itself says that "0 acre-feet of water" is for irrigation use. Vol. IV, at 625. As to the "back-up source" of 5.85 AF, which is from the "Elk Dance water," par. 6(B)(2) says that can be used to augment "the in-house domestic use only" of the Community Well, and is in the amount of *5.85 AF/yr*–not even one-half of Spring Creek Ranch's expected depletions. Thus, although Spring Creek Ranch is zoned to permit outdoor uses such as horses and gardens and hot tubs, and Homeowners certainly paid full value for their properties in order to enjoy such uses (and the McNicholses have had horses), under the new plan for augmentation there may be times when they will *not* be able to enjoy these activities. Elk Dance will, however, because the augmentation plan in 80 CW 504 fully augments for these uses.

Our second motion for summary judgment included the points in the preceding paragraph, as well as several others. First, the Green Mountain contract provides only for the augmentation of *seven* homes, while the ruling of the referee says *14* homes. Second, the contract omits mention of two square miles of Spring Creek Ranch, as the augmented property. The Applicant confessed these points, saying in response that it had asked the Bureau of Reclamation for an amendment. Vol. IV at 679. What was before the water court, however, was an *unamended* contract which was insufficient on its face.

In addition, the Green Mountain water is not a permanent source of augmentation water, having only a 40-year term, on which 16 years has now run. While there is an option to renew once for an additional 40 years, there is no guarantee of future renewals. We learned, by the time of filing the reply on our second motion for summary judgment that, in fact, Green Mountain water *was unavailable* for the years 2002-2003, both because of the drought as well as the low level of the reservoir, which caused instability of the banks. Vol. V at 694-95; Vol. VII at 124, line 5, through 125, line 3 (testimony of Bill Lorah). In contrast, the irrigation rights dedicated to the original plan for augmentation decreed in 80 CW

504 are senior enough that water will always be available, if there is a drop of water in the system.

As to the "back-up source" of 5.85 AF of consumptive use of the "Elk Dance water" the substituted plan provides Spring Creek Ranch in the event Green Mountain water is unavailable, not only is that insufficient in quantity, and not only does it augment for "in-house use" only--when outside uses are permitted by the zoning (and allowed under the original augmentation plan)--there are conditions on Elk Dance's providing it which Spring Creek Ranch will never be able to meet. Par. 7 of the ruling says Spring Creek Ranch must dry up 3.1 acres of land "historically irrigated by the Spring Ditch." There is no "Spring Ditch," not has there ever been any irrigated land in Phase I of Spring Creek Ranch. There is nothing to dry up. The historically irrigated land is all on Elk Dance's property, but Elk Dance has wiggled out of the obligation to dry up its property to serve Phase I, so its obligation to provide "back-up water" to Phase I will never be triggered. Finally, the ruling mentions no obligation of Elk Dance to provide storage. Thus, the "back-up water" is also not available in winter. Finally, the referee's ruling decrees an exchange which was never applied for.

Thus, we were putting Applicant to strict proof as to the elements of its application. However, after losing on our first motion for summary judgment, since the jurisdictional defects of 99 CV 277 was our main reason for filing our protest, we attempted to settle. After my second motion for summary judgment was denied, on Sept. 9, 2005, we filed a pleading entitled "Proposed Terms and Conditions for Decree," offering to stipulate to entry of the Applicant's decree on conditions that would have been very easy for it to live with. Vol. V at 772-74. The Applicant turned down our proposal, forcing us to go to trial. It was because *Applicant's* case at trial was frivolous, all of the evidence it put on being unnecessary or irrelevant, that the water court reduced the award of fees and costs to $15,877.93 from the approximately $80,000 it had claimed. See my "Objection to Bill of Costs," Supp. I at 185-218.[4]

---

[4]The "Objection to Bill of Costs" was filed Feb. 23, 2006. A hearing on the fees and costs was set for May 18, 2006, but no evidence was presented, so it was not transcribed. I attempted, at this hearing, to challenge our liability for the fees, and show the court I had violated no order, but the court would not let me. As to the amount, therefore, I simply stated that we would stand on our "Objection to Bill of Costs." Judge Ossola revealed he had not read that pleading, which had been filed three months earlier, since he said on the record that he *would* read it; he then awarded the amount of $15,877.93 which we had asserted was all Applicant could reasonably claim, since the trial was unnecessary.

d. A court has a duty to decide the issues brought to it for its determination, and cannot tell us we are "barred" from doing so.

The court refused to decide our claims that the judgment in 99 CV 277 was invalid, for jurisdictional defects. There were four strong bases for the collateral attack: that the McNicholses had defaulted having been served with the original complaint in 99 CV 277, which sought merely a declaratory judgment that Swenson, Lindley, and Beattie were the "duly elected" directors of the Spring Creek Ranchers' Association, and never had any notice that issues affecting their use of water and other property rights had been injected into that case; that Elk Dance was not even a party to 99 CV 277, so that a determination of ownership in it could not be made in a declaratory judgment action; that a change to the augmentation plan (by attaching it to a different P.U.D.) was a water matter outside the jurisdiction of the district court; and that the removal of the augmentation plan decreed in 80 CW 504 from the Spring Creek Ranch P.U.D. by the court was unlawful, since the P.U.D. statute provides that only the Board of County Commissioners may modify a P.U.D., and only after hearing. The water court refused to decide these issues, holding that we were "barred" from doing so by the very district court judgment we maintained was invalid.

There are numerous examples in the case law of collateral attacks being mounted in one court, on decisions made in a coordinate court. Moreover, because lack of jurisdiction is alleged, it is immaterial whether the district court decision was appealed: it is void. See, e.g., Stonewall Estates v. C.F.& I. Steel, Inc., 197 Colo. 255, 592 P.2d 1318 (Colo. 1979); West End Irrig. Co. v. Garvey, 117 Colo. 109, 184 P.2d 476. We had every right to ask the court to decide the jurisdictional issues here–and it had a responsibility to do so. Instead, it punished us. Its order granting attorney fees must be reversed for errors in law, and abuse of discretion.

e. The statutory requirements for an award of attorney fees were not met.

Sec. 13-17-102(2), C.R.S., provides for attorney fees "against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification." Fees are assessed if the court "finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it:

> ... finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under ... As used in this article, "lacked

> substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

Sec. 13-17-102(4), C.R.S.

The court found specifically that it was my "violations" of its order not to "relitigate issues determined in 99 CV 277" which "unnecessarily prolonged the proceedings." As pointed out, I did not violate its order. Once it was entered, I took great care to abide by it, although it constituted an abuse of discretion. I made efforts to settle with the other side, in order that we could appeal our questions of law directly and avoid a trial. I could not simply withdraw our statement of opposition after losing on our first motion for summary judgment, since that would have abrogated our right to appeal the jurisdictional issues. At that time (September 2005), no decision had been reached in 04 SA 328. Because I had failed in obtaining the other side's stipulation to be bound by the result in 04 SA 328, we had to preserve our right to appeal the outcome of this case.

Although Sec. 13-17-103, C.R.S., sets forth a set of factors the court must consider when determining the amount of an attorney fee award, as noted we did not challenge$15,877.93 of the approximately $80,000 claimed, so the court awarded $15,877.93. Thus, the amount of fees is not at issue. Only liability for the fees is.

We should not be held liable for any fees at all, since I acted seriously and responsibly in order to protect my clients' ability to continue to make the uses of water at their homes which are legal, and which they are accustomed to make.

B. This Court's denial of fees to Elk Dance in 04 SA 328, for defending against our attempt to collaterally attack the judgment in 99 CV 277, precludes the award of fees by the water court in 93 CW 213.

