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SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

Appeal from the District Court
Water Division 2, 09CW142
Water Division 1, 09CW272
Water Division 5, 09CW186

Opposers-Appellants:

Grand Valley Water Users Association; Orchard Mesa Irrigation District; Ute Water Conservancy District acting by and through the Ute Water Activity Enterprise; Colorado River Water Conservation District; Basalt Water Conservancy District; Board of County Commissioners of Eagle County; Board of County Commissioners of Pitkin County; Dick Wolfe, P.E., State Engineer; David L. Nettles, Division Engineer for Water Division 1; Steve Witte, P.E., Division Engineer for Water Division 2; and Alan Martellaro, P.E., Division Engineer for Water Division 5;

v.

Applicant-Appellee:

Busk-Ivanhoe, Inc., a Colorado corporation.

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Case Number: 2014SA303

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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For the party responding to the issue:

X It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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/s/ Austin Hamre
Austin Hamre, #17823

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Exhibit References

Pursuant to C.A.R. 28(e), the following provides the transcript page and line number at which exhibits relied upon herein were initially referenced at trial and at which they were offered into evidence:

Ex.A-036	R.Tr.I, p.61; R.Tr.I, p.63
Ex.A-049	R.Tr.I, p.174; R.Tr.I, p.175
Ex.A-055	R.Tr.I, p.198; R.Tr.I, p.198
Ex.A-059	R.Tr.I, p.64; R.Tr.I, p.65
Ex.A-143	R.Tr.I, p.220; R.Tr.I, p.221
Ex.A-145	R.Tr.II, p.304; R.Tr.II, p.315
Ex.A-162	R.Tr.I, p.210; R.Tr.I, p.212
Ex.A-221	R.Tr.IV, p.836; R.Tr.IV, p.836
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Ex.A-344	R.Tr.I, p.246; R.Tr.I, p.248
Ex.A-366	R.Tr.V, p.1018; R.Tr.V, p.1019

TABLE OF ABBREVIATIONS AND ACRONYMS

For the Court's convenience, the following provides definitions of the abbreviations and acronyms used herein:

1. **B-I:** Busk-Ivanhoe, Inc., the Applicant-Appellee herein.
2. **Busk-Ivanhoe System:** The transmountain diversion structures of the Busk-Ivanhoe System Water Rights, comprised of Ivanhoe Reservoir, Carlton Tunnel (a.k.a. Ivanhoe Tunnel), Lyle Ditch, Pan Ditch, and Hidden Lake Creek Ditch. Currently co-owned by the Pueblo Board of Water Works and Busk-Ivanhoe, Inc.
3. **Busk-Ivanhoe System Water Rights:** The entire water rights of the Busk-Ivanhoe System.
4. **B-I Water Rights:** B-I's one-half interest in the entire Busk-Ivanhoe System Water Rights, which is the subject of this change case.
5. **HLCC:** The High Line Canal Company.
6. **Order:** May 27, 2014 Order of the Water Court, Water Division 2, Case No. 09CW142.
7. **PBWW:** The Pueblo Board of Water Works.
8. **Pitkin County**: Appellant-Opposer, Board of County Commissioners of Pitkin County.

9. **River District Group**: Appellant-Opposers, the Colorado River Water Conservation District, Grand Valley Water Users Association, Orchard Mesa Irrigation District, Ute Water Conservancy District, Basalt Water Conservancy District, and Board of County Commissioners of Eagle County.

10. **SEO-DEO:** Appellant-Opposers, Dick Wolfe, P.E., State Engineer, David L. Nettles, Division Engineer for Water Division 1, Steve Witte, P.E., Division Engineer for Water Division 2, and Alan Martellaro, P.E., Division Engineer for Water Division 5.

STATEMENT OF THE ISSUES

1. Whether the Water Court correctly found the historical practice of storing the Busk-Ivanhoe Water Rights in the Arkansas River Basin after transmountain diversion to be lawful, where the unique nature of transmountain water allows such practice, and where the weight of evidence established such storage was intended by the original appropriators, and had been historically used since the inception of the rights.

2. Whether the Water Court correctly found the historical practice of storage fees paid in the form of water was necessary for the effective use of the Busk-Ivanhoe Water Rights for its decreed supplemental irrigation purpose and therefore part of the beneficial use.

3. Whether the Water Court correctly selected a representative study period of the Busk-Ivanhoe Water Rights based upon the facts in evidence.

STATEMENT OF THE CASE

A. Nature of the Case/Course of Proceedings

This matter came before the District Court for Water Division 2 upon the application of Busk-Ivanhoe, Inc. ("B-I") for a change of its one-half interest in the water rights of the Busk-Ivanhoe System ("B-I Water Rights"). The disposition in the Court below follows the statement of facts.

B. Statement of Facts

The Arkansas River Basin has been over-appropriated since the mid-1880s (R.Ex.A-306, p.3119[1]), such that water rights junior to 1887 are unreliable for the entire irrigation season, yielding water only during peak runoff. R.CF, p.4360-1, ¶43; R.Ex.A-306, p.3119; R.Tr.I, p.141, l.13-17. With unsatisfied crop irrigation demands early and late in the irrigation season (R.Ex.A-306, p.3119) and at least 80,000 acres of land under cultivation "inadequately supplied" with irrigation water (R.CF, p.4360, ¶40), Arkansas Basin irrigators began developing storage vessels and looking beyond the basin for supplemental supplies. R.Ex.A-306, p.3119-20. The Colorado River Basin had a surplus of water due to limited irrigable land and limited industrial use. R.Ex.A-306, p.3119-20; R.Tr.I, p.137, l.18 – p.142, l.7.

To address this need, A.E. Carlton and his brother L.G. Carlton developed a plan by which the Ivanhoe Tunnel (a.k.a. Carlton Tunnel), originally constructed as a railway tunnel (R.CF, p.4352-3, ¶¶20-21), would be used to import water into the Arkansas Basin. R.CF, p.4353, ¶21. In 1921, the Carltons filed a Map &

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[1] Citations to the certified electronic record are as follows: *Clerk's Record File:* R.CF, p.[.pdf page number], *Exhibit File:* R.Ex.[exhibit number], p.[.pdf page number], or *Transcript File:* R.Tr.I-V, p.[page number], l.[lines]. Citations to the orders of the Water Court also include the paragraph number.

Statement declaring their intent to build the Busk-Ivanhoe System.[2] R.CF, p.4352, ¶17; R.Ex.A-049, p.274. Once fully constructed, the Busk-Ivanhoe System consisted of three ditches (Pan, Lyle, and Hidden Lake Ditches) carrying water into Ivanhoe Reservoir at the west portal of Ivanhoe Tunnel on Ivanhoe Creek.[3] R.CF, p.4352, ¶17; p.4354, ¶25; p.2905-7; R.Tr.I, p.108-9. The Ivanhoe Tunnel then conveys water under the Continental Divide into Busk Creek in the upper reaches of the Arkansas Basin, and then into the on-channel Sugar Loaf Reservoir (now Turquoise Reservoir). R.CF, p.4352, ¶17; p.4354, ¶25; R.Ex.A-010, p.97, included in the Court's Order at R.CF, p.4354, ¶25; R.CF, p.2905-7; R.Tr.I, p.108-9. Construction began in the early 1920s, with the first diversions through Ivanhoe Tunnel in 1925. R.CF, p.4352, ¶17.

From its inception, the Busk-Ivanhoe System was operated to maximize its physically available yield. R.CF, p.4361, ¶45; R.CF, p.4483, ¶17.4; R.Tr.I, p.212-13. The West Slope components of the Busk-Ivanhoe System are located at a high elevation (approximately 10,900 feet in elevation), and collect runoff from a very limited area (approximately 6.6 square miles). R.CF, p.4353, ¶22; R.Ex.A-240,

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[2] The 1921 filing pertained to Ivanhoe Reservoir and the Ivanhoe Tunnel. Filings for the other portions of the Busk-Ivanhoe System were made between 1921 and 1927. R.CF, p.4352, ¶17.

