

UPPER ARKANSAS
WATER CONSERVANCY
D I S T R I C T

June 16, 2009

Custer County Commissioners
c/o Mr. Lynn Attebery, Chairman
205 S. 6th Street
P.O. Box 150
Westcliffe, CO 81252

Re: Augmentation for Custer County

Dear Chairman Attebery and Commissioners;

Several weeks have passed since the Upper Arkansas Water Conservancy District presentation at your work session on May 28, 2009. I want to express our District's and my appreciation for your diligence and hospitality in conducting this work session. It is vitally important for the citizens of Custer County to understand the intricacies of developing a plan for augmentation and to appreciate that augmentation is about protection of water rights. I would like to take this opportunity to submit to you some points that further illustrate the benefits of a District blanket plan of augmentation that may not have been obvious from the presentations at the work session.

First, the sources of augmentation water will not result in the dry-up of agricultural lands in Custer County by the District. Replacement water utilized by the District will come from water rights that have already been changed to augmentation use and the historically irrigated lands have already been dried-up or their dry-up is already planned by others. With these sources coupled with the District's current inventory of water the view of the valley floor will not change as a result of the District's augmentation plan. In the future the District will continue its long established practice of utilizing water rights for their historic decreed uses to the maximum extent possible. There are tools that the District believes could be used to provide additional water if needed in the distant future. One practice is the use of interruptible water supplies that allow irrigated land to continue to be irrigated in most years. The District will first use Custer County water rights to meet the needs in the county. These policies will foster retention of water rights in Custer County by allowing flexibility of use and continued beneficial use of water in the county. Further this practice will assist in preventing the purchase of water rights by non-Custer County entities that purchase the water and permanently remove it from Custer County.

Second, provision of supplemental augmentation through the proposed District's plan for existing augmentation plans in Custer County was discussed. We understand that some of these plans may be out of compliance and in need of additional replacement water. The District's plan may be a source of water to supplement these plans. What was not discussed is the on going impact to water rights in Custer County in the absence of a supplemental source of augmentation water such as the District's proposed plan. Further, it is our opinion that the State Engineer is not waiting for the District to file an augmentation plan before it forces compliance with Colorado Statutes. It is our opinion that the Division Two Engineer's present lack of staff availability to investigate out-of-compliance plans that is postponing compliance activities. In the absence of a ready source of replacement water, such as the forthcoming District Plan, existing plans found out of compliance by the Division Engineer would be forced to either limit use or procure Custer County water rights that may result in a dry-up of irrigated agriculture and at considerable expense and impact to irrigated lands. The District believes that its plan will be able to provide supplemental replacement water for these citizens of Custer County at significantly reduced costs and with no impact to existing irrigated lands in Custer County.

Third, it has been inferred that a result of the District's augmentation plans in Chaffee and Fremont County, that the Division Engineer was spurred to initiate compliance of well pumping rules. This is preposterous and ignores the impacts of water right administration in the Arkansas Valley beginning with the adoption of the "Water Right Determination and Administration Act of 1969" that integrated tributary ground water with surface water use and ended with the 1985 Kansas v. Colorado suit over post-compact well pumping in the Arkansas Valley and the eventual adoption of the Arkansas Basin Amended Rules and Regulations on the use of Ground Water. The impacts from out of priority well pumping impacted all surface water right users in the Arkansas Basin including in Custer County. Residents of Custer County may well remember that the State Engineer forced Round Mountain Water and Sanitation District to curtail out of priority use since they were out of compliance and thus causing injuring to senior surface water rights. And further it was the Upper Arkansas Water Conservancy District that rose to help Round Mountain when the Division Engineer forced curtailment. The benefit to those covered by the District's blanket plans of augmentation were realized in Chaffee and Fremont County. Nearly six years ago the Custer County Commissioners realized these same benefits accruing to Chaffee and Fremont County were needed for Custer County, and the proposed augmentation plan was developed to respond to this need.