1. Applicable Standard of Appellate Review. Questions of law are reviewable de novo. Valdez v. People, 966 P.2d 587, 590 (Colo. 1998).

Because this Court should be able to see, now, that there are no issues of fact–that the water court's finding that I was "stubbornly litigious" is supported by no competent evidence–it is requested to revisit, and grant, our motion for summary disposition as to the preclusive effect of this Court's judgment in 04 SA 328 on the award of fees granted by the water court below. For obvious reasons, I would prefer not to have my name in a published opinion of this Court in connection with charges of misconduct. I committed no misconduct.

In the event that motion is not granted, because it is likely that its substance cannot be incorporated by reference into this brief the "meat" of that argument is repeated here.

The decision denying attorney fees in 04 SA 328 should be given preclusive effect in the present case, due to the close relationship between these two entities. Case law establishes two types of relationships sufficiently close to preclude SCRA from being awarded attorney fees in this case. even though it was a nonparty in the earlier litigation involving Elk Dance. First, it stood in the position of trustee, while the litigation was conducted by its beneficiary, with the corpus of the trust effectively at issue; and second, it substantially participated in, and directed, the prior litigation.

2. Preclusion applies when a fiduciary litigates an issue on behalf of a beneficiary.

In Nevada v. United States, 463 U.S. 110, 135, 103 S.Ct. 2906, 2920-21, 77 L.Ed.2d 509, the Paiute Indian Tribe was barred from litigating a claim for reserved water rights to maintain the fishery because the United States had, many years earlier, in the Orr Ditch case, obtained a water right for the Newlands Project, and simultaneously a determination of the reserved rights claims of the Tribe, which did not include use of water for a fishery. The United States Supreme Court held that, because the Tribe's interests had been represented in the Orr Ditch case, it could be bound by that decree, even though it was not a party.

This principle is applicable in the present case, where the Swenson Group, acting as the board of directors of SCRA, litigated case 99 CV 277, seeking the anomalous finding that its neighbor Elk Dance was the owner of the SCRA plan for augmentation. Elk Dance was not a party in 99 CV 277, but was the beneficiary of SCRA's efforts–its attorney Glenn Porzak even (as we have learned) directing the litigation in 99 CV 277--and argued successfully in 04 SA 328 that it owned the plan for augmentation *because* of the judgment in 99 CV 277. Elk Dance's settlor, SCRA, is barred from attacking the conclusion of this Court in 04 SA 328 that attorney fees are not available for defending against the attack on 99 CV 277.

> *4. Preclusion applies when a nonparty substantially participated in, or directed, the earlier litigation.*

Relitigation is precluded of any issue that has once been adequately tried by a person sharing a substantial identity of interests with a nonparty. "[P]rivity ... is a shorthand way of expressing assurance that the non-party has had adequate notice and opportunity to be heard, and that its rights and interests have been protected." Alaska Foods, Inc. v. Nichiro Gyogyo Kaisha, Ltd., 768 P.2d 117, 121 (Alaska 1989).

> [T]he most obvious justification [to justify preclusion of a nonparty] is found in cases that extend preclusion to a person who was not a formal party to the

> first litigation but who participated so extensively as to assume a de facto role as an actual party.

18A Wright, Miller, & Cooper Federal Practice and Procedure "Jurisdiction" (2002), §4448, at 328. In Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), a contractor on a federal project had challenged, in state court, a state tax imposed only upon contractors of public, but not private, construction projects. The litigation was directed and financed by the United States, which, after the contractor lost in the Montana Supreme Court, brought its own suit in federal district court under the Supremacy Clause. The U.S. Supreme Court ultimately held that, under the doctrine of collateral estoppel, the United States was precluded from mounting this challenge to the tax, since (1) it had exercised control over the litigation; (2) the issue was the same; (3) the controlling facts in the state court action had not changed in the federal action; (4) there had been no change in controlling legal principles; (5) there were no special circumstances justifying the exception to general principles of estoppel for unmixed questions of law in successive actions involving substantially unrelated claims, the exception being inapplicable in view of the close alignment in time and subject matter of the legal

demands of the federal litigation to those involved in the state litigation; and other reasons more attenuated.

In the present situation, SCRA provided extensive assistance to Elk Dance in the litigation in 04 SA 328, to help it overcome Homeowners' collateral attack on 99 CV 277. Elk Dance's counsel attached to her brief in this Court several pleadings and orders from case 99 CV 277 which were provided to her by SCRA's attorney Victor Boog: Elk Dance was not a party to 99 CV 277 and its counsel did not, therefore, have her own file for that case, or know what had happened.

SCRA was also well aware of Homeowners' attempts in Elk Dance's water cases 00 CW 99 and 00 CW 302, as well as in this Court, to set aside the judgment in 99 CV 277. Homeowners had moved, in 2004, to consolidate those cases with SCRA's application in 93 CW 213, and the water court held a joint hearing of all three cases on July 27, 2004, on the issue of Homeowners' standing, as well as on both SCRA's and Elk Dance's claims that Homeowners were barred from contesting Elk Dance's ownership of the SCRA augmentation plan, based on the judgment in 99 CV 277. Water counsel for SCRA, Jeff Houpt, participated in this hearing, as did counsel for Elk Dance. Both Mr. Houpt and Victor Boog, SCRA's counsel in 99 CV 277, had a number of communications with Elk Dance's counsel Kristin

Moseley and Glenn Porzak about the various cases, as well, as is revealed by their bills.

B. Judge Petre's disqualification constituted an abuse of discretion, and constituted reversible error.

2. Applicable standard of appellate review. The standard of review for an act committed to a court's discretion is abuse of discretion. Valdez v. People, 966 P.2d 587, 590 (Colo. 1998). Because Judge Petre made no findings in his order disqualifying himself, and did not permit us to respond to it, the order constituted an abuse of discretion. As to Judge Ossola's conclusion that the referee could not act as the judge, that is reviewable de novo, as a question of law. Colo. Dept. of Revenue v. Garner, 66 P.3d 106, 109 (Colo. 2003).

3. A judge has a duty to preside over a case, absent a valid reason for disqualification.

Rule 97, C.R.C.P. ("Change of Judge"), provides that a judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is a material witness, or is so connected with any party or his attorney as to render it improper for him to set on the trial, appeal, or other proceeding therein. C.R.C.P. 63 ("Disability of a Judge") provides that if by reason of death, sickness, or other disability a judge before whom an action has been tried

is unable to perform his duties after a verdict is returned or findings of fact and law are made, another judge may step in to perform those duties.

Cases construing C.R.C.P. 97 provide that a trial judge has a *duty* to preside over a case, in the absence of a valid reason for disqualification. Blades v. DaFoe, 666 P.2d 1126, 1128 (Colo. App. 1983), rev'd on other grounds 704 P.2d 317 (Colo. 1985); Kubat v. Kubat, 238 P.2d 897, 899 (Colo. 1951) ("it is the duty of a judge to sit on a case on the absence of a showing that he is disqualified"); BOCC v. Blanning, 479 P.2d 404, 406 (Colo. App. 1970). Although the cases construing C.R.C.P. 63 are not instructive to the issue at hand, a case construing the virtually identical provision in the criminal rules (Rule 25) strictly limits the circumstances in which one judge may be substituted for another. In People v. Little, 813 P.2d 816 (Colo. App. 1991), the Colorado Court of Appeals held that a remand was required, where the record did not reflect why one judge was substituted for another. It also held that the second judge's actions would be vacated, and the case returned to the first judge, if the reason for the substitution was not one of those specifically listed in Rule 25 of the Colorado Rules of Criminal Procedure.