[3] Ivanhoe Reservoir also captures the natural flow of Ivanhoe Creek.

p.2137. The production of water therefrom coincides with the snowmelt and runoff in the Arkansas River Basin, which peaks in late May to early June; by mid-July the collection ditches are nearly dry. R.CF, p.4353, ¶22. This hydrology and the carriage capacity through the tunnel were the primary constraints on the diversions. R.Ex.A-162, p.1701-2. Calls from senior water rights on the West Slope rarely affected the operation of the Busk-Ivanhoe System, because by the time such calls were issued, there was no water left to be diverted. R.Tr.II, p.520-523; R.Tr.V, p.1025-1029.

Although production from the Busk-Ivanhoe System coincided with the peak runoff in both the Colorado and Arkansas River Basins (R.CF, p.4353, ¶22; R.Tr.I, p.204-6), the supplemental irrigation water was not needed until very late or very early in the irrigation season. R.Ex.A-143, p.1449. Without storage in the Arkansas Basin, most of the imported water would not be available at the time needed to provide a supplemental irrigation supply. R.CF, p.4360, ¶43.

The Carltons did not own a reservoir in the Arkansas Basin, so they rented storage space in Sugar Loaf Reservoir, owned by CF&I Steel Company, and occasionally in other reservoirs. R.CF, p.4352, ¶18; p.4360, ¶41; p.4362, ¶46-7. The fee charged for such storage was a percentage of the transbasin water stored. R.CF, p.4373, ¶¶88-9; R.Tr.II, p.57, l.19-25. The Rocky Ford High Line Canal

Company ("HLCC"), a major agricultural water user in the Arkansas Basin, held a collection of native water rights, but needed additional sources of supplemental supply as well as reservoir water. R.Ex.A-221, p.2003-04; R.Ex.A-225, p.2014. The Carltons leased the imported water to HLCC on an on-demand basis (releasing from storage as needed) for supplemental irrigation. R.CF, p.4352, ¶18. At least as early as 1926, imported Busk-Ivanhoe water was described as "reservoir water." R.CF, p.4352, ¶18; R.Ex.A-223, p.2008; R.Ex.A-225, p.2014.

The Garfield County District Court adjudicated the water rights associated with the Busk-Ivanhoe System ("Busk-Ivanhoe System Water Rights") in Civil Action 2621; it entered a decree on January 9, 1928 ("C.A. 2621 Decree"). R.CF, p.4352, ¶17; R.Ex.A-055, p.287.[4]

Eventually, HLCC purchased the Busk-Ivanhoe System and Water Rights in 1950, continuing to store in Sugar Loaf Reservoir and release for use when needed. R.CF, p.4352, ¶18; R.Ex.A-240, p.2132-2138. When Sugar Loaf Reservoir was enlarged and renamed Turquoise Reservoir during construction of the Fryingpan-

[4] Portions of the Busk-Ivanhoe System were the subject of further diligence proceedings C.A. 3082 (R.Ex.A-317, p.3608-3669) and C.A. 4033 (R.Ex.A-331, p.3881-3904), wherein conditional portions were made absolute up to the amount deliverable through the Ivanhoe Tunnel and the remainder canceled.

Arkansas Project, HLCC contracted with the Bureau of Reclamation for storage space therein. R.Ex.A-059, p.709-31; R.CF, p.4352, ¶¶18-9.

As early as 1946, the Division Engineer for the Arkansas Basin (Water Division 2) reported storage of imported water in the Arkansas River Basin in annual reports to the State Engineer's Office. R.CF, p.4364, ¶51. These reports demonstrate the State and Division Engineers ("SEO-DEO") considered all transmountain water to be storable, including Busk-Ivanhoe imported water. R.CF, p.4364, ¶51; R.Ex.A-341, p.4072; R.Ex.A-344, p.4152-3 and p.4164-73. In 1985, reports by the Division 2 Engineer's Office and the State Engineers' Office in connection with the *Colorado v. Kansas* interstate compact litigation acknowledge that water imported by nearly every transmountain diversion into the Arkansas Basin was stored prior to use, including Busk-Ivanhoe imported water. R.CF, p.4364, ¶51; R.Ex.A-305, p.3098-103; R.Ex.A-306, p.3121-33; R.Tr.I, p.143, l.18-23.

In 1971, HLCC sold the Busk-Ivanhoe System and an undivided one-half interest in the Busk-Ivanhoe System Water Rights to the Pueblo Board of Water Works ("PBWW"). R.CF, p.4350, ¶13.f. PBWW immediately began using the imported water for municipal purposes. R.Tr.I, p.125, l.3-17.

In 1984, Busk-Ivanhoe, Inc. ("B-I") was formed and HLCC transferred its one-half interest in the Busk-Ivanhoe System Water Rights to B-I. R.Tr.I, p.61-62. B-I then issued shares of B-I to the shareholders of HLCC. R.Tr.I, p.61-62.

In 1990, PBWW filed an application in Case No. 90CW340 to change the type of use for its interest in the Busk-Ivanhoe Water Rights to municipal uses, which was decreed in 1993. R.CF, p.4344, ¶3.

Aurora began purchasing shares in B-I in late 1986, and by 2001 had acquired one hundred percent of the B-I shares (the one-half interest PBWW did not own). R.CF, p.4350, ¶13.g.; R.Tr.I, p.62-3; R.Ex.A-036, p.259-261. Starting in 1987, the Busk-Ivanhoe System Water Rights were diverted through the Ivanhoe Tunnel in the same amounts as occurred historically, and the B-I Water Rights were used by Aurora for municipal purposes. R.CF, p.4355, ¶27; p.4371, ¶75. Although the Division Engineers for Water Divisions 2 and 5 were aware of this undecreed use (R.CF, p.4372, ¶77), they never curtailed it. R.Tr.II, p.190, l.13-6.

C. Disposition in the Water Court

At the request of the Division 2 Engineer (R.Tr.II, p.189-190), B-I filed an application to change the type of use for the B-I Water Rights to municipal uses in 2009, initiating Case No. 09CW142, Water Division 2.

Prior to trial, B-I filed a C.R.C.P. Rule 56(h) motion, requesting legal determinations that: 1) the previous change of PBWW's one-half interest in the Busk-Ivanhoe System Water Rights in Case No. 90CW340 was a legally binding, system-wide quantification; 2) the only changed circumstances that would justify a re-examination of that quantification are circumstances that changed stream conditions on the West Slope; and 3) that if the Water Court should rule that a new quantification is required, any such quantification must exclude periods of undecreed use as a matter of law, and must not count years of undecreed use as zero use.

In denying B-I's Rule 56(h) motion, the Water Court concluded that the 90CW340 decree was not a binding system-wide quantification, that the transmountain nature of the B-I Water Rights does not preclude an analysis of beneficial use because transmountain water must be "lawfully" introduced into the basin of import, and that "***[t]he representative period of historical use of the subject water rights is a factual determination and cannot exclude an analysis of undecreed use simply as a matter of law.***" R.CF, p.3439, ¶3 (emphasis added).

Thereafter the Water Court held a five-day trial, during which it considered and admitted nearly all proffered evidence.[5] None of the Water Court's evidentiary rulings were appealed.

At trial, the Water Court found B-I's expert, Ross Bethel, presented a credible historical beneficial use analysis utilizing a representative study period of decreed beneficial use. R.CF, p.4370, ¶74.a.vi; R.CF, p.4374-5, ¶¶86-91. Conversely, the Water Court found the Opposers' experts presented outcome determinative analyses not supported by competent evidence, or utilizing contradictory evidence, which did not establish a study period representative of the historical beneficial use of the B-I Water Rights. R.CF, p.4370-71, ¶74.b.; R.CF, p.4372, ¶80. The Opposers' analyses included several factual assumptions premised on a hypothetical history of the Busk-Ivanhoe System (R.CF, p.4375, ¶91.), including analyses contrary to fact which assumed storage did not occur, and therefore water was used at times it was not needed, based on the Opposers' legal position that storage of the Busk-Ivanhoe water should not have occurred. R.CF, p.4375, ¶91; R.Tr.V, p.1000, l.19 – p.1001, l.10. Accordingly, the Water Court

[5] At trial, B-I sought to introduce a number of other transmountain decrees as evidence of how other courts addressed storage in the basin of import. The Colorado River Water Conservation District successfully objected, with the Water Court ruling that decrees for any other transmountain diversions were irrelevant, and inadmissible. R.Tr.I, p.233-44.

found B-I's historical beneficial use analysis more credible than the Opposers'. R.CF, p.4370, ¶74.a.vi; R.CF, p.4375, ¶91. The SEO-DEO did not present a historical beneficial use analysis, nor evidence as to a representative study period. R.Tr.II, p.187-212.

