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EXECUTIVE SESSION MEMORANDUM

TO: **Douglas County Board of County Commissioners**

CC: **Lance Ingalls, Esq., Douglas County Attorney**

FROM: **Stephen H. Leonhardt, Esq. and April D. Hendricks, Esq.**

DATE: **March 23, 2022**

SUBJECT: **Renewable Water Resources (RWR) Proposal**

This memorandum summarizes our legal analysis of the proposal made to Douglas County by Renewable Water Resources, LLC ("RWR"), and of several issues that proposal raises for Douglas County.

EXECUTIVE SUMMARY

RWR's proposal has generated considerable controversy, with proponents and opponents expressing differing views on numerous issues. Here are our conclusions on the legal issues that have been raised:

1. The RWR proposal does not raise the same issues that were litigated and decided in previous cases brought by RWR's predecessors.

2. The anti-speculation doctrine allows Douglas County to act as a governmental agency providing water for its residents.

3. In order to do so, Douglas County must show that it has a feasible water supply plan, to provide water (1) by agreement with water providers within the County, and/or (2) to County residents who are not served by existing water providers.

4. Douglas County will also need to show the amount of water being obtained is necessary to meet the County's water needs that will not be met from other sources, within a reasonable planning period (presumed to be 50 years).

5. There is no "unappropriated water" available in the Confined Aquifer for RWR's proposed pumping.

6. Therefore, the water may be taken and used only if the Water Court in Division 3 (Alamosa) approves a plan for augmentation that meets all legal requirements for preventing injury to other water rights.

7. In the San Luis Valley, an augmentation plan for wells must not only prevent injury to water rights on the stream system, but must also maintain the sustainability of both the Confined Aquifer and the Unconfined Aquifer.

8. This requires, at a minimum, providing one-for-one replacement for all water pumped, either by retiring historical well pumping or by recharging the aquifer.

9. RWR has not yet developed an augmentation plan in sufficient detail to demonstrate that its plan will meet the requirements of the Rules and avoid injury to other water rights.

10. Current Rules require one-for-one replacement within the same Response Area. RWR cannot meet this requirement, even if it were to acquire and retire all wells within its Response Area. Therefore, RWR's plan cannot succeed without an amendment to this rule. RWR is developing a legislative strategy to address this issue.

11. The augmentation plan will also require changing and storing surface water rights (including some that RWR owns), in order to replace depletions to streams.

12. As applicants, RWR and Douglas County will bear the burden of proving that their augmentation plan meets all requirements of the Rules and avoids injury to other water rights.

13. RWR will not get augmentation credit for any reductions in pumping (from either aquifer) that are already necessary to meet sustainability requirements.

14. Before RWR and Douglas County can file an augmentation plan application, they will need to:

    a. Enter into a contract with each other;
    b. Develop a plan and further agreements for use of the water rights (County);
    c. Obtain an amendment to the Rules (by State legislation or rulemaking) to allow more flexibility in replacement locations;
    d. Buy sufficient wells to retire 22,000 acre-feet of historical pumping from the Confined Aquifer at appropriate locations (RWR);
    e. Identify/ acquire surface water rights to change, and storage locations, to replace surface stream depletions at appropriate locations (RWR); and
    f. Develop engineering, including runs of the RGDSS computer model, to demonstrate that the replacements are sufficient to meet all requirements of the Rules and avoid injury to water rights.

15. The augmentation plan decree will impose ongoing requirements on Douglas County, under supervision of the Water Court's retained jurisdiction. Douglas County (rather than RWR) likely will have primary responsibility, perhaps sole responsibility, for meeting these requirements.

16. These requirements will include changing replacement requirements as the Rules are changed in the future, and likely will include revegetation of the historically irrigated lands from which replacement water is being removed, which may require use of some of the water.

17. The permanent retirement of thousands of acres of irrigated lands makes it very difficult to create a "win-win" with the San Luis Valley.

    a. Current state water policy (including the Water Plan) favors temporary leasing rather than permanent dryup, in order to preserve agricultural lands and communities whenever possible.
    b. Effectively addressing these impacts will require negotiating IGA(s) with RGWCD, SLVWCD and/or Saguache County.