Substitution of judges was an abuse of discretion in the present case, because none of the circumstances referenced in C.R.C.P. 97 or C.R.C.P. 63 were present:

there was no indication of any death, sickness, or other disability, and no indication that Judge Petre had any bias or connection to any of the parties. The case must be remanded for a new trial before Judge Petre (who has recognized that the judgment in 99 CV 277 is moot because the composition of two of the "directors" has changed, and the judgment in that case is personal, applying only for the benefit of the three individuals who participated in it).

4. That Judge Petre had acted as the referee was not a reason for disqualification.

Opposing counsel stated at the phone conference that the reason for Judge Petre's recusal was likely that he had acted as the referee on the case. Supp. III at 4, line 25, through 5, line 4. Vol. IV at 557. Although Mr. Houpt indicated he did not "know for a fact that that was his rationale," Supp. III at 5, lines 1-2, Judge Ossola adopted that reason as fact and used it to deny our motion to reinstate Judge Petre. Supp. III at 7, lines 8-14.

The water statutes make clear that the water judge may act as the referee. Sec. 37-92-203(5), C.R.S., stated in pertinent part:

> (5) Each water referee authorized by this section shall be appointed by the water judge of the water division...; but *in any water division, the water judge may elect to perform the functions which by this article would otherwise be vested in the water referee.*

Because the General Assembly has statutorily determined that the judge may perform the functions of the referee, as a matter of law there is no conflict warranting recusal because the judge has acted as the referee.

5. Homeowners were entitled to respond to Judge Petre's disqualification after seeing his reason, since they had the right to waive his conflict.

Sec. 13-1-122, C.R.S., says:

> **When judge shall not act unless by consent**. A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity in the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all parties to the action.

Even if Judge Petre had a conflict, it is clear from this statute that we had the right to consent to his continuing to sit on the case. We were denied that right, in this case.

II. CONCLUSION

Fees were granted to the Applicant in this case on grounds which are unsupported by the evidence. I was not "stubbornly litigious": I was acting in good faith, attempting to obtain a determination from the court on a serious issue. That is my what I am supposed to do as an attorney, and neither my clients nor I should be punished for it.

Judge Ossola was irregularly presiding on this case, because there was no reason for Judge Petre's recusal. Because Judge Ossola acted without authority, all the orders he issued in the case are void.

Other orders issued by Judge Ossola show a similar carelessness with the facts. For example, to the Summit County case as the "Eagle County litigation." In the third paragraph of his November 4, 2005, order attached as Exhibit B, he asserts that it was *protesters* who filed 99 CV 277, as well as a series of other lawsuits, asserting that they were the proper homeowner's association officers and that the "proported [sic] officers who had entered into a settlement agreement with applicants were in fact acting in an *ultra vires* capacity." This is completely wrong. It was the Swenson Group who sued *Protesters* in 99 CV 277 for a declaratory judgment that they were the "duly elected directors of the Spring Creek Ranchers'

Association." Judge Ossola said the same thing in an order he issued Sept. 13, 2005. Vol. V, at 776-78. The Swenson Group has, in fact, to date filed *14 suits* against Homeowners, mostly to foreclose fraudulent "assessment liens" it has placed against their properties, with the express purpose of foreclosing on those liens and driving them out of the subdivision. In 00 CW 99 and 00 CW 302, this Court may recall that Judge Ossola said I had asserted the district court had no jurisdiction to determine title to a water right. My argument was, instead, that a plan for augmentation was *not* a water right, and that the changes to the plan in that case involved the use of water, so for *that* reason were not within the jurisdiction of the district court. There are other material errors too numerous to detail. It is burdensome to have to appeal to the Supreme Court because of careless errors, and undoubtedly annoying to this Court, as well–but the consequences are too severe to live with, if we do not.

The award of fees must be reversed, as unsupported by competent evidence and contrary to law, and the case remanded for a new trial and directed for assignment to Judge Petre.

Alison Maynard

Alison Maynard

CERTIFICATE OF SERVICE

I, Alison Maynard, hereby certify, by my signature below, that I have served the foregoing **"OPENING BRIEF"** on the other parties by depositing true copies in the United States mail, postage prepaid, this 2nd day of February, 2007, addressed as follows:

Jefferson Houpt, Esq.
Caloia, Houpt & Hamilton, P.C.
1204 Grand Ave.
Glenwood Springs, CO 81601

Jennifer Mele, Esq.
Colo. Dept. of Law
Natural Res. & Environment Sec.
1525 Sherman St., 7th floor
Denver, CO 80203

Kristin Moseley, Esq.
Porzak, Browning & Bushong, LLP
929 Pearl St., Suite 300
Boulder, CO 80302

Ms. Halena Lewis
c/o Ms. Olga Pasionek
4317 Cherokee St.
Denver, CO 80216

Russell W. Kemp, Esq.
Ireland, Stapleton, Pryor & Pascoe, P.C.
1675 Broadway, Suite 2600
Denver, CO 80202

Alison Maynard

DISTRICT COURT, **WATER DIVISION NO. 5, STATE OF COLORADO** 109 Eighth Street, Suite 104 Glenwood Springs, CO 81601 (970) 945-5075 - 970-945-8756- facsimile	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: **SPRING CREEK RANCHERS ASSOCIATION, INC.** **in SUMMIT County, Colorado**	▲ COURT USE ONLY ▲
Date of Trial: September 14, 2005 Proceeding: Hearing on Protest to Referee's Ruling Presiding Judge: Thomas W. Ossola	Case No. 93CW213

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

The above-entitled Application was filed on October 1, 1993. The Application was thereafter referred to the Water Referee for Water Division No. 5, State of Colorado, by the Water Judge of said Court in accordance with Article 92, Chapter 37, C.R.S., known as the Water Rights Determination and Administration Act of 1969, as amended. On June 11, 2003, the Referee entered Findings of Fact, Conclusions of Law and Ruling of the Referee (referred to herein as the "Ruling"). The Ruling was protested pursuant to Section 37-92-304(2), C.R.S.

Trial of this matter was held before the Water Judge on September 14, 2005. Having considered the testimony and evidence presented at trial, and otherwise having become fully advised with respect to the subject matter of the Application, the Water Judge does hereby make the following Findings of Fact, Conclusions of Law, Judgment and Decree in this matter:

FINDINGS OF FACT

1. The name and address of the Applicant is:

Spring Creek Ranchers Association, Inc.
Attn: Robert Swenson
P. O. Box 270179
Louisville, CO 80027-5002
(720) 890-1111

c/o Jefferson V. Houpt, Esq.
Caloia, Houpt & Hamilton, P.C.

EXHIBIT A

1204 Grand Avenue
Glenwood Springs, CO 81601
(970) 945-6067

2. Timely and adequate notice of the filing of this Application was given as required by law.

3. Statements of Opposition were filed in this matter by the State and Division Engineers, Galloway, Inc. and Nelson P. Lane and Catherine Denise Lane (the "Lanes"). No other Statements of Opposition were filed, and the time for filing such Statements has expired. Following its acquisition of the interests of the Lanes, Elk Dance Colorado, LLC ("Elk Dance") was substituted for the Lanes by Order dated March 20, 2000. Following the acquisition of Elk Dance's interests by Shadow Creek Ranch Owners Association, Inc. ("Shadow Creek"), Shadow Creek was substituted for Elk Dance by Order dated October 3, 2002. Each of the Objectors entered into stipulations with the Applicant in which they agreed to the entry of a decree herein with certain terms and conditions. On June 11, 2003, the Referee entered the Ruling. A timely Protest to the Ruling was filed on July 1, 2003 by Halena Lewis, Gerald Lewis, Ken McNichols, Joyce McNichols, and Marguerite Sergent pursuant to Section 37-92-304(2), C.R.S.