Based on the evidence presented at trial, the Water Court made comprehensive factual findings, including:

- Storage of the B-I water in the Arkansas Basin ("East Slope Storage") was part of the original appropriation. R.CF, p.4362, ¶¶48-49; R.CF, p.4364, ¶¶53-4; R.CF, p.4365, ¶57. The appropriators' intent was understood by the court in C.A. 2621, and was reflected in its decree. R.CF, p.4361, ¶43.
- East Slope Storage was necessary for the effective and beneficial use of the Busk-Ivanhoe water for its intended purposes. R.CF, p.4364, ¶53.
- The "fees" paid for storage in Sugar Loaf Reservoir by providing a portion of the imported water to CF&I were necessary for beneficial use of the water for supplemental irrigation. R.CF, p.4373, ¶88-9.
- Storage of imported water in the basin of import was a common practice and viewed by the State and Division Engineers as being allowed by law without specific authorization in a decree. R.CF, p.4364, ¶52; R.Tr.II, p.195, l.6-15.

- East Slope Storage, including storage in Turquoise Reservoir as an enlargement of Sugar Loaf Reservoir, did not cause an expansion or injurious alteration of stream conditions in the Colorado River Basin. R.CF, p.4365-6, ¶¶55-58; R.CF, p.4367, ¶63.
- The use of the Busk-Ivanhoe System Water Rights has never expanded. R.CF, p.4365, ¶56; R.CF, p.4373, ¶83; R.CF, p.4376, ¶¶93 and 95.
- During the period of supplemental irrigation use, the amount of irrigated land in the Arkansas Basin did not increase because of the Busk-Ivanhoe System Water Rights. R.CF, p.4376, ¶¶93 and 95. This period contains the largest diversions from the West Slope. R.Ex.A-366, p.4660.
- Busk-Ivanhoe diversions during Aurora's undecreed municipal use were not materially different from the decreed use in years prior to Aurora's acquisition of the B-I Water Rights. R.CF, p.4373, ¶83.
- From 1928 through 1986, an annual average of 2,416 acre feet of Busk-Ivanhoe water was beneficially used for the decreed purpose of supplemental irrigation. R.CF, p.4374, ¶¶85 and 90; R.Ex.A-145, p.1451.
- The period of 1928 through 1986 is representative of the lawful historical beneficial use of the Busk-Ivanhoe System Water Rights. R.CF, p.4370, ¶74.a.iv. This period includes dry, wet, and average water years (R.CF,

p.4370, ¶¶74.a.iii and iv), and for a significant portion of this period HLCC owned the entirety of the Busk-Ivanhoe System Water Rights, and kept good records of use. R.CF, p.4370, ¶74.a.vi; R.Tr.II, p.311, l.15 to p.312, l.4.

- There are no available records of use of the Busk-Ivanhoe System Water Rights for the period of 1925 through 1927. R.CF, p.4370, ¶74.a.v.
- From 1987 through 2009, the B-I Water Rights were applied to undecreed municipal use in Aurora's service area. R.CF, p.4350, ¶13.h; R.CF, p.4371, ¶74.b.iii, R.CF, p.4370, ¶84. This period is not representative of the lawful historical use of the B-I Water Rights. R.CF, p.4371, ¶74.b.iii.
- The use of B-I's proposed study period will prevent injury to Opposers' water rights by maintaining the historical stream conditions in the Colorado River Basin. R.CF, p.4367, ¶63.
- B-I's historical beneficial use analysis does not include any period of undecreed use, and therefore there is no need to determine if a period of undecreed use should be considered as zero use or non-use of the B-I Water Rights. R.CF, p.4373, ¶84.

A Final Decree was entered August 15, 2014 granting the change, which incorporates the final Findings of Fact Conclusions of Law and Order of the Court by reference. R.CF, p.4474, ¶12.2.

STANDARD OF REVIEW

1. With regard to the East Slope Storage issue, B-I agrees with the River District Group's[6] statement that this Court reviews *de novo* a water court's legal conclusions. *Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo.2011). However, the River District Group's arguments frequently contest findings of fact (e.g., determinations of appropriator's intent), inferences drawn therefrom (e.g. meaning of supplemental irrigation), or the Water Court's admission of evidence (e.g. admissibility of evidence regarding the appropriator's intent), which are not *de novo* review. The water court's factual findings are accepted unless they are so clearly erroneous as to find no support in the record. *Id*. Findings of sufficiency, probative effect, weight of the evidence and the inferences drawn therefrom are for the water court to determine; they should not be disturbed on appeal. *Id*. The water court's decision to admit or deny evidence is reviewed for abuse of discretion. *Id.*

2. B-I disagrees with the River District Group that a *de novo* standard of review is applied to the Water Court's finding that storage fees paid in the form of water was part of the beneficial use. This Court has applied a "clearly erroneous"

[6] "River District Group" refers to the parties who filed the brief authored by Grand Valley Water Users Association, *et al.*

standard to factual findings of beneficial use. *Archuleta v. Gomez*, 2012 CO 71, ¶23-27.

3. B-I disagrees with the SEO-DEO and Pitkin County that a *de novo* standard of review is applied to the Water Court's selection of a representative study period. This Court "review[s] the water court's choice of a study period under an abuse of discretion standard." *Burlington*, 256 P.3d at 665.

SUMMARY OF ARGUMENT

The Water Court correctly interpreted prior case law and ruled storage of transmountain water in the basin of import is within the "wide latitude" accorded importers of transmountain water provided such storage does not result in an expansion of the water rights. The Water Court examined the scope of the appropriator's intent, and the water right resulting from it, determining that in the context of this transmountain appropriation, East Slope Storage was lawful. In addition, the Water Court selected a study period that excluded undecreed uses, and further examined that study period to ensure the B-I Water Rights were not expanded through East Slope Storage or otherwise. Throughout the proceedings, the Water Court considered all parties' engineering analyses of beneficial use of the water. Based on this complete analysis, the Water Court determined the stream conditions on which junior water rights in the Colorado River Basin are entitled to

rely would be maintained if it granted the proposed change decree, including its protective terms and conditions. The Water Court specifically found the novel approach of including years of diversion for undecreed uses, then substituting zeros for those diversions, was not necessary to properly quantify the B-I Water Rights, nor was it necessary to prevent injury to West Slope water rights.

ARGUMENT

One incident of a water right is the right to change it to other uses without loss of priority, provided the change does not cause injury. *In re Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1168 (Colo.2002). The statutory standard for approval of a change of water rights is: "A change of water right … shall be approved if such change … will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right …." C.R.S. §37-92-305(3)(a).[7] Moreover, "the extent of beneficial use of the original appropriation limits the amount of water that can be changed to another use, and … the change must not injure other water rights." *Wolfe v. Sedalia*, 2015 CO 8, ¶20. Therefore, in a change proceeding, the water court must ensure "the true right – that which has ripened by beneficial use over time – is the right that continues in its changed from under the new decree." *Id.*

[7] See Addendum for the text of all statutes cited herein.

This "true right" is "based upon a pattern of diversion and use over a representative period of time, expressed in acre-feet of water and is the quantitative measure of the water right." *Id.* at ¶22. It is in this context in which the Order of the Division 2 Water Court was appealed.