18. Douglas County will face numerous hurdles to obtain federal, state and county permits for the project after a decree is entered. RWR does not intend to obtain permits before going to Water Court, and RWR's current proposal calls for Douglas County to bear all responsibility for obtaining the required permits for this project. Obtaining the required federal, state, and county permits likely will take several years, at a substantial financial cost to Douglas County, with a risk that one or more permits will be denied. RWR may consider to what extent RWR will remain involved in this process, if the County desires RWR's continued involvement (as a public-private partnership).

19. The RWR project is not consistent with the Colorado Water Plan, so it likely will not qualify for any state assistance in meeting permit requirements.

20. The project facilities will require 1041 permits from Saguache, Chaffee and Park Counties, and likely will also require federal and state environmental permits and/or right-of-way approval. The federal permits and approval will require compliance with the National Environmental Policy Act ("NEPA") procedural mandates and the Wirth Amendment.

21. The Wirth Amendment requires findings of "no harm" to the Great Sand Dunes National Park, Baca National Wildlife Refuge, and Closed Basin Project before any federal permits or other federal approval may be granted. Some of these issues may get resolved in Water Court, and some may be left to the subsequent permitting process to resolve.

22. Even if all federal, state and local permits are obtained, mitigation requirements under these permits may reduce the amount of water available under decreed water rights.

23. RWR's price is based on the amount of "paper water" available to pump from the wells, as determined by the Water Court, which is an upper limit. The amount of water actually available to Douglas County will be less, reduced by:

    a. Any potential shortfalls in physical water availability to the wells;
    b. Any reductions necessary to meet augmentation plan requirements under the Court's retained jurisdiction (including any reductions for sustainability and water needed for revegetation requirements); and
    c. Transit loss (over 10%) as the water is delivered down the South Platte River from the proposed pipeline.

24. RWR proposes that Douglas County's initial payment be refundable in the event the Water Court does not decree rights for at least 12,000 AF. Before making the initial payment, the County should request sufficient security for this refund obligation—either holding the payment in escrow or obtaining a lien on property RWR owns (RWR estimates the value of its Ranch is $15-20 million).

25. RWR's proposal does not require agreements for storage/ conveyance on the South Platte River. Therefore, Denver's and Aurora's refusal to consent is not fatal. Some of the potential end users may have their own storage accounts in Chatfield Reservoir, which can help to make the water available at the times it is needed, but could require further federal approval.

26. The RWR proposal is not eligible for ARPA funds under current federal regulations.

I. HISTORICAL BACKGROUND

Since at least the 1980s, water developers have had visions of pumping groundwater from the northeastern San Luis Valley ("SLV") and piping the water over Poncha Pass to serve growing populations on Colorado's Front Range. RWR's proposal seeks to use some of the same water resources, but differs significantly from the previous proposals in order to meet some of the objections raised to those proposals and resulting legal constraints. Still, political opposition to such export proposals has solidified in the previous political and legal battles, resulting in a strong and broad-based front of opposition that is highlighting the legal constraints and political challenges to RWR's current proposal.

The most notorious proposal, and most thoroughly litigated, was brought by American Water Development, Inc. ("AWDI") in 1986. AWDI claimed rights to 200,000 acre-feet (AF) of groundwater from beneath more than 100,000 acres, including RWR's current property as well as the adjacent Baca Land Grant property, which is now the Baca National Wildlife Refuge. Two of

AWDI's claims were fully litigated and then rejected by the Water Court: (1) that the Mexican government's land grant for the Baca property (and related U.S. laws) conveyed water rights with that property; and (2) that much or all of the claimed groundwater was nontributary (i.e., legally disconnected from the stream system, which would avoid the need for an augmentation plan). The Colorado Supreme Court affirmed the Water Court's decisions rejecting these claims.[1] RWR is not proposing any similar claims to the AWDI claims that the Water Court rejected.