4. The Applicant is the homeowners association for a small subdivision located in Summit County, Colorado known as Spring Creek Ranch. Among the Applicant's responsibilities is the provision of domestic water service, including water for limited outdoor uses, to properties within Spring Creek Ranch. The Application herein was filed by the Association in furtherance of that responsibility.

5. After the filing of the Application, Applicant and Protestants were parties to litigation in Case No. 99CV277, District Court in and for Summit County, Colorado, generally concerning the composition of the Association's Board of Directors, the authority of the Board to enter into certain agreements (referred to as the "1989 Settlement Agreement" and the "2000 Addendum" thereto) affecting, *inter alia*, the water rights and water supply for Spring Creek Ranch, and the validity of those agreements. A final Findings of Fact, Conclusions of Law and Judgment ("Final Judgment")was entered in Case No. 99CV277 which confirmed the composition of the Board and its authority to enter into the 1989 Settlement Agreement and 2000 Addendum on behalf of all members of the Association, and confirmed the validity and enforceability of those agreements. The Final Judgment included the following order:

> "[T]he Court further Orders that each Lot Owner shall sign the 2000 Addendum to the 1989 Settlement Agreement, and also, if required by the Water Court, sign the proposed Decree in 93 CW 213 and any other documents necessary to accomplish the purposes of the Addendum. If any party refuses to do so within ten (10) days of written demand by the Homeowners' Association, the Court hereby appoints the Clerk of the Combined Courts of Summit County to execute the documents on their behalf pursuant to Rule 70, C.R.C.P."

The Final Judgment was not appealed.

6. Following entry of the Final Judgment, the Association sought and obtained an Order from the Court in 99CV277 directing the clerk to execute a Withdrawal of Protest to the Ruling of the Referee, and submitted the executed Withdrawal to this Court with its Motion for Confirmation of Ruling of the Referee and Entry of Final Judgment and Decree. At about the same time, Protestants filed a Motion for Summary Judgment requesting a determination that the Association is the owner of the augmentation previously decreed in Case No. 80CW504 and the associated water rights and that Protestants have standing to prosecute their claims in this proceeding. These Motions were fully briefed and argued to the Court on July 27, 2004, after which this Court entered an Order ruling that the Final Judgment operates to bar Protestants from re-litigating issues in this proceeding that were determined in Case No. 99CV277, but acknowledging that Protestants have standing to put the Applicant on strict proof of its claims herein.

7. Trial of the Applicant's claims was thereafter conducted. Based upon the testimony and evidence presented, the Court finds as set forth herein.

8. The Applicant requests confirmation of a conditional water right, described as follows:

Name of structure: Spring Creek Ranchers Community Well (the "Community Well").

A. *Legal Description of Well:* The well is located approximately in the NE1/4SE1/4 of Section 7, Township 2 South, Range 80 West of the 6th P.M., Summit County, Colorado, at a point approximately 1390 feet from the South section line and 425 feet from the East section line of said Section 7, more specifically described as follows: Beginning at the SE corner of Lot 6, Block 4 of Spring Creek Ranch Phase I First Filing and considering the SE line of said Lot 6 as bearing South 75° 00' 00" West and with all bearings contained herein relative thereto; thence South 21° 05' 27" West 2998.88 feet to the True Point of Beginning; thence South 00° 43' 35" West 50.00 feet; thence South 89° 16' 25" East 50.00 feet; thence North 89° 16' 25" West 50.00 feet more or less to the True Point of Beginning.

B. *Source*: Morrison sandstone (the Applicant is not claiming nontributary water from Dakota formation).

C. *Depth*: Approximately 110 feet

D. *Amount*: 100 gpm, 17.16 acre feet annually.

E. *Date of Appropriation*: August 31, 1995.

F. *Proposed uses*: Domestic and irrigation.

G. *Remarks*: A well permit application was filed on July 14, 1992, and refiled on September 28, 1993. A new well permit application was filed on April 17, 1995, to correct the irrigated acreage and pumping rate.

9. The Court finds that the Applicant has formed and simultaneously demonstrated the requisite intent to appropriate and has taken a substantial first step toward appropriation of water in the amounts and for the purposes set forth in paragraph 8 above. The Court finds that the proposed appropriation is not speculative, and that it can and will be completed with reasonable diligence and within a reasonable time.

10. The Applicant has also requested approval of a plan for augmentation, including a conditional right of exchange, described as follows:

A. *Structure to be augmented*: The Community Well, as described in paragraph 8 above.

B. *Water rights to be used for augmentation*:

(1) **Green Mountain Reservoir.** Pursuant to a Water Service Contract with the United States Bureau of Reclamation dated April 2, 1991 (the "Green Mountain Reservoir Contract"), Applicant is entitled to annual releases from Green Mountain Reservoir in the amount of 15 acre feet per year. The water rights under which such water is stored are described as follows:

(a) Source: Blue River, tributary of Colorado River

(b) Legal description: located approximately 16 miles Southeast of the Town of Kremmling in Summit County, Colorado, and more particularly in all or parts of Sections 11, 12, 13, 14, 15, and 24 of

Township 2 South, Range 80 West, and in Sections 17, 18, 19, 20, 21, 28, 29, and 34, Township 2 South, Range 79 West of the 6th P.M.

(c) Adjudication Date: October 12, 1955

(d) Appropriation Date: August 1, 1935

(e) Case No.: 2782, 5016, and 5017
Court: United States District Court, District of Colorado

(f) Decreed Amount: 154,645 acre feet

(g) Decreed Uses: in accordance with paragraph 5(a), (b), and (c) of the section entitled "Manner of Operation of Project Facilities and Auxiliary Facilities" in Senate Document 80.

(2) **Smith Ditch**: Pursuant to the Settlement Agreement dated May 22, 1989, and recorded in the records of Summit County, Colorado, at Reception No. 374033 and the Addendum thereto dated August 11, 2000, which is recorded at Reception No. 695189, Summit County, Colorado, the terms of which are incorporated herein by this reference, the Applicant has the right to utilize up to 5.85 consumptive acre feet of water per year from the following described water rights (the "Elk Dance Water") to augment the in-house domestic use only of the Community Well in connection with the subject plan for augmentation, provided, however, the Elk Dance Water may only be used to the extent that: (i) the term of the Green Mountain Reservoir Contract is not renewed in the future by the Bureau of Reclamation; (ii) the Green Mountain Reservoir Contract is deemed by the Water Court or the State Engineer as an insufficient source of augmentation water for the in-house domestic requirements of 14 single-family residences or is otherwise not available to the Homeowners Association; or (iii) an additional source of water is required to fully augment the in-house domestic requirements of 14 single-family residences. The Elk Dance Water shall be made available from the augmentation plan decreed by the Water Court in Case No. 80CW504 (the "Decree"), and consists of 5% of the augmentation supply described in paragraph 9 of the Decree. To implement the foregoing, Elk Dance agrees to bypass to the North Fork of Deep Creek 0.84% of the flows of the Smith Ditch rights as required in paragraph 12 of the Decree for the equivalent of 14 residential units. No storage rights as described in

paragraph 14 of the Decree are associated with the Elk Dance Water. The Smith Ditch rights, as described in paragraph 12 of the Decree, are as follows:

DITCH	SOURCE	DECREED AMNT(cfs)	ADJUD. DATE	APPROP. DATE
Smith	Deep Creek	15.0	03/02/1910	07/01/1891
1st Enlg.	Deep Creek	15.0	03/02/1910	09/01/1901
Smith #2	Deep Creek	15.0	03/02/1910	11/09/1901
1st Enlg.	Deep Creek	15.0	03/10/1952	11/09/1901
Smith #1	Deep Creek	5.0	03/10/1952	07/01/1891

11. Statement of plan for augmentation:

General Description: Applicant seeks to provide water service to 14 single family residences on approximately 360 acres, more or less, located in portions of Sections 5, 6, 7, 8, Township 2 South, Range 80 West of the 6th P.M., Summit County.