I. THE WATER COURT CORRECTLY DECIDED EAST SLOPE STORAGE OF THE BUSK-IVANHOE WATER RIGHTS WAS LAWFUL.

It is undisputed fact the Busk-Ivanhoe System Water Rights were, from their inception and consistently thereafter, stored in the Arkansas River Basin after transmountain diversion from the Colorado River Basin ("East Slope Storage"). R.CF, p.4357, ¶38.a.; p.4362, ¶49; R.Ex.A-223, p.2008. Nonetheless, the River District Group argues such storage was unlawful, and 'could expand' the B-I Water Right.[8] *River District Group Opening Brief*, p.40.

Both arguments were rejected by the Water Court. It found East Slope Storage was lawful for three reasons: 1) The law pertaining to transmountain water allows for wide latitude in the use of such water, including practices such as East Slope Storage; 2) East Slope Storage was within the scope of the

[8] Although both the Colorado River Water Conservation District and Pitkin County were parties to the quantification of the other half of the Busk-Ivanhoe System Water Rights in Case No. 90CW340, this argument was noticeably absent from that proceeding.

appropriation; and 3) the East Slope Storage that occurred in this case did not expand the B-I Water Rights. The Water Court did not rule "anything goes" with regard to transmountain water, but instead balanced the wide latitude accorded a transmountain importer with the requirement that stream conditions in the basin of export must be maintained, and junior water rights in that basin must be protected from injury.

A. The Water Court correctly concluded East Slope Storage was allowed under the law when considering the transmountain nature of the water.

Opposers at trial argued East Slope Storage was unlawful. The Water Court correctly found East Slope Storage of transmountain water[9] was lawful, and further held the transmountain nature of the B-I Water Rights raised factual considerations pertaining to historical beneficial use, which had to be weighed under the circumstances of this case. R.CF, p.4359, ¶38.j.; p.4360-61, ¶43.

This Court succinctly outlined the evolution of the law of transmountain water in *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 66, fn 59 (Colo.1996), noting a consistent policy that developers of transmountain diversions should enjoy the 'fruits of their labors.' "A review of Colorado case law and statutory

[9]"Transmountain water" refers to the transbasin diversions which have reached the basin of import.

provisions concerning such transmountain foreign water reveals importers of such water ***enjoy greater rights of use and reuse*** than do users of native water."[10] *Id. at* 66 (emphasis added). Moreover, the appropriators of transmountain water "may reduce or eliminate the amount of foreign water available to junior appropriators, by ***changing the time, place or manner*** in which these waters are used, even if junior appropriators are adversely affected." *City of Florence v. Bd. of Waterworks of Pueblo,* 793 P.2d 148, 153 (Colo.1990)(emphasis added). Of particular importance to this case, this Court has recognized that after importation, use of transmountain water is "'***independent of the priority system.***'" *Thornton*, 926 P.2d at 66, fn.59 (emphasis in original).

The Water Court correctly relied upon this law, concluding transmountain water is "a source of water unrelated to the natural flow of a stream," and an importer's efforts are rewarded "by recognizing a ***right to this water*** … that was ***independent of the priority system.***" R.CF, p.4356-57, ¶¶35-36 (emphasis in original). While the Water Court recognized the legal distinction between direct flow and storage rights in the context of native water rights (R.CF, p.4357-58, ¶38.b.; p.4359, ¶38.j), it also recognized that the distinction is not applicable to transmountain water. R.CF, p.4364, ¶52. In this context, the Water Court

[10] "Native water" refers to water arising in, and used within the same basin.

correctly recognized East Slope Storage only "affects the time and/or manner of use, [but c]hanging the time and/or manner of use – and not the timing of diversions – affects only the basin of import." R.CF, p.4357, ¶37. Because other water users in the basin of import have no rights to transmountain water (*Florence*, 793 P.2d at 153), the Water Court correctly held the "distinction between direct flow and storage rights … is not applicable after export to an unconnected river system" and declined to hold under the facts of this case that East Slope Storage was unlawful *per se*. R.CF, p.4364-65, ¶¶52, 56.

While the River District Group acknowledges the "wide latitude" accorded users of transmountain water, it now argues C.R.S. §37-82-106(1) codified and limited this 'wide latitude' to reuse alone. This argument is incorrect. First, §106(1) codifies the right to reuse of transmountain water – nothing else – and the Court may rely on the unambiguous plain language of the statute. Second, this Court has ***already*** recognized a common law of transmountain water independent of the legislative authority of §106(1). *City & County of Denver v. Fulton Irr. Ditch Co.,* 506 P.2d 144, 147 (Colo.1972) ("Even without the statute we think that Denver has the rights of re-use, successive use and disposition of foreign water …."). Accordingly, §106(1) did not legislatively abrogate those common law

rights to use of such water 'independent of the priority system.' *See Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶17.

Further, the Water Court actually addressed the underlying concern of the River District Group – whether East Slope Storage enlarged the B-I Water Rights (R.CF, p.4367, ¶59-63), which is the underlying rationale for the native water distinction between direct flow and storage rights. *See e.g. Handy Ditch Co. v. Greeley & Loveland Irr. Co.*, 280 P. 481, 482 (Colo.1929). But as is described in Section I.C. below, the evidence did not support the contention that East Slope Storage expanded the B-I Water Rights. R.CF, p.4367, ¶63.

The Water Court's conclusion that East Slope Storage was lawful is bolstered by the historical actions of the State water administrators (i.e. SEO-DEO). R.CF, p.4364, ¶51. Although not controlling on a water court, evidence of the SEO-DEO's administration is persuasive evidence of the lawful use of a water right. *S. Adams County Water & Sanitation Dist. v. Broe Land Co.*, 812 P.2d 1161, 1168 (Colo.1991). Throughout the history of the Busk-Ivanhoe System Water Rights, the SEO-DEO not only permitted East Slope Storage of transmountain water rights, but also acknowledged that practice in reports it prepared in advance of the State of Colorado's litigation of the U.S. Supreme Court case *Kansas v. Colorado*. R.CF, p.4364, ¶51; R.Ex.A-341, p.4072; R.Ex.A-344, p.4152-53 and

p.4164-73; R.Ex.A-305, p.3098-103; R.Ex.A-306, p.3121-33. Accordingly, the evidence is not merely acquiescence by a water commissioner (*see e.g. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 57 (Colo.1999)), but rather an interpretation of the law by the agency charged with its enforcement. Indeed, the Division 2 Engineer testified that reservoir decrees which mention storage of transmountain water rights are a rarity, because the storage of such water "was not the central focus" for the adjudication of the native water right. R.Tr.II, p.450, l.6-15.

For these reasons, the Water Court correctly concluded that storage of transmountain water is different than storage of native water rights. R.CF, p.4364-65, ¶¶52, 54. Both the facts and the law support that conclusion. Furthermore, and contrary to the River District Group's broad arguments, the Water Court did not rely on that conclusion as its sole basis and did not ignore claims of injury. Instead, the Water Court Order shows all assertions as to unlawfulness of East Slope Storage – including analysis of injury and expansion – were considered, and found unsupported by law and factual evidence.

B. The Water Court correctly concluded that East Slope Storage was within the scope of the appropriation.

Having concluded East Slope Storage was not unlawful *per se*, the Water Court recognized "a factual question remain[ed] regarding whether such storage

resulted in an unlawful expansion of the Busk-Ivanhoe System water rights." R.CF, p.4365, ¶56. To answer that question, the Water Court first analyzed whether East Slope Storage was within the scope of the original appropriation.