In the same case, AWDI also made an alternative claim for tributary groundwater with an augmentation plan, more similar to what RWR now proposes. Just three weeks before the scheduled trial in 1991, AWDI asked to dismiss that alternative claim. The Water Court (affirmed by the Supreme Court) allowed the dismissal, but at a heavy cost: AWDI was held liable for the opposing parties' attorney fees, expenses and costs incurred in litigating the dismissed claim, a total of over $2,700,000.[2]

Gary Boyce and his affiliated entities, including Stockman's Water Co. and Cotton Creek Circles, then pursued water development on much of the former AWDI property, including the property now owned by RWR. Significantly, the Baca Grant property was donated to The Nature Conservancy and became the Baca National Wildlife Refuge, just north and west of the Great Sand Dunes National Park, so the Boyce entities did not pursue water development on the Baca property. Boyce pursued several proposed statewide ballot initiatives, aimed at weakening the Rio Grande Water Conservancy District ("RGWCD") and existing well users in the San Luis Valley. Two of these initiatives were on the 1998 general election ballot (1998 Initiatives 15 and 16), where they lost by 3-to-1 margins.

The Boyce entities did not file any applications in Water Court. Their most extensive litigation resulted from Cotton Creek Circles' opposition to the State Engineer's Confined Aquifer New Use Rules, through trial in 2006 and an appeal decided in 2008.[3] Those Rules, and the decisions upholding the Rules, set the stage for RWR's current proposal. The court rejected Boyce's challenges to the sustainability/ artesian pressure requirements of the rules and the resulting one-for-one replacement requirement for new pumping from the Confined Aquifer.[4] Boyce did not challenge the State Engineer's 2015 Rules, apparently in hope for greater collaboration with local water users, even though those Rules impose further requirements for new wells in the Confined Aquifer. The relevant provisions in both sets of Rules are further discussed below.

The AWDI and Boyce litigation and ballot initiative battles mobilized strong local opposition to proposed exports of water from the SLV. The opponents have succeeded in enacting state and federal legislation and rules that impose formidable obstacles to such proposals, but also make the ground rules more clear than they were at the time of the AWDI litigation.

[1] *AWDI v. City of Alamosa,* 874 P.2d 352 (Colo. 1994).
[2] *Id.,* 874 P.2d at 376-388.
[3] *Simpson v. Cotton Creek Circles, LLC,* 181 P.3d 252 (Colo. 2008).
[4] *Id.*

II. WATER COURT APPROVAL NECESSARY TO DIVERT GROUNDWATER FROM THE RWR PROPERTY FOR USE IN DOUGLAS COUNTY.

As RWR and others have discussed, any water diversions of the nature proposed by RWR will need to be approved by the Water Court in Water Division 3, based in Alamosa. This section describes the requirements and prospects for this Water Court proceeding to adjudicate rights to use groundwater from the Confined Aquifer. If Douglas County agrees to purchase the water rights, it should be a co-applicant with RWR in this proceeding, for reasons discussed below.

A. The Anti-Speculation Doctrine

To avoid dismissal, the application will need to satisfy the "anti-speculation doctrine" under Colorado water law. This doctrine generally requires potential users of water to demonstrate a specific beneficial use before being granted a water right. Speculating, or appropriating water for mere profit rather than use, is not a beneficial use and is not allowed under Colorado water law.[5]

The statute codifying this doctrine, C.R.S. § 37-92-103(3)(a), defines an "appropriation" of water and provides:

> "Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by the following:
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> 1. The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefitted by such appropriation.
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> 2. The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

Thus, to avoid objections based on speculation, any appropriator of water rights must have a "specific plan and intent" to take water for specific beneficial uses. With regard to the further requirement to hold an interest in the lands or facilities to be served, a "governmental agency" has a limited exception. This exception, while not a total exemption from the anti-speculation doctrine, provides a government agency greater flexibility to meet the needs of its growing population.[6]

[5] *See Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566, 568 (Colo. 1979) ("Our constitution guarantees a right to appropriate, not a right to speculate.").
[6] *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 37 (Colo. 1996) ("*Bijou*").