Water Requirements: Engineering studies conducted by Applicant (see Exhibit C) indicate that the maximum annual water diversion requirement for 14 residences will be 17.16 acre feet, which includes a maximum of 5.49 acre feet for in-house domestic use and a total of 10.97 acre feet for irrigation of 13,300 sq. ft. per residence, and horse watering for up to 3 horses per lot for total annual consumptive use of .70 acre feet. As an evaporative waste water treatment system is used, it is assumed that 100% of the water diverted for in-house domestic purposes is consumptively used and does not return to the stream system. It is also assumed that horse watering is 100% consumptive. It is further assumed that 80% of the water diverted for irrigation will be consumed, or a maximum of 8.77 acre feet per year. Therefore, the total annual consumption under the subject plan for augmentation is 14.97 acre feet per year. (See Exhibit C-1).

Operation and Administration of Plan. In order to prevent injury to vested senior water rights as a result of any out-of-priority diversions of water through the Community Well, a corresponding amount of water will be released to the Colorado River stream system, pursuant to the Green Mountain Reservoir contract described above.

Exchange Reach. Diversions by the Spring Creek Rancher's Community Well will deplete the groundwater aquifers that discharge to Deep Creek and Blue River. Deep Creek is tributary to the Blue River two miles below Green Mountain Reservoir Dam. Exchange is down the Blue River from Green Mountain Reservoir to the confluence of Deep Creek, then up Deep Creek to the well. The well is 1,300 feet higher in

elevation and approximately 2 miles west of the Blue River. Depletions at the well will be seasonal; however, the effect of these depletions on the flow of the Blue River are expected to be constant year-round due to the long travel time and attenuating effect of the aquifer hydraulics. The exchange date is 12/31/1993 for an exchange rate of 14.97 acre feet per year (9.3 gpm average).

Dry-Up. By stipulation, the Applicant has agreed that, in the event that the Green Mountain Reservoir water is not available to the Applicant, the Applicant must utilize the Elk Dance Water as its source of in-house augmentation water from the Smith Ditch, then in such years Applicant will cause to be removed from irrigation 3.11 acres of land (based on consumptive use of 1.88 acre feet per surface acre for the 5.85 consumptive use acre feet furnished by Elk Dance) historically irrigated by the Smith Ditch as more particularly described on the attached Exhibit A so as to augment Applicant's in-house domestic diversions. The Association and/or the individual lot owners agree to designate the first three acres of the Association's land to this dry-up which is depicted on Exhibit B. Except as expressly modified by this Decree, the decree entered by the District Court in Water Division No. 5, Case No. 80CW504 regarding the Smith Ditch water rights shall remain in full force and effect.

12. Applicant shall be required to replace all out-of-priority depletions that occur after groundwater diversions cease, by providing proof to the State Engineer that Applicant or its successor in interest have an adequate contract with the Bureau of Reclamation for Green Mountain Reservoir water to provide for delivery of water to replace those out-of-priority depletions, or that Applicant has acquired other augmentation water sufficient to replace out-of-priority depletions. This term shall be a covenant running with the Spring Creek subdivision, shall bind the individual owners of the property in the subdivision, and the owners of the dry-up lands as well as the Homeowner's Association.

13. The plan for augmentation proposed by Applicant is designed to preclude injury to other vested or conditionally decreed water rights and to prevent the curtailment of diversions. The Court finds that the augmentation plan requested by Applicant may be decreed without injuring other vested or conditionally decreed water rights.

CONCLUSIONS OF LAW

14. The Application filed herein is complete, covering all applicable matters required under C.R.S. §37-92-302.

15. All notices required by law have been given, and no further notice need be given. C.R.S. § 37-92-101, *et seq.*

16. The Court has jurisdiction of this matter and of all persons, whether they have appeared or not. C.R.S. §37-92-301(2) and -303(1).

17. The Court has authority to confirm the conditional water right requested in the Application. C.R.S. §37-92-301(2), -302, -303(1), and -304.

18. The Court has authority to approve the plan for augmentation requested in the Application. C.R.S. §37-92-301(2), -302 ,-303(1), and -304.

19. The Court must approve a plan for augmentation if the plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or decreed conditional water right. C.R.S. § 37-92-305(3).

20. A proposed plan for augmentation that relies upon a supply of augmentation water which, by contract or otherwise, is limited in duration shall not be denied solely upon the ground that the supply of augmentation water is limited in duration, so long as the terms and conditions of the plan prevent injury to vested water rights. C.R.S. §37-92-305(8); *see also, Empire Lodge Homeowners' Assoc. v. Moyer, 39 P.3d 1139, n.24 (Colo. 2001).*

21. Any decree approving a change of water right must be conditioned upon the retained jurisdiction of the Court for a period necessary or desirable to preclude or remedy any injury to the vested rights of others. C.R.S. §37-92-304(6).

22. The plan for augmentation proposed by Applicant is one contemplated by law. If implemented and administered in accordance with this decree, the plan of augmentation will permit the depletions associated with the Applicant's provision of water without adversely affecting the owners or users of vested water rights or decreed conditional water rights in the Blue and Colorado Rivers, or any of its tributaries.

23. The State Engineer may lawfully be required under the terms of this decree to:

(a) Administer and insure compliance with the plan for augmentation in the manner set forth herein;

(b) Refrain from curtailing diversions by the Community Well in times of shortages, the depletions for which are compensated by the operation of the plan for augmentation approved herein;

(c) Curtail out-of-priority diversions by Applicant's well at any time that the consumptive use associated with Applicant's provision of water as described and approved herein exceeds the net amount of replacement water available under this plan for augmentation.

(d) Issue a well permit for the Community Well described herein to the Applicant pursuant to § 37-90-137(2), C.R.S. and the conditions of this decree.

JUDGMENT AND DECREE

24. The foregoing Findings of Fact and Conclusions of Law are incorporated herein by this reference.

25. The Court hereby confirms a conditional water right for the Community Well as described in paragraph 8 above. The State Engineer shall issue a well permit for the Community Well under the terms and conditions of this decree and pursuant to the statutory requirements of §37-90-137(2), C.R.S. The well permit number will be incorporated into this decree by this reference for administration by the State Engineer.

26. The Court further rules that the plan for augmentation, as more fully set forth herein, is approved, subject to the terms and conditions set forth herein.

27. The Applicant shall install measuring devices as required by the Division Engineer for the operation of this plan. So long as the operation of this plan for augmentation is in compliance with said conditions, they shall not curtail the diversion and use of water by Applicant which is in accordance with this plan. Pursuant to §37-92-305(8), C.R.S., the State Engineer shall curtail out-of-priority diversions, the depletions from which are not replaced so as to prevent injury to vested water rights.

28. In the event Applicant or its successors in interest require a replacement well to provide an adequate water supply for the property described herein, such well will be included in this plan for augmentation provided the use of such well is consistent with the plan, and provided the well is permitted in accordance with §37-90-137(2), C.R.S.

29. Applicant shall install a totalizing flow meter approved by the Division Engineer on the well. After construction, the Applicant shall attach an identification tag on the well which specifies the well name, the well permit number and this Case Number.

30. Applicant shall file an annual report by November 15th of each year with the Division Engineer summarizing diversions, depletions and the amount of replacement water provided pursuant to this plan. The Applicant shall provide adequate water accounting and supply calculations regarding the timing of depletions and other such information as may be requested by the Court, the Division Engineer for Water Division No. 5, or his agents in order to administer the plan.