The C.A. 2621 Decree neither authorizes nor proscribes East Slope Storage; it is silent as to this issue. R.CF, p.4359, ¶38.i. But adjudication decrees do not create or grant a water right; they are evidence of the pre-existing water right and silence in the decree does not foreclose East Slope Storage from being within the scope of this transmountain appropriation. *Cresson Consol. Gold Min. & Mill. Co. v. Whitten*, 338 P.2d 278, 283 (Colo.1959). *See also United States v. Bell*, 724 P.2d 631, 642 (Colo.1986) ("[w]ater rights are obtained by a combination of acts and intent constituting appropriation and are not dependent upon adjudication"). While a decree should be "complete and certain in itself," a "decree is not woven of thin air …. It is grounded on the facts creating that issue; and, where construction is necessary, it must be construed in the light of the facts which gave it birth and limited by the issue it resolved." *Hinderlider v. Canon Heights Irrigation & Reservoir Co.*, 185 P.2d 325, 327-328 (Colo.1947). Applying this principle, the Water Court correctly sought to determine whether East Slope Storage was within the scope of the Busk-Ivanhoe appropriation, so it could accurately resolve the disputed quantification of the historical beneficial use of the

B-I Water Rights. Therefore, the Water Court properly considered the law applicable at the time of the appropriation in determining whether the East Slope Storage had to be adjudicated in this or any decree, and reviewed all credible evidence to determine if the practice of East Slope Storage was intended and within the scope of the appropriation.

1. The Water Court found several reasons why the C.A. 2621 Decree did not address East Slope Storage.

There are four reasons the Water Court found C.A. 2621 Decree was silent as to East Slope Storage: 1) The adjudicating Court did not have the authority to adjudicate water rights in a different basin; 2) The appropriators did not own any East Slope reservoirs – a requirement for adjudication of a storage right at the time; 3) The law did not allow for adjudication of a 'second' priority for water that was already appropriated; and 4) Although diversions out of the basin were administered under a priority, use of the transmountain water was considered independent of the priority system once in the basin of import.

"The silence of the C.A. 2621 Decree with regard to storage in the Arkansas Basin is explained in part by the scope of the court's authority under Colorado statutes as they existed in the 1920s." R.CF, p.4362, ¶50. Put simply, the controlling statutory framework at the time was not well suited for the complexities of transmountain diversions. Section 1760, of the Compiled Laws of

Colorado of 1921 prescribed the content and manner of petitions to adjudicate priorities, stating:

> "[A]ny one or more persons, associations or corporations, ***interested as owners*** of any ditch, canal or reservoir in any water district shall present to the district court of any county ***having jurisdiction of priority of rights to the use of water for irrigation in such water district*** according to the provisions of an act entitled an act to regulate the use of water for irrigation [lengthy statute title abridged] a motion, petition or application in writing, moving and praying said court to proceed to an adjudication of the priorities of rights to use of water for irrigation between ***the several ditches, canals, and reservoirs in such district*** …."

§1760, C.L. (1921) (emphasis added) (cited as Mills Ann. Stat. §3807 (1930) by the Water Court).

First, under Section 1760, the original appropriators properly petitioned for the adjudication of the "several ditches, canals, and reservoirs" located within the water district over which Garfield County District Court had jurisdiction, and the resulting C.A. 2621 Decree confirmed the appropriations made by means of those structures. R.CF, p.4362-63, ¶50. However, because any East Slope reservoir was not a reservoir "in such district" as required by §1760, the appropriators could not petition for its adjudication by that Court. §1760, C.L. (1921); R.CF, p.4363, ¶50.a. Second, the appropriators of the Busk-Ivanhoe System Water Rights did not have standing to petition adjudication of a priority in any East Slope reservoir,

because they were not "owners," of any such reservoirs. §1760, C.L. (1921); R.CF, p.4363, ¶50.c.

Third, by 1928 it was already well settled law in Colorado that one could not obtain two priorities based on the diversion of the same water. *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 98 P. 729, 733 (Colo.1908). Hence, the in-priority diversion of water in the Colorado River Basin did not support the grant of a priority for diversion of the same water once in the Arkansas Basin. R.CF, p.4363, ¶50.b.

Fourth, and more fundamentally, a separate East Slope Storage priority (or decree) of Busk-Ivanhoe water is inapplicable to the recapture of transmountain water. R.CF, p.4363, ¶50.b; p.4356-57, ¶36. "Priority" means a right superior to someone else. A priority date fixes by decree the relative ability to divert vis-à-vis other water rights. *Santa Fe*, 990 P.2d at 54. Accordingly, upon import the water became "independent of the priority system" and no one on the East Slope, junior or senior, could make any claim to it while under the importer's dominion. *Thornton*, 926 P.2d at 66, fn 59; *Pub. Serv. Co. of Colorado v. Willows Water Dist.*, 856 P.2d 829, 833 (Colo.1993). The assertion that a further decreed water right (i.e. a priority) was needed to recapture the water in the Arkansas Basin fails to comprehend what "independent of the priority system" means.

For these reasons, the Garfield County District Court did not adjudicate water rights for East Slope Storage. In hindsight we might think it would have been helpful for the court to make findings of fact about the appropriators' intent to utilize East Slope Storage, but in the 1920s such findings were not necessary; a fact the Water Court recognized. R.CF, p.4362-63, ¶50. Accordingly, the Water Court addressed the critical question, which now needed resolution: whether intent and actual historical use established East Slope Storage as within the scope of the appropriation. It therefore considered the decree and other credible evidence to resolve that question.

2. The Water Court properly relied upon credible evidence of the facts and circumstances surrounding the appropriation of the Busk-Ivanhoe System Water Rights to determine their scope.

The Water Court thoroughly considered the facts that 'gave birth' to the Busk-Ivanhoe System Water Rights, thereby determining the scope of the appropriation. The Water Court found the water supply to the Busk-Ivanhoe System is available predominantly between May and June, but supplemental irrigation water was primarily needed later in the irrigation season. R.CF, p.4353, ¶22; p.4360-61, ¶43; p.4364, ¶53. East Slope Storage was therefore necessary to hold the water until needed for its decreed purpose. R.CF, p.4360-62; ¶¶41-43, 48, 49. The Water Court also inferred that typed references to "direct irrigation" in the

C.A. 2621 Decree, which were stricken and replaced by handwritten references to "direct flow," indicated the Garfield County District Court's understanding that some diversions would be exported on a direct flow basis but would be stored on the East Slope prior to being applied to irrigation. R.CF, p.4361, ¶44; R.Ex.A-055, p.294–295. [11] Based on all the evidence, the Water Court found East Slope Storage was within the scope of the appropriation, and the Garfield County District Court understood its necessity to effectuate the decreed supplemental irrigation purpose. R.CF, p.4360-61; ¶43.

The River District Group has not appealed the Water Court's admission of evidence, its factual findings regarding the intent of the appropriator, or the

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[11] No party appealed the Water Court's factual finding that the Garfield County District Court understood Busk-Ivanhoe water would be stored in the Arkansas Basin, and Amicus Grand County may not do so via the back door. Further, it's argument that East Slope Storage should have been expressly referenced in the statement of claim, or addressed by the referee ignores the statutory law governing petitions for adjudication, and most importantly comes many decades too late. *See* §1706, C.L. (1921); *and See Estes v. Crann*, 216 P. 517, 518 (Colo.1923)(objections to irregularities in statements of claim are to be raised in the adjudication proceedings).

inferences drawn by the Water Court.[12] Instead, they attempt to nullify an extensive body of factual findings by arguing any analysis of appropriator's intent must be limited to the four corners of the C.A. 2621 Decree.

More specifically, the River District Group argues only an express finding of ambiguity allows consideration of other evidence to determine the scope of a water right. This Court has previously held to the contrary. A decree's silence as to a certain aspect of the appropriation, allows review of evidence beyond the decree to determine the scope of the appropriation. *In re Water Rights of Cent. Colorado Water Conservancy Dist.*, 147 P.3d 9, 16-17 (Colo.2006)("*Jones Ditch*"). The River District Group incorrectly argues *Jones Ditch* is not permissive, but rather restrictive; that review is limited to the record from the original adjudication. Instead, *Jones Ditch* stands for the proposition that a water court may look beyond the decree, and the facts of that case illustrate it does not limit what evidence the water court can consider. In *Jones Ditch*, the water court relied on historical testimony of the original appropriator to establish the scope of the irrigated acreage

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[12] The River District Group nonetheless argues facts contrary to the Water Court's Order. Notably, a review of the headings of sections A.4. through B.3. illustrates the brief is argued almost entirely upon facts and inferences contrary to the Water Court's Order, and presupposes that admission of evidence was improper. *River District Group Opening Brief*, p.ii. The findings of fact, inferences, and admissions of evidence are supported by the record and should not be disturbed upon appeal.

was ‘at least 300 acres,’ but it then ultimately determined the intent of the appropriator to be irrigation of ***344 acres*** – relying on some other evidence not in the record at the adjudication proceeding to reach that finding. *Id*. at 12.