Absent a contractual relationship as "agent in fact" for an end user or "governmental agency," RWR could not obtain a decree for water rights to be used by others.

Douglas County qualifies for the "governmental agency" exception to the extent it seeks to obtain water for its present and expected future residents and constituents (and not for use outside the County). However, it "must demonstrate that it has a governmental agency relationship with the end users to be benefitted by the water it seeks to appropriate."[7] Moreover, the amount of water obtained must be consistent with the County's "reasonably anticipated requirements based on substantiated projections of future growth."[8]

Douglas County does not currently act as a water provider, either retail (providing water directly to end users) or wholesale (providing water to municipalities and other retail water suppliers within the County). However, the County has the legal authority to do so, if it chooses. The governmental agency exception "applies only to a 'governmental agency . . . *for the persons proposed to be benefitted*' by" the requested water rights.[9]

The court decisions have not spelled out how this requirement applies to a local government providing "wholesale" water service within its boundaries. [redacted]

As a governmental agency supplying water for at least some of its growing population, Douglas County also will need to demonstrate: (1) it is using a reasonable water supply planning period, (2) its substantiated population projections are based on a normal rate of growth for the period, and (3) the amount of available water is reasonably necessary to serve the County's anticipated needs for the planning period.[10] The courts typically have accepted a 50-year planning period as reasonable, holding that "while each case depends on its own facts, the water court should closely scrutinize a governmental agency's claim for a planning period that exceeds fifty years."[11]

To the extent that Douglas County plans to furnish the water to local water suppliers, it should have contracts in place with those entities it plans to serve, and must show that the contracted amounts of water are necessary to meet "the reasonably anticipated future population

[7] *United Water & Sanitation Dist. v. Burlington Ditch Reservoir & Land Co*., 2020 CO 80, ¶ 29, 476 P.3d 341 (Colo. 2020) ("*United*").
[8] *Bijou*, 926 P.2d at 39.
[9] *United*, 476 P.3d at 349 (emphasis in original).
[10] *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited,* 170 P.3d 307, 309-10 (Colo. 2007) ("*Pagosa I*").
[11] *Id.,* 170 P.3d at 317.

demands of the municipalities with which it contracts."[12] This test applies the *Pagosa I* standards outlined in the previous paragraph, and requires consideration of whether the water suppliers' "existing water rights are insufficient" to meet the anticipated population demands.[13]

[redacted]

To meet anti-speculation requirements, Douglas County will need a study to show the amount and timing of reasonably anticipated future water needs within the County, consistent with the *Pagosa I* standards and with due consideration of any recent studies of regional water needs as part of the ongoing Colorado Water Conservation Board ("CWCB") effort to identify water needs and unmet gaps. To the extent that the County relies on water needs within areas served by current water suppliers, it will be important to have agreements with those water suppliers and their cooperation in carrying out the study of water needs.

[redacted]

B. Water Court Process and Requirements

The case will be initiated by filing an application with the Water Court in Water Division 3. The application will include claims for underground water rights and a plan for augmentation (the augmentation plan is explained in detail below). It may also include changes of existing water rights (surface water and/or groundwater rights) to be used in the augmentation plan. As discussed below, several items will need to be addressed before this application is filed, so the application may not be ready to file until 2023 or later.

RWR plans to take the lead in filing and pursuing this application in order to obtain a final decree, at which time the balance of Douglas County's purchase price will be determined. Under RWR's proposal, the balance will be due six months after the decree is entered and has become final (no longer appealable). Douglas County will have the opportunity to participate as a co-applicant in the case, and it likely will be in Douglas County's interest to do so. Several issues in

[12] *Upper Yampa Water Conservancy Dist. v. Dequine Family, L.L.C.*, 249 P.3d 794, 800 (Colo. 2011) ("*Upper Yampa*").
[13] *Id.*, citing *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774 ("*Pagosa II*")

the case (including the anti-speculation doctrine discussed above) will bear directly on Douglas County, whether or not it is a party, and most of the terms and conditions included in the decree will affect Douglas County, as further discussed below. Thus, Douglas County likely will want to be a party involved in framing the issues and shaping the decree terms in litigation and/or settlement negotiations.