31. Pursuant to §37-92-304(6), C.R.S., this Court retains jurisdiction for reconsideration of the question of injury to the vested rights of others for a period of five (5) years. The retained jurisdiction provision shall commence at the time the development is 75% built out. The Division Engineer shall be notified in writing when the 75% build out is reached.

32. It is hereby ordered that this decree shall be filed with the Water Clerk and become effective upon such decree.

33. It is further ordered that a copy of this decree shall be filed with the Division Engineer and the State Engineer and shall be recorded with the Clerk and Recorder of Summit County.

34. The Applicant shall be responsible for ensuring the compliance with the terms and conditions of this decree.

35. All water rights confirmed herein are SUBJECT TO ALL EARLIER PRIORITY RIGHTS OF OTHERS, and to the integration and tabulation by the Division Engineer of such priorities and changes or rights in accordance with law.

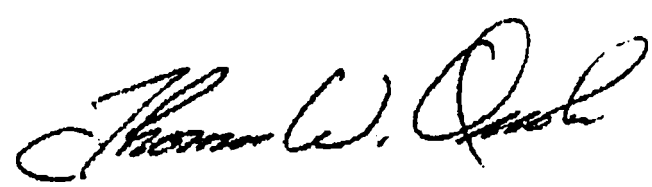
36. An Application for Finding of Reasonable Diligence on the conditional water right confirmed herein shall be filed in the same month of the sixth calendar year following entry of the decree herein unless a determination has been made prior to that date that such conditional right has been made absolute by reason of the completion of the appropriation, or is otherwise disposed of.

37. The Court shall retain jurisdiction to review this decree for a period to three years to

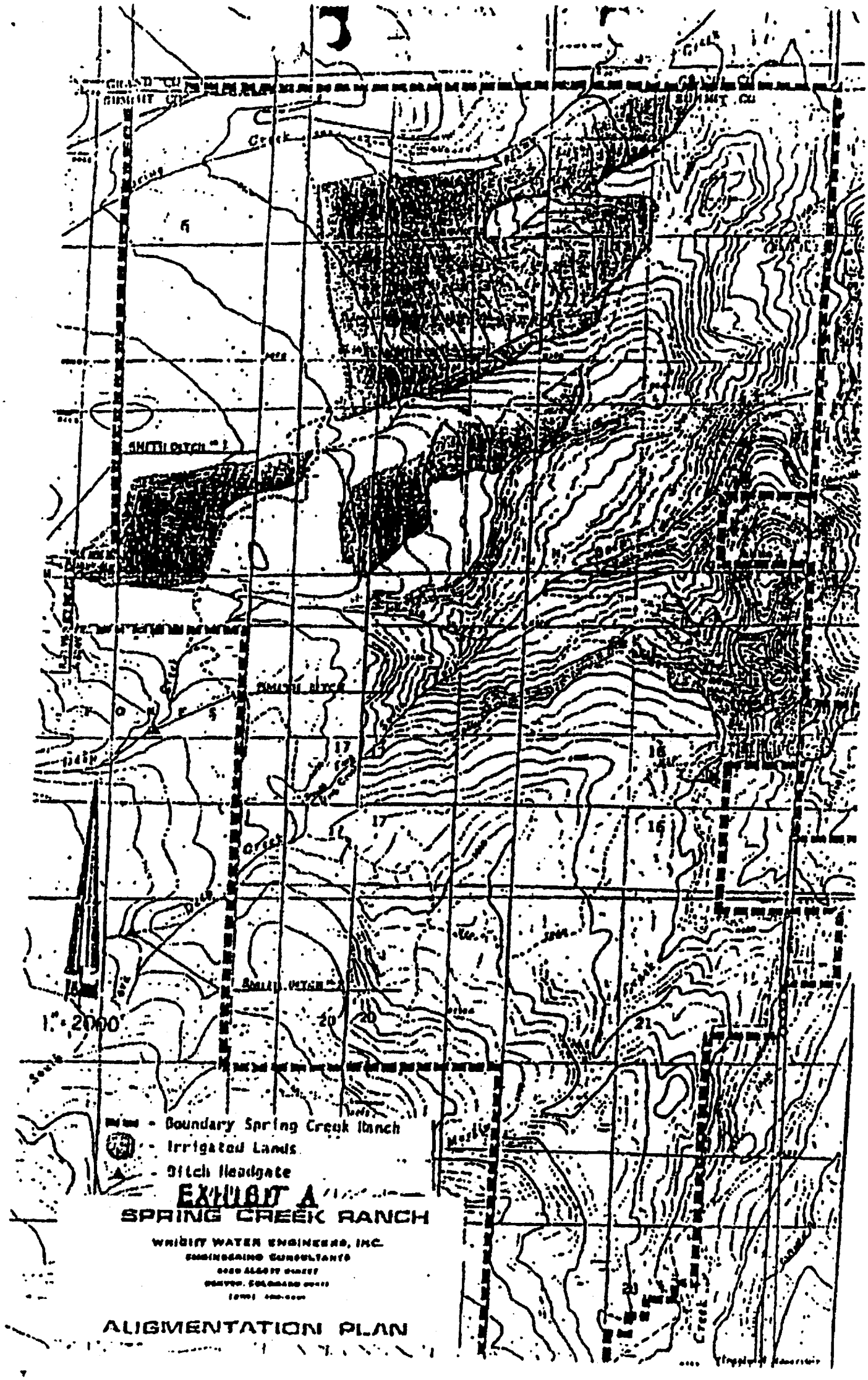
consider the impact of judgments that may be entered collaterally attacking the judgment entered in Summit County Civil Action 99CV277.

DATED this 22nd day of September, 2005.

BY THE COURT:



Thomas W. Ossola, District Judge
State of Colorado


1" = 2000'
- Boundary Spring Creek Ranch
- Irrigated Lands
- Ditch Headgate
EXHIBIT A
SPRING CREEK RANCH
WHIBIFF WATER ENGINEERS, INC.
AUGMENTATION PLAN