More broadly, in *Southern Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226 (Colo.2011)(“*Southern Ute*”) this Court interpreted “determination of a water right” in C.R.S. §37-92-302(1)(a) to allow water courts “to construe and make determinations regarding the ***scope of water rights adjudicated in prior decrees***,” which this Court held to be “consistent with the fundamental principle that adjudications of water rights have as their object the confirmation of pre-existing rights.” *Id.* at 1234 (emphasis added). More specifically, in *Burlington* this Court said the “water court has authority to determine ***a prior decree’s setting, intent, meaning and effect*** when adjudicating an application for a water use right ***or ascertaining the existence of an undecreed enlargement*** of a decreed right.” *Burlington*, 256 P.3d at 660 (emphasis added). In *Burlington,* the water court relied in part on a 1909 contract to determine the intended scope of an 1885 appropriation. *Id.* at 657-58.

Here, the Water Court followed this Court’s guidance. Faced with a dispute over whether the historical practice of East Slope Storage was lawful, the Water Court looked to the C.A. 2621 Decree and found that it was silent on that issue.

R.CF, p.4359, ¶38.i. To resolve the dispute, the Water Court considered credible evidence to determine the appropriators' intent. R.CF, p.4360, ¶38. It would be illogical to require the Water Court to rely on an extensive body of evidence establishing the actual historical usage of the Busk-Ivanhoe System Water Rights, but put blinders on when considering whether East Slope Storage is part of that historical use. Where the scope of the right is in question, the Water Court should resolve the issue relying on evidence probative of its setting, intent, meaning and effect. *Jones Ditch, Southern Ute,* and *Burlington* all illustrate the water court's ability to look outside the decree "is not a rule for construing water decrees; it is a term implied by Colorado's law of appropriation and consumptive use." *Jones Ditch,* 147 P.3d. at 16. The River District Group's attempt to limit the Water Court's review of certain evidence is not only contrary to law, but also ignores one of the fundamental questions the Water Court must answer in a change case: the originally intended scope of the water rights being changed.

3. Payment of storage fees with imported water was a part of the appropriation.

It is undisputed the Busk-Ivanhoe appropriators did not own any East Slope reservoirs. R.CF, p.4360, ¶41. In order to store the imported water – which the Water Court found to be necessary to beneficially use the Busk-Ivanhoe water for its decreed purpose – the appropriators had to pay for storage in Sugar Loaf

Reservoir. R.CF, p.4374, ¶89. These payments were made by providing imported water as "payment" to the reservoir owners. R.CF, p.4374, ¶88. The River District Group contends the quantification should exclude the payments, arguing the "payment" of water was not beneficial use. This focuses on the wrong question. By analogy, reservoir evaporation, in and of itself, is not a beneficial use, but it is accepted as a component part of beneficial use because water cannot be stored for later use without incurring such losses. The Water Court correctly rejected such a limited view of beneficial use, finding the "payment" water was necessary for beneficial use of the imported water, and no different than evaporation loss. R.CF, p.4374, ¶¶88-89. Therefore, it correctly included the "payment" water as part of the quantified historical beneficial use.

The River District Group's reliance on case law regarding the prohibition against selling excess water is inapposite. *See River District Group Opening Brief,* p.35. Those cases address appropriators attempting to sell water in excess of the needs of the lands originally intended to be irrigated, which would expand the water rights in question. *See e.g. Enlarged Southside Irr. Ditch v. John's Flood Ditch Co.*, 183 P.2d 552, 587-588 (Colo.1947). That is not what was happening here. The Busk-Ivanhoe System Water Rights were appropriated as a supplemental source for 80,000 acres (R.CF, p.4353, ¶23) but historically used on

only 22,500 acres under the HLCC. R.Tr.V, p.965, l.10. Moreover, the HLCC was still a water short[13] ditch, even with the Busk-Ivanhoe water (R.Tr.II, p.268, l.14-20), and East Slope Storage, including storage fee payments, had been occurring since before the rights were decreed. R.CF, p.4362, ¶¶47, 49; p.4374, ¶¶88, 89. HLCC was not expanding their rights, but was paying for storage with a portion of their water they otherwise would have used. R.CF, p.4365, ¶56; p.4374, ¶89. Accordingly, the Water Court did not abuse its discretion, and correctly found the 'payments' were necessary to effectuate the decreed purpose, and therefore part of the historical beneficial use.

C. The Water Court correctly concluded East Slope Storage was not an expansion.

After the Water Court found East Slope Storage was not a *per se* expansion of the Busk-Ivanhoe System Water Rights, it then took the next step of examining whether the East Slope Storage that actually occurred resulted in expansion beyond the original appropriation. To this end, it noted an expansion would be injurious to West Slope water users if it altered the stream conditions on the West Slope. R.CF, p.4365, ¶55. To decide this issue, the Water Court considered extensive evidence of the entire history of the right, and found "storage of Busk-Ivanhoe

[13] "Water short" means the water rights could not fully satisfy the demand of the crops they irrigated.

water in the Arkansas Basin did not cause an injurious expansion or alteration of stream conditions in the Colorado River Basin," and based on extensive support in the record, such finding should not be disturbed. R.CF, p.4367, ¶63; R.CF, p. 4367, ¶¶60-61 (finding no evidence of changed stream conditions injuring Opposers); R.CF, p.4365, ¶¶55-58 (finding no expansion of historical diversions); R.CF, p.4376, ¶93 (finding no expansion of land irrigated by the Busk-Ivanhoe System Water Rights).

Thus the Water Court correctly interpreted prior case law and ruled East Slope Storage was within the "wide latitude" accorded importers of transmountain water provided such storage did not result in an expansion of the B-I Water Rights. It then looked at the facts and circumstances shedding light on the appropriators' intent and use of the Busk-Ivanhoe System Water Rights before adjudication and found East Slope Storage to be part of the appropriation, after which it considered the long-term use of the water rights and found no expansion had taken place.

II. THE WATER COURT PROPERLY QUANTIFIED THE B-I WATER RIGHTS BASED ON A REPRESENTATIVE STUDY PERIOD.

The Water Court correctly quantified the B-I Water Rights. In doing so, it correctly applied the law requiring quantifications to be based upon a representative period of lawful use, which excludes undecreed use and prevents injury or expansion. It correctly declined to adopt the Opposers' novel and

unfounded theory that additional reductions to the actual lawful historical beneficial use of the appropriation should be made by including a non-representative period of use and pretending such use should have been non-use.

A. The Water Court's finding that 1928 through 1986 is a representative study period is supported by the evidence.

The Water Court found the study period of 1928 through 1986 is representative of the decreed beneficial uses of the Busk-Ivanhoe appropriation. R.CF, p.4370, ¶74.a.iv. After hearing testimony from B-I's expert, Ross Bethel, and the Opposers' expert, Mike Sayler, the Water Court found Mr. Bethel's testimony to be "more credible" regarding the proper study period (R.CF, P.4370, ¶74.a.vi; R.CF, p.4375, ¶91), and found Mr. Sayler's testimony to be contradictory and unclear.[14] R.CF, p.4371, ¶74.b.v.