Once the application is filed, any interested party may file a statement of opposition within the next two months. Parties may file such statements in order to protect their own water rights against injury, and/or to require the Applicants (RWR and Douglas County) to prove all elements of their claims. At this point, it appears likely that several dozen parties will file statements of opposition to the application RWR proposes. The Applicants will have the opportunity to propose and negotiate decree terms with the parties. Each Opposer may either stipulate to settle the case based on proposed decree terms (which is how most Water Court cases are resolved), or to take the case to trial.

Unless all parties settle before trial, the Water Court will hold trial, likely between 2 – 4 years after the application is filed (possibly later if required by adjustments to the RGDSS Model, as discussed below). Trial will be held in Alamosa, before the Water Judge for Water Division 3 (consisting of the San Luis Valley), who will be the finder of fact; there are no jury trials in Water Court. The trial of this case likely will last for several weeks (perhaps months), with substantial costs incurred for legal and engineering participation at trial. The final decree likely will be entered several months after the trial concludes. A final decree from Water Court may be appealed directly to the Colorado Supreme Court. The Supreme Court will reach its own conclusions on any disputed legal issues, but will not disturb the Water Court's findings of fact "unless they are wholly unsupported by the evidence."[14]

The application will need to meet the requirements of two sets of Rules that were authorized by legislation, adopted by the State Engineer, and confirmed by the Water Court (Water Division 3):

1. The *Rules Governing New Withdrawals of Ground Water in Water Division 3 Affecting the Rate or Direction of Movement in the Confined Aquifer System* ("Confined Aquifer Rules"), adopted in 2004 and upheld by the Water Court and Colorado Supreme Court (following trial and appeal by Boyce), impose requirements (including 1-for-1 replacement, maintaining artesian pressure, use of the RGDSS model, and augmentation to prevent injury) for any new wells or new uses of water from the Confined Aquifer.

2. The *Rules Governing the Withdrawal of Groundwater in Water Division 3 (the Rio Grande Basin) and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division 3 for All Irrigation Water Rights* ("Groundwater Use Rules"), adopted in 2015 and upheld by the Water Court and Colorado Supreme Court, apply to all groundwater use (including existing use) in

[14] *AWDI*, 874 P.2d at 367.

both the Unconfined and Confined Aquifers, and impose additional requirements for augmentation plans and for attaining sustainability of these aquifers.

Under both sets of rules, the Rio Grande Decision Support System (RGDSS) groundwater model is used as the standard for assessing compliance. The Rules recognize that the RGDSS model may be revised periodically based on new data and better knowledge of the relationships between the Confined and Unconfined Aquifers and surface streams. Groundwater Use Rule 24 explains the presumed correctness of the RGDSS model and the process for ongoing review and revisions to the model.

C. Confined Aquifer Groundwater

All of the groundwater that RWR proposes to pump is in the Confined Aquifer. This section summarizes the legal characteristics of groundwater in the Confined Aquifer of the San Luis Valley.

1. No "unappropriated water" is available in the Confined Aquifer

RWR and its predecessors have argued that water is available to withdraw and use from the Confined Aquifer. However, legal precedents have clearly established that there is no *unappropriated* water available from the Confined Aquifer. As a general rule, groundwater is not available for appropriation when pumping the groundwater would injure other parties' water rights. The Court's decisions in *AWDI* and *Cotton Creek Circles*, as well as the State Engineer's findings in adopting the Confined Aquifer Rules and the Groundwater Use Rules, establish the potential for material injury when taking water from the Confined Aquifer, such that the Confined Aquifer is overappropriated. Thus, the water is not legally available for appropriation, and the Colorado constitutional right to appropriate unappropriated water does not apply.[15] Where no unappropriated water is available, an augmentation plan is necessary so that water can be taken outside of the prior appropriation system, while preventing injury to water rights in that system.