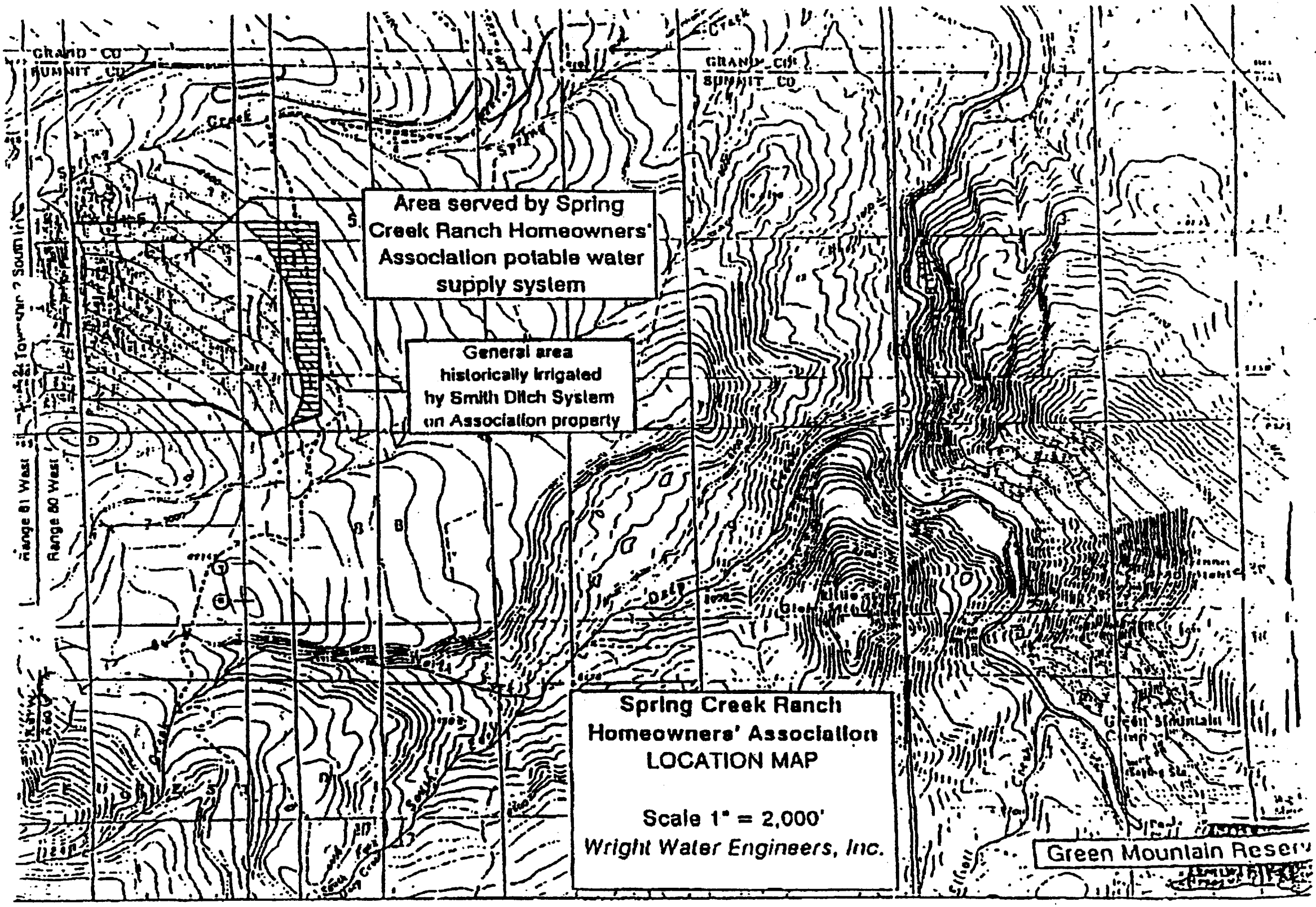

GRAND CO
SUMMIT CO
Area served by Spring Creek Ranch Homeowners' Association potable water supply system
General area historically irrigated by Smith Ditch System on Association property
Spring Creek Ranch Homeowners' Association
LOCATION MAP
Scale 1" = 2,000'
Wright Water Engineers, Inc.
Green Mountain Reser

EXHIBIT B

EXHIBIT C-1

TABLE 1

SPRING CREEK RANCHERS ASSOCIATION

WATER DIVERSIONS AND DEPLETION REQUIREMENTS

All Values in Acre-Feet

Month	Percent Occupancy	Diversions			Depletions		
		In-House (1)	Domestic Irrigation (2)	Total (3)	In-House (4)	Domestic Irrigation (5)	Total (6)
January	100%	0.53	0	0.53	0.53	0	0.53
February	100%	0.48	0	0.48	0.48	0	0.48
March	100%	0.53	0	0.53	0.53	0	0.53
April	100%	0.51	0	0.51	0.51	0	0.51
May	100%	0.53	1.81	2.33	0.53	1.45	1.97
June	100%	0.51	2.47	2.98	0.51	1.98	2.49
July	100%	0.53	2.47	3.00	0.53	1.98	2.50
August	100%	0.53	1.87	2.39	0.53	1.49	2.02
September	100%	0.51	1.45	1.96	0.51	1.16	1.67
October	100%	0.53	0.90	1.43	0.53	0.72	1.25
November	100%	0.51	0	0.51	0.51	0	0.51
December	100%	0.53	0	0.53	0.53	0	0.53
TOTAL		*6.19*	*10.97*	*17.16*	*6.19*	*8.77*	*14.97*

Date: August 21, 1997

Wright Water Engineers, Inc.

Column Notes:

(1) 14 Total Equivalent Residential Units (EQR). Gals/EQR/day diverted =* 395

(2) 15000 sf of lawn irrigation per EQR.
4.8 total acres irrigated by water supply.

(3) Column (1) + Column (2)

(4) 100% of (1) of in-house water is depleted.

(5) 80% of (2) is consumptively used.

(6) Column (4) + Column (5)

* assuming 3.5 people per unit, an in house use of 100 gallons per day per person, and 3 horses per unit with a use of 15 gallons per day per horse

C:\DAVIDS\CRA.XLS

Exhibit C-2

TABLE 2

SPRING CREEK RANCHERS ASSOCIATION

Suggested Augmentation Requirements after Community Well is Shut Down (a)

MONTH	PUMPING RATE AF (1)	DEPLETION RATE at BLUE RIVER AF (2)	PERCENT AUGMENTATION REQUIRED % (3)	AUGMENTATION AF (4)
January	0.53	1.25	100%	1.250
February	0.48	1.25	100%	1.250
March	0.53	1.25	100%	1.250
April	0.51	1.25	100%	1.250
May	2.33	1.25	100%	1.250
June	2.98	1.25	100%	1.250
July	3.00	1.25	100%	1.250
August	2.39	1.25	100%	1.250
September	1.96	1.25	100%	1.250
October	1.43	1.25	100%	1.250
November	0.51	1.25	100%	1.250
December	0.53	1.25	100%	1.250
January	0 (b)		100%	1.250
February	0		100%	1.250
March	0		100%	1.250
April	0		100%	1.250
May	0		95%	1.188
June	0		90%	1.125
July	0		85%	1.063
August	0		80%	1.000
September	0		75%	0.938
October	0		70%	0.875
November	0		65%	0.813
December	0		60%	0.750
January	0		55%	0.688
February	0		50%	0.625
March	0		45%	0.563
April	0		40%	0.500
May	0		35%	0.438
June	0		30%	0.375
July	0		25%	0.312
August	0		20%	0.250
September	0		15%	0.187
October	0		10%	0.125
November	0		5%	0.062
December	0		0%	0

NOTES:

(a) Augmentation is not required if there is no call on Blue River just below Green Mountain Reservoir.

(b) Pumping stops

(1) See Table 1

(2) Constant steady state depletion at maximum build-out

(3) 100% during pumping, 100% 4 months after pumping stops

(4) 1.25 AF multiplied by column (3)

☒ District Court, Water Division No. 5, Colorado Court Address: 109 8th St., Suite 104, Glenwood Springs, CO, 81601, 970.945.5075	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: SPRING CREEK RANCHERS ASSOCIATION, INC. In Summit County, CO.	▲ COURT USE ONLY ▲
Date: November 4, 2005 Proceeding: Motion for Attorney Fees Presiding Judge: Thomas W. Ossola	Case Number: 93CW213 Division Courtroom
ORDER	

THIS MATTER having come before the Court for consideration of applicant's motion for attorney fees following final orders on a protest to referee ruling and the Court being fully advised in the circumstances, finds, concludes and orders the following.

Applicant moves for attorney fees pursuant to CRS 13-71-101, *et seq.* following a hearing on protest to referee's ruling in which the Court entered an order affirming and modifying the ruling of the referee. Protesters object to the motion and ask for a hearing on the amount of attorney fees.

This case has a long and complicated history, having begun in 1993. During the long history, a series of lawsuits were filed in various courts by the protesters. Specifically, the protesters commenced proceedings in Summit County District Court in 99CV277. In that case they alleged that they were the proper homeowner's association officers and that the proported officers who entered into a settlement agreement with applicants were in fact acting in an *ultra vires* capacity. The trial court ruled against them and ordered the settlement agreement to be signed and the protest here to be withdrawn. The referee's ruling here was based in substantial part upon the terms of that agreement.