It also found there was no evidence that the 1987 through 2009 period was representative hydrologically, and found this latter period was not representative of the decreed historical use of the appropriation. R.CF, p.4370-71, ¶¶74.b.ii-vi. No evidence contradicted the finding that 1928 to 1986 was a representative study period. R.CF, p.4369, ¶74.a.iv. Because no party has appealed the Water Court's

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[14] Appellants' Briefs rely heavily on Mr. Sayler's testimony, which was rejected as "outcome determinative," by the Water Court. R.CF, p.4372, ¶80. Such credibility findings are not subject to re-examination on appeal.

findings of fact, and the Water Court's selection of a representative study period is supported by the record, it should not be disturbed. *Burlington*, 256 P.3d at 665 (This Court "review[s] the water court's choice of a study period under an abuse of discretion standard").

B. The Water Court's selection of a representative study period is in accordance with the law.

The Water Court's quantification of the B-I Water Rights followed all of the rules for a change case – it was based on a representative period of lawful decreed use, it was not based upon undecreed use, and it employed several other factors endorsed by this Court to determine a representative period. The Water Court correctly determined it need not go any further, rejecting Appellants' novel legal theory and finding it unnecessary to prevent injury.

1. The Water Court quantified the B-I Water Rights based on a period of lawful decreed use.

This Court has consistently held a water right must be quantified based on its use in accordance with its decree. "Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes..." *Santa Fe*, 990 P.2d at 56 (quoting *Williams v. Midway Ranches Property Owners Ass'n, Inc.,* 938 P.2d 515, 521 (Colo.1997). "Because beneficial use defines the genesis and

maturation of every appropriative water right ... a water right is limited to that amount of water actually used beneficially pursuant to the decree at the appropriator's place of use." *Santa Fe,* 990 P.2d at 54. Consequently, a change proceeding must "identify the extent of ***actual beneficial use*** of the decreed appropriation ***at its place of use***" because the fundamental purpose is "to ensure that the true right – that which has ripened by beneficial use over time – is the one that will prevail in its changed form." *Id.* at 55 (emphasis added).

It has long been the law that junior appropriators are entitled to the maintenance of stream conditions existing at the time of their appropriations. S*ee e.g. Colorado Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434-5 (Colo.2005) and cases therein cited. A "quantification" is merely the application of that long-standing principle to the facts of a specific case, resulting in a numerical determination of historical use, and the corresponding historical stream conditions upon which junior users rely. *Santa Fe,* 990 P.2d at 58. The focus of a quantification, and therefore the study period, is always the period of time for which the water right was used as originally intended (i.e. its decreed use). The Water Court followed this principle by using only the period of lawful decreed use as a basis to quantify the B-I Water Rights. R.CF, p.4368, ¶67; p.4371, ¶75; p.4373, ¶84.

2. The Water Court Properly Excluded Undecreed Use From The Quantification.

The Water Court followed the express language of this Court that "[a]n undecreed change of use of a water right ***cannot provide the basis*** for quantifying the right for change purposes." *Santa Fe,* 990 P.2d at 59 (emphasis added); R.CF, p.4371, ¶75. The SEO-DEO states this language "means that undecreed use cannot have an effect on the quantification" (*SEO-DEO Opening Brief*, p.8), and Pitkin County similarly agrees (*Pitkin County Opening Brief*, p.27-28). Yet they then argue undecreed use must be included and have an effect on the quantification in this case. Because the Water Court followed the plain language of *Santa Fe* and determined doing so would prevent injury, its analysis should be upheld. R.CF, p.4367, ¶63; R.CF, p.4370, ¶73.

3. The Water Court Employed Other Factors Endorsed By This Court To Determine A Representative Study Period.

The Water Court also employed several factors this Court has endorsed in selecting a representative study period. It found the 1928 through 1986 period included an appropriate mix of wet, dry and average years, in accord with *City and County of Broomfield v. Farmers Reservoir and Irr. Co.*, 235 P.3d 296, 301 (Colo.2010). R.CF, p.4370, ¶¶74.a.iii., iv. It considered the availability of records pertaining to diversion and use, in accord with *Pueblo West Metropolitan Dist. v.*

Southeastern Colorado Water Conservancy Dist., 717 P.2d 955, 959 (Colo.1986); R.CF, p. 4370, ¶74.a.v. Additionally, the Water Court weighed other evidence of historical use, and found such evidence supported its determination that 1928 through 1986 was a representative period. R.CF, p.4370, ¶74.a.vi. The Water Court made findings regarding how each of these factors impacted the selection of a study period, ultimately concluding the period from 1928 through 1986 was representative. R.CF, p.4369-71, ¶74; p.4373, ¶84. The weight given to this evidence is within the Water Court's discretion.

C. The Water Court prevented injury without applying a novel legal theory.

The Water Court's determinations of credibility, the weight it gave to the evidence, its findings of fact, and its inferences therefrom are all supported by the record and should not be disturbed on appeal. Notwithstanding these deferential standards of review, and the express language of *Santa Fe* that "undecreed use cannot be the basis" for a quantification (*id*. at 59), Appellants ask this Court to specifically include undecreed use as a basis for quantification, and also determine that undecreed use can be used to further reduce the amount of actual decreed use. Appellants advocate for this dilution of the true measure of the B-I Water Right to penalize undecreed use. *Pitkin County Opening Brief,* p.36. They argue – as a

matter of law – that years of undecreed use must be included in the quantification, *and* (perhaps most significantly) the water court should pretend the diversions in those years are equivalent to zero use. *Pitkin County Opening Brief,* p.36; *SEO-DEO Opening Brief*, p.18-19. The Water Court was able to prevent injury in this case without applying this novel and unsupported legal theory.

Aside from the fact that the Water Court did not abuse its discretion and its findings were well supported, two independent grounds favor rejection of this novel legal theory. First, the theory is premised on hypothetical stream conditions that conflate non-use of a water right with undecreed use. Second, where the Water Court has expressly found no expansion, the law does not allow relinquishment of a portion of a water right as a penalty for undecreed use.

1. Non-Use is not the same as undecreed use.

At least since 1928, the amount of water diverted by the Busk-Ivanhoe System Water Rights has not been available to junior West Slope water rights. [15] The average amount diverted prior to B-I's municipal use starting in 1987 was the same as the average amount diverted thereafter. R.CF, p.4373, ¶84; R.Tr.II, p.19, l.23 to p.20, l.15. Although the SEO-DEO argues that "the usufructary nature of

[15] Nor was it available to senior appropriators, as the physical supply in the basin above the Busk-Ivanhoe points of diversion had runoff before senior users placed a call for water. R.Tr.III, p.520-523; R.Tr.V, p.1025-1029.

water rights should guide [this Court's] determination" (*SEO-DEO Opening Brief,* p. 8), the SEO-DEO blatantly asks this Court to ignore the manner in which *the actual use* of the B-I Water Rights affected historical stream conditions. The SEO-DEO asserts the failure to reduce the quantification below the 1928-1986 average is an expansion (*SEO-DEO Opening Brief,* p.28-29), even though the undecreed use starting in 1987 had no effect on historical river conditions. R.CF, p.4373, ¶84. For this Court to agree with Appellants' novel legal theory, it must disregard the critical fact that West Slope river conditions never changed. The result of the SEO-DEO approach would be to significantly dilute the true measure of the B-I Water Rights by averaging twenty two years of hypothetical zeros into 59 years of *actual* diversions. As the Water Court correctly recognized, this "does not result in a representative measure of the appropriation" (R.CF, p.4373, ¶82). It therefore concluded it need not address the legality of such an approach. R.CF, p.4373, ¶84.

Undecreed use and non-use differ both factually and legally. Factually, non-use leaves water in the stream that could be diverted by the others, whereas undecreed use generally results in some consumption and return flows. As a result, the stream conditions experienced by juniors during a period of undecreed use are different from the stream conditions experienced by juniors during a period of non-use – particularly in cases of transmountain diversions.

There are also important legal distinctions between nonuse and undecreed use: A prolonged, unjustified period of non-use can make the unused water available to junior appropriators in order of priority. *Midway,* 938 P.2d at 522 (junior appropriators entitled to maintenance of stream conditions at time of appropriation, accordingly, change is limited in time and quantity to historical use); *see also Wolfe v. Sedalia*, 2015 CO 8, ¶6 (recognizing that 13 acre-feet of historical consumptive use water was left in the stream for 24 years); *Id.* at ¶34 (excess augmentation water left in the stream under a decree benefits other water users in order of their priorities). However, no one can rely on stream conditions resulting from undecreed use. In *Burlington*, some appropriators argued for the continuation of conditions they found favorable resulting from undecreed uses of the Burlington water rights. This Court ruled they had no legal entitlement to continuation of those conditions. *Burlington,* 256 P.3d at 672.