2. Confined Aquifer vs. Denver Basin groundwater

As geologists have explained, the Confined Aquifer has different physical characteristics than the Denver Basin aquifers found in Douglas County. It also has several different legal characteristics:

1. The entire Confined Aquifer is classified as tributary groundwater, due to its interaction with the Unconfined Aquifer and stream system. Large portions of the Denver Basin aquifers have been classified as nontributary (so that no augmentation plan is required to address the minimal impacts of pumping on surface stream systems).

[15] *See Cotton Creek Circles*, 181 P.3d at 261.

2. The Denver Basin aquifers (whether classified as nontributary or "not nontributary") generally are allocated based on the ownership of overlying land. Like most other tributary groundwater in Colorado, Confined Aquifer groundwater may only be withdrawn by obtaining a water right and/or well permit. While land ownership (or landowner consent) at the well site, is important in obtaining such rights, the land boundaries do not determine the extent of the water right.

3. Augmentation plans are required for pumping "not nontributary" Denver Basin groundwater in order to replace depletions to affected surface streams, both during and after the years in which the well is used. In the San Luis Valley, the Confined Aquifer Rules and Groundwater Use Rules require replacements not only to protect surface water rights, but also to maintain sustainability of the Confined Aquifer and Unconfined Aquifer.

4. The Confined Aquifer and Unconfined Aquifer are connected to each other, unlike the Denver Basin aquifers which are in disconnected layers. Thus, an augmentation plan for pumping from the Confined Aquifer will need to address sustainability of *both* aquifers.

D. Plan for Augmentation

As discussed above, the Rio Grande River and its tributary waters (including the Confined Aquifer) are considered over-appropriated. As a result, new non-exempt wells that pump groundwater from the Confined Aquifer are presumed to cause injury to vested water rights. Thus, the appropriation and beneficial use of groundwater from the Confined Aquifer may not occur unless the Water Court approves a plan for augmentation.[16]

A plan for augmentation is a "detailed program to increase the supply of water available for beneficial use," which may be accomplished in various ways, including by providing substitute supplies of water.[17] Typically, an augmentation plan authorizes the out-of-priority diversion of water (including groundwater) for beneficial use, while requiring that a replacement supply of water is introduced to the system to offset any depletions resulting from the new diversions of water.[18] Such a plan ensures that the new diversions are able to occur without causing injury to senior vested water rights.[19] Augmentation plans are intended to allow for the "maximum utilization" of Colorado's limited water supplies while ensuring that senior water rights in over-appropriated systems are protected from injury.[20]

[16] *See* Confined Aquifer Rules 5.F and 6.A.
[17] C.R.S. § 37-92-103(9).
[18] *See Well Augmentation Subdist. of Cent. Colo. Water Conservancy Dist. v. Aurora,* 221 P.3d 399, 409 (Colo. 2009).
[19] *Id.*
[20] *Empire Lodge Homeowners' Ass'n v. Moyer,* 39 P. 3d 1139, 1150 (Colo. 2001).

By statute, the proponent of an augmentation plan bears the burden of demonstrating that out-of-priority well pumping allowed under the plan will not injure vested rights.[21] To meet this burden, an augmentation plan must be supported by appropriate engineering analysis of the impacts of new well pumping to vested water rights. To ensure that well pumping will not reduce the amount of water available to satisfy senior water rights, the augmentation plan must replace out-of-priority depletions to the affected rights (on the stream and/or aquifer) in appropriate time, location, and amount, making that replacement water available to satisfy senior water rights.[22]

1. Augmentation Plans in Water Division 3

While Colorado law generally requires that an augmentation plan replace out-of-priority depletions so as to prevent injury to vested rights, specific rules adopted in Water Division 3 (as discussed above) impose additional requirements for such plans involving new withdrawals of groundwater, to ensure the sustainability of the local aquifer system and compliance with the Rio Grande Compact.