Prior to trial, this Court entered an order determining that the decree in the Summit County case was *res judicata* in this case and that the protesters would be allowed to proceed to hearing on the protest in their individual capacities only. The Court cautioned the protesters not to attempt to re-litigate the status of

EXHIBIT B

officers of the homeowner's association or the settlement agreement, and that if they did so, they may be liable for attorney fees.

Notwithstanding the Court's order, the protesters continued to raise these issues at every opportunity as documented in applicant's motion. When confronted with this Court's prior order, protesters would politely move on to other issues and when they felt an opportunity presented itself, they returned to already resolved issues, often with the explanation that they needed to make a record for appeal.

While this Court appreciates the need of vigorous advocacy and the need to make an appellate record, the record in this case indicates that protestants were so vigorous and persistent as to disregard the clear orders of the Court and were stubbornly litigious. See *Crissey Fowler Lumber Co. v. First Comm. Indus. Bank*, 8 P.3d 531 (Colo. App. 2000). In so doing, they unnecessarily prolonged the proceedings and caused applicants to incur more attorney fees than they should have been reasonably expected to incur. In so doing, they have made themselves liable for those fees incurred in unnecessarily defending against issues that had already become law of the case. Protestants have requested a hearing on the reasonableness of fees requested and are entitled to such a hearing.

WHEREFORE, IT IS ORDERED that applicant's motion for attorney fees is granted. The protestants who participated in trial and their counsel are therefore liable for attorney fees jointly and severally.

IT IS FURTHER ORDERED that applicant cause a hearing to be set upon notice as to the amount and reasonableness of fees to be assessed against protestants and their counsel

BY THE COURT:

Water Judge

☒ District Court, Water Division No. 5, Colorado Court Address: 109 8th St., Suite 104, Glenwood Springs, CO, 81601, 970.945.5075	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: **SPRING CREEK RANCHERS ASSOCIATION, INC., a Colorado nonprofit corporation,** **In SUMMIT COUNTY, CO.**	▲ **COURT USE ONLY** ▲
Date of Hearing: July 27, 2004 Proceeding: Motion for Confirmation of Ruling Presiding Judge: Thomas W. Ossola	Case Number: 93CW213 Division Courtroom A

ORDER

THIS MATTER having come before the Court for oral argument on the motion and the Court having considered the motion, briefs of counsel and related motions, this Court finds, concludes and orders the following.

The protestants are homeowners in the Spring Creek Ranch subdivision. They filed a timely protest the entry of the referee's ruling in this case on behalf of themselves and the Spring Creek Ranchers Association on numerous grounds. The protestants and other homeowners became involved in a dispute as to which group properly composed the governing body of the homeowners association. That issue was litigated in Eagle County District Court in 99CV277 before Lass, D.J. Protestants did not prevail in that action as the competing group of homeowners was determined to properly constitute the board of the association. That judgment was not appealed and is a final judgment. Later, the prevailing homeowners sought relief in that action pursuant to Rule 70, C.R.C.P., requiring these protestants to execute certain documents including a withdrawal of the protest in this case. That relief was granted. Protestants have appealed that order. No stay has been granted.

The original applicants seek an order from this Court approving of the referee ruling arguing that the order of the Eagle County District Court operates to collaterally estop protestants from raising the same issues in this case. They assert that this Court must recognize the withdrawal of the protest signed by the Clerk of the Eagle County Combined Courts as valid. For reasons set out in their various briefs, protestants

EXHIBIT C

argue that collateral estoppel is not a bar to their protest. They also argue that pursuant to the Water Rights Determination Act they have standing as individuals to protest the ruling.

This Court concludes that the Eagle County District Court final order and judgment does act as a bar to protestant's protest as it resolves issues fully litigated among the same parties. While protestants are barred from representing themselves as the homeowners association and raising issues in this case that were determined in the previous lawsuit, they may protest this application as individuals on other grounds. By their protest, they may put applicant to strict proof on its claims for relief in the application before the Water Judge. In doing so, however, they must be mindful not to assert frivolous and groundless defenses and that by doing so, may subject themselves to an assessment of attorney fees pursuant to CRS 13-71-101, *et seq.* The referee ruling having been the subject of a timely protest by protestants in their individual capacities, the motion to confirm the ruling should be denied. Applicants will be required to go forward with a hearing before the Water Judge at which they will be put to strict proof as to the matters alleged in the application. Protestants will be estopped from asserting that applicant does not have the authority to act as the homeowner's association.

IT IS SO ORDERED.

Dated:

BY THE COURT:

Water Judge

8-7-03

DISTRICT COURT, WATER DIVISION 5, COLORADO 109 Eighth Street, Suite 104 Glenwood Springs, Colorado 81601 (970) 945-5075	
CONCERNING THE WATER APPLICATION OF: SPRING CREEK RANCHERS ASSOCIATION, In Summit County, Colorado.	**▲COURT USE ONLY▲** Case Number: 93CW213
MINUTE ORDER	

This matter comes before the Court to address a procedural issue brought to its attention by the Water Clerk, relating to the Protest to the Ruling of the Referee filed by Alison Maynard, Esq. on behalf of Halena Lewis, Ken McNichols, Joyce McNichols, Gerald Lewis, and Marguerite Sergent, for themselves and, they assert, on behalf of Spring Creek Ranchers Association ("the Association"). In Paragraph 4 of the Protest, counsel for the Protesters purported to explain how the Association (her client) could protest the Ruling obtained by the same Association (represented by Jefferson Houpt, Esq.): "[t]he persons who have told the court they represent the SCRA – Swanson et al. – do not have the authority to do so."

For many months, this Case did not proceed while Clayton Beattie, Lisa Lindley, Robert Swenson, Halena Lewis, Joyce and Kenneth McNichols, Dr. Joseph and Marguerite Sargent, and Jacquelyn and Richard Wade litigated in Summit County District Court, Case No. 99CV277, to determine who was authorized to act for the Association. On January 28, 2002, the Court in that Case declared that "Plaintiffs Beattie, Lindley and Swenson were the duly elected members of the Board of Directors of the Spring Creek Ranchers Association, Inc., at all times relevant to these proceedings, and are vested with the powers and duties necessary to conduct, manage and control the affairs and business of the Association . . ." Page17 of the Findings of Fact, Conclusions of Law, and Judgment in Summit County District Court, Case No. 99CV277, a copy of which is attached hereto as Exhibit A. That Court further explicitly stated that such authority extended to proceeding with this Case No. 93CW213. *Id.* Barring a reversal of that Judgment, a subsequent election changing in the make-up of the Board of Directors of the Association, or similar event occurring after the Judgment – none of which has yet been brought to this Court's attention – this Court concludes that the doctrines of collateral estoppel, res judicata, or both prevent Ms. Maynard's clients from speaking for the Association for purposes of the adjudication of the Protest.

The Water Court Clerk is directed to regard Ms. Maynard's individual clients, but not the Association, as Protesters of the Ruling of the Referee.

EXHIBIT D

Since it is the policy of the Water Judge to have the undersigned Referee function as case manager for all protested rulings, within the next 60 days, Mr. Houpt is directed to contact Water Court Clerk Kathy Hall (970-947-3862) or Deputy Clerk Laura Martin (970-947-3861) to arrange a telephone status conference that includes all counsel and the Water Referee.

Dated: August 4, 2003.

BY THE COURT:

Water Referee
Water Division 5

Copy of the foregoing mailed to all Counsel of record---Water Referee,---Div. Engineer---and State Engineer---Date 8/5/03

Deputy Clerk, Water Div. No. 5

Houpt
Porzak
Pascoe
Smilovits
Maynard