Fourth, a local Custer County citizen group called "C-4" has made inaccurate representations about the advantages of postponing the filing of the District's plan until after July 1, 2009, claiming new Colorado Rules of Civil Procedure will appreciably change the disclosure obligations of an applicant with respect to the proposed augmentation plan. The new rules are no more stringent in requiring the applicant to demonstrate to the water court that no injury will occur to other water right owners. The following are bullet points of the advantages of filing the plan before July 1, 2009:

- The new rules increase the burden on water resources engineers, and therefore the cost of such engineers to all parties.
- Specifically, once the new rules are in place, the parties' experts are required to meet twice, confidentially and without counsel or the parties present, to try and resolve disputed issues. Thus, without a qualified expert such as a water resources engineer, a party would not be able to participate in this key component of the negotiation process. Consequently, parties will have to incur the cost of retaining a qualified water resources engineer or other expert just to participate meaningfully in the process. This cost could prove to be a difficult burden for many pro se parties or those with limited resources.
- In addition, although the goals of the new rules are laudatory in their attempt to increase the efficiency of the process, the first water court cases subject to the new rules are likely to experience additional delays and increased costs while the court, its personnel, parties, counsel, and engineers all learn, and adapt to, the new system. Moreover, the provisions concerning formal meetings between experts in the revisions to Rule 11, merely formalize a process that often occurred informally in the past. The unintended result of these revisions may be to stymie cooperative, informal, and early negotiations between the parties and their engineers.
- The new rules do not increase the transparency of the process or make the water court process more open to the public. Water court proceedings and the documents filed therein, like most adjudicatory proceedings in the State of Colorado, are readily available from the Court. The new rules do not change this. There is no significant difference in the openness of the process before and after the new rules. The revisions are concerned with perceived problems related primarily to efficiency.
- In a June 4, 2009 letter to the group Custer County Commissioners from C-4 Concerned Citizens for Custer County ("C4"), C4 represented that any new plan for augmentation filed after July 1 must include "a description of all water rights to be established or changed by the plan, a map showing the approximate location of historical use of the rights, and records, or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist." The letter goes on to claim that "[t]his language is completely new and is designed to ensure that those affected by a new augmentation plan are informed of the details of the plan at the outset and do not have to fight for details in the

Custer Aug. Plan

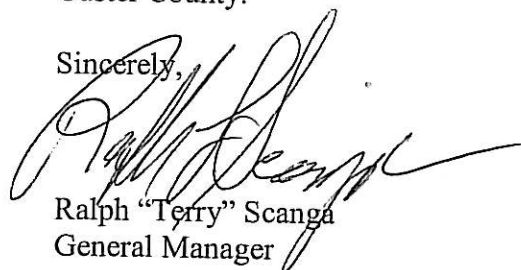
water court.” This is incorrect. Applications for approval of a plan for augmentation have always required such information, and mandatory disclosures pursuant to C.R.C.P. 26(a) provide parties with additional information concerning the materials supporting the application, without even having to ask for it. The new rules do not appreciably change the disclosure obligations of an applicant with respect to a proposed augmentation plan.

- The new rules do not lessen the burden on the applicant to demonstrate to the water court no injury will occur to other water rights owners.

Fifth, many of the concerns expressed by “C-4” are not within the purview of the water court and relate to policies of administration of the augmentation plan by the District. These concerns are related to the setting of a priority for the augmentation of structures so that the out of compliance structures would be served before new structures and the cost of participation in the plan. Augmentation decrees do not provide for these administrative policies. Since the total replacement requirement for all potentially out of compliance plans is about 30 acre feet per year and the District’s water supplies in Custer County alone far exceed this amount, the issue of priority of augmentation is at best a “Trojan Horse”. The cost of augmentation has not been determined yet but will most likely closely follow the present cost established in the other District plans. That cost is significantly less than an individual seeking augmentation through a private plan would be forced to pay. In any case the policy discussion is premature and not related to the filing of a plan of augmentation with the water court. Further, it is odd that this citizen group has shown little concern about the protection of senior water right owners; the whole purpose of augmentation.

Finally, the filing of the plan of augmentation is not the end of public input or public meetings, rather it is the beginning. It is the intent of the District to set up public meetings with the assistance of the Custer County Commissioners beginning in mid-July. Input from objectors and water right owners are crucial to the process of fine-tuning a plan of augmentation. Thus, the District requests the setting of meetings beginning with a July Custer County Commissioner work session. Information on the Custer County Augmentation Plan has been posted on the District web site at www.uawcd.com and will continue to be posted as it becomes available as a further convenience to the citizens of Custer County.

Sincerely,



Ralph “Terry” Scanga
General Manager

Enc: Draft Applications