Because there is no unappropriated water in the Confined Aquifer, the 2004 Confined Aquifer Rules require managing the groundwater supply of the San Luis Valley to protect surface water rights from injurious depletions while also ensuring sustainability of the Confined Aquifer system and avoiding violations of the Rio Grande Compact. The 2015 Groundwater Use Rules govern both existing and new groundwater uses in both aquifers within the San Luis Valley, in an effort to integrate surface and groundwater use and further promote sustainability of the aquifer system. The most significant aspects of these rules, as related to the RWR Proposal, are discussed below.

a. One-for-One Replacement

Rule 6 of the Confined Aquifer Rules outlines the standards by which the State Engineer must determine if new withdrawals of groundwater from the Confined Aquifer will injure vested water rights. Under Rule 6.B.2, to prevent injury, new withdrawals of water from the Confined Aquifer must be offset by changing the point of diversion of or permanently retiring existing vested water rights to withdraw water from the Confined Aquifer that have a historical withdrawal equal to the new proposed withdrawals from the aquifer. This Rule, therefore, mandates one-for-one replacement of new withdrawals of water from the Confined Aquifer to prevent injury to other vested water rights and to ensure the sustainability of the aquifer.

Rule 6.B.2.a further provides that, if a new withdrawal of water from the Confined Aquifer will be based on the change or permanent retirement of an existing right to withdraw groundwater from the Confined Aquifer, then the changed or retired water right be located such that the water to be made available by permanently retiring the right will prevent injury to the vested water rights of others from a new withdrawal. The Confined Aquifer Rules divided the San Luis Valley into

[21] C.R.S. §§ 37-92-304(3); 305(3)(a); and 305(8).
[22] *City of Aurora v. Colo. State Eng'r,* 105 P. 3d 595, 615 (2005); *Buffalo Park Dev. Co. v. Mountain Mut. Reservoir Co.,* 195 P. 3d 674, 684 (Colo. 2008).

four hydrologic zones, and Rule 6.B.2.a created a rebuttable presumption that an existing well in a different hydrologic zone, or that withdraws from a different layer of the Confined Aquifer, is not located so as to prevent injury. Under this rule, wells that are permanently retired to satisfy the one-for-one replacement requirement generally must be located in the same hydrologic zone as the new withdrawal, but applicants were permitted to rebut that presumption by introducing evidence that the retirement of wells in other zones would be sufficient to prevent injury. However, under Rule 7 of the 2015 Groundwater Use Rules, depletions resulting from groundwater withdrawals must be determined based upon each hydrologic zone (or "Response Area"); as a result, to ensure aquifer sustainability, retired water rights must be located within the same Response Area as the new withdrawal.

b. Maintaining Artesian Pressure within the Confined Aquifer

Additionally, to ensure the sustainability of the Confined Aquifer, the Confined Aquifer Rules require the maintenance of the artesian pressure within the aquifer. New or increased withdrawals of groundwater from the Confined Aquifer lowers the aquifer's artesian pressure and, as a result, reduces the amount of water available for withdrawal by others, not only in the Confined Aquifer, but also in the unconfined aquifer and surface streams. The requirement to maintain artesian pressure levels is, thus, intended to prevent injury to existing water rights, ensure the sustainability of the Confined Aquifer, and support the delivery of water to the Colorado-New Mexico state line, in satisfaction of Colorado's obligations under the Rio Grande Compact.

To avoid adverse impacts to the artesian pressure in the Confined Aquifer, Rule 6.B.4 of the Confined Aquifer Rules prohibits new withdrawals of groundwater from the Confined Aquifer if those withdrawals will cause fluctuations in artesian pressures in the aquifer to fall outside the range in pressures that historically occurred from 1978-2000.[23] Under this Rule, average artesian pressure levels must remain similar to those that occurred during that time period. The 2015 Groundwater Use Rules recognize that implementing this standard is difficult, considering the lack of data on the artesian pressure within the Confined Aquifer during the 1978-2000 period. Because of the present lack of historical data concerning artesian pressure within the aquifer, the 2015 Groundwater Use Rules instead limit Confined Aquifer groundwater withdrawals to the levels that are estimated to have occurred during 1978 – 2000, pending the collection of additional data concerning artesian pressure within the Confined Aquifer.