Moreover, whereas non-use may be evidence of an intent to abandon, *Haystack Ranch v. Fazzio*, 997 P.2d 548, 552 (Colo.2000), undecreed use is affirmative evidence of an intent not to abandon. *East Twin Lakes Ditches and Water Works, Inc. v. Board of County Com'rs of Lake County*, 76 P.3d 918, 924-6 (Colo.2003); *Lengel v. Davis*, 347 P.2d 142, 146 (Colo.1959).

The SEO-DEO and Pitkin County provide no authority for undecreed use being the same as non-use. Pitkin County relies on *Trinchera Ranch Co. v. Trinchera Irr. Dist.*, 266 P. 204 (Colo.1928) for the proposition that "unlawful use should be part of the water court's evaluation of the historical use…." *Pitkin County Opening Brief,* p.28. In *Trinchera,* although decreed rights were not diverted at their decreed locations, this Court held diversions at other locations had not been proven to be diversions under any decreed rights. *Id.* at 207. With no known diversions pursuant to the rights being changed, it spoke in terms of non-use, but did not state that non-use and diversions for undecreed uses were functionally identical. Instead, this Court's discussion focused on the evidence necessary to maintain the actual historical stream conditions in which juniors had established vested rights – an approach that necessarily focuses solely on use for decreed purposes.

Junior appropriators are entitled to rely on the ***actual*** stream conditions existing at the time of their appropriation, *Colorado Water Conservation Bd. v. City of Central*, 125 P.3d at 434, but they are not entitled to have hypothetical stream conditions memorialized in a change case. The Water Court had no basis for making any assumption as to diversions that *would have* occurred in the absence of the undecreed use, and this Court has consistently required changes to

be based on demonstrable, historical facts; it has not required a water court to divine what *would have* happened under other circumstances. *Thornton*, 926 P.2d at 88 (injury must be "demonstrated by evidential facts and not by potentialities").

Treating a period of undecreed use as if it were non-use results in a quantification based on imaginary stream conditions that never existed, and to which junior appropriators have never been entitled. Equating non-use and undecreed use, then including hypothetical non-use in a study period to reduce the average, is therefore factually and legally unsupportable. The Water Court was able to maintain historical stream conditions and thus prevent injury without adopting fictional portrayals of the facts, and its quantification should be upheld.

2. The law does not allow relinquishment of a portion of a water right that was not expanded as a penalty for undecreed use.

This Court has recognized that "[t]erms and conditions to prevent injury *may include relinquishment of part of the decree* for which a change is sought '*if necessary to prevent an enlargement* upon the historical use...to the detriment of other appropriators.'" *Sedalia*, 2015 CO 8, ¶26 (quoting C.R.S. §37-92-305(4)(a)(II))(emphasis added.). However, in a case such as this, where the Water Court considered the entire period of record and found no expansion, the law has

never permitted a court to penalize undecreed use by forcing relinquishment of part of the volume put to decreed use if not ***necessary*** to prevent expansion.

A change case is a special statutory proceeding with the sole purpose of quantifying the use of a water right, and insuring that the proposed changed use does not cause injury. C.R.S. §37-92-305(3)(a). Its purpose is not deterrence, punitive damages, nor compensating certain water users for alleged past wrongs or injuries. *Steffens v. Rinebarger*, 756 P.2d 1002, 1007 (Colo.1988); *Groundwater Appropriators of the South Platte v. Boulder,* 73 P.3d 22, 26-27 (Colo.2003)(cross-claim for injunction improper as part of action for determination of a water right).

Burlington has been argued as support for the approach of substituting zeros for actual, though undecreed, use. But unlike this case, *Burlington* was an expansion case. In *Burlington*, the amount of decreed use was in no way diminished by the amount of undecreed use – the result for which the SEO-DEO and Pitkin County contend here. *Burlington* simply excluded undecreed use from the quantification. The most analogous aspect of *Burlington* is the 1885 direct flow right, regarding which only the twenty four years of diversions for decreed use were considered; the following 95 years including undecreed use was excluded. *Burlington*, 256 P.3d at 665-66. With regard to the 1885 Storage Right, the period of decreed use was only twelve years: 1897 – 1909. However, because

the water court found diversions from 1927 – 2004 were nearly the same as diversions during the period of decreed use, 1897 – 1909, this Court upheld the water court's determination that the later 77 year period was also representative of the 1885 Storage Right when diverted through decreed structures. *Id*. at 666. The exclusion of the Metro Pump diversions in *Burlington* is not relevant because there is no issue involving undecreed points of diversion in this case.

In the end, all of the decreed use in *Burlington* was included in the quantity changed, and no undecreed use was 'averaged' into the calculation of historical decreed use so as to diminish the amount actually needed and historically used for the decreed purpose. *Burlington* does not stand for the proposition for which Pitkin County contends.

Pitkin County mischaracterizes *Santa Fe* as holding that 'credit' for undecreed use cannot be substituted for "the zeroes of credit an applicant would receive" for undecreed use. *Pitkin County Opening Brief*, p. 22. Pitkin County simply assumes its desired result of including zeros – there was no study period populated with zeros in *Santa Fe*. Because the applicant could only find records of undecreed use, there was ***no study period at all***. Lacking any competent evidence of use, the application was dismissed without trial. *Santa Fe*, 990 P.2d at 58-9.

Nothing in *Santa Fe* supports selecting a study period to include undecreed use but treating that use as non-use by substituting zeros.

Lastly, Appellants' novel legal theory ignores the existing significant consequences for undecreed use – namely, curtailment, pursuant to a Division Engineer's statutory authority, C.R.S. §§ 37-92-501(1) and 502, or pursuant to injunction action if the Division Engineer fails to properly curtail (and if it is brought separately from a "determination of a water right"). It was common knowledge to the SEO-DEO and other water users that B-I's diversions during this time were for undecreed uses, however, the B-I Water Rights were never curtailed or enjoined. More importantly, no injury resulted from this undecreed use, and water users who sat by and watched it for twenty-two years cannot now assert it as a justification for giving them a windfall.

In summary, the issue before this Court regarding the study period selected by the Water Court is simple: does the evidence support the finding that it is representative of the historical use of B-I Water Rights in accordance with the decree? If so, the findings must stand. In this case, the Water Court's findings as to the representative study period are in accordance with the law, soundly grounded in the record, and should not be disturbed. The Water Court prevented

injury by following the law, and correctly rejected Appellants' novel legal theory. This Court should uphold the Water Court's determination.

CONCLUSION

The Water Court's ruling is in accordance with the law and supported by the evidence, as shown by its extensive factual findings. The Water Court identified a period of lawful beneficial use, and used that period as the basis upon which to quantify the B-I Water Rights. In doing so, the Court carefully considered the transmountain nature of the water and the historical stream conditions in the basin of export. The end result is a decree that accurately quantifies the mature B-I Water Rights, and will maintain stream conditions so as to prevent injury to other water users. For all of the reasons described above, the Water Court's Order and Decree should be upheld.

Respectfully submitted this 17th day of February, 2015.

HAMRE, RODRIGUEZ, OSTRANDER & DINGESS, P.C.

A duly signed physical copy of this document is on file at the offices of Hamre, Rodriguez Ostrander & Dingess, P.C. pursuant to C.R.C.P. Rule 121, § 1-26(9)

By: /s/ Austin Hamre
Austin Hamre, #17823

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2015, a true and correct copy of the foregoing **Answer Brief** was served via ICCES on each of the following:

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Pursuant to Rule 121, the signed original is on file in the Law Offices of Hamre, Rodriguez, Ostrander & Dingess, P.C.

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