To develop the necessary data concerning the fluctuating artesian pressures within the Confined Aquifer, Rule 8.1.1 and 8.1.2 require additional data collection and investigation of the hydrologic conditions, water levels, and artesian pressure in the Confined Aquifer. The State Engineer must prepare a report with the results of these investigations within ten years of the effective date of the Groundwater Use Rules, which will be in 2027. During the ten-year data

[23] In House Bill 98-1011, the General Assembly authorized the State Engineer to adopt rules for the sustainability of the Confined Aquifer, which resulted in the Confined Aquifer Rules. In this legislation, the General Assembly presumed that the Confined Aquifer was in a sustainable condition during this time period; for this reason, the Confined Aquifer Rules and the Groundwater Use Rules focus on this time period as a benchmark for sustainability.

collection period (2017-2027), Rule 8.1.7 of the Groundwater Use Rules requires that withdrawals of water from the Confined Aquifer must be limited so that the five-year running average of withdrawals does not exceed the average annual groundwater withdrawals in the Response Area at issue for the 1978-2000 time period. Accordingly, under this Rule, withdrawals from the Confined Aquifer must be limited to the historical average amount of water withdrawn from the Response Area from which the withdrawals occur.

As a result of this ten-year study, the State Engineer may propose changes to the Groundwater Use Rules in order to implement the requirement that artesian pressure in the Confined Aquifer be maintained at historical levels. Following the completion of that study in 2027, the State Engineer may initiate a new rulemaking, with additional or different requirements for promoting the sustainability of the aquifer. Any new rules proposed by the State Engineer may further restrict well pumping from the Confined Aquifer, but Rule 8.1.8 does provide the State Engineer the discretion to allow groundwater withdrawals in excess of the historical average withdrawal if the data demonstrates that additional pumping will not adversely impact historical artesian pressures. At this time, with the information that is publicly available, it is not possible to predict the results of the study, or the extent to which the 2015 Groundwater Use Rules may be modified in response to the study's findings.

c. Replacement of Injurious Depletions to Unconfined Aquifer and Surface Streams

Rule 6.B.5 of the Confined Aquifer Rules acknowledges that "there are only limited times when depletions to the flows of natural streams . . . will not cause injury to senior appropriators or impair Colorado's ability to meet its interstate Compact obligations under the Rio Grande Compact." Accordingly, in order to make new withdrawals of groundwater from the Confined Aquifer, applicants must demonstrate that its replacement water will be available to replace all depletions to the flow of natural streams (including both flowing surface streams and the Unconfined Aquifer), to meet the requirements of senior water rights in time and location, and to meet Colorado's obligations under the Rio Grande Compact.

d. The Rio Grande Decision Support System ("RGDSS") Model Determines Whether Necessary Criteria have been satisfied.

From 1998 through 2004, the State Engineer and the Colorado Water Conservation Board undertook a joint study of the Confined Aquifer system, as directed by House Bill 98-1011, which culminated in the development of the Rio Grande Decision Support System ("RGDSS") model. The RGDSS is "one of the most comprehensive studies of the [San Luis] Valley's geology and hydrology that has ever been undertaken," and involved extensive data collection and modeling of the Valley's aquifer and stream systems.[24] For all augmentation plans in the Rio Grande basin, the RGDSS model will determine the extent of depletions resulting from pumping, the extent to which

[24] *Simpson v. Cotton Creek Circles, LLC*, 181 P. 3d 252, 257 (Colo. 2008).

the depletions would cause injury, and whether injurious depletions have been appropriately replaced to offset new withdrawals of water.

The RGDSS provided the basis of the Confined Aquifer Rules.[25] Under Rule 6.A.1 of those Rules, the State Engineer must rely on the RGDSS Model to determine if new withdrawals of groundwater will impact the rate or direction of movement of water in the Confined Aquifer. Rule 6.B.6 provides that the State Engineer must use the RGDSS Model to determine the amount, time, and location of depletions and fluctuations of artesian pressures that would be caused by new withdrawals of groundwater from the Confined Aquifer. Under this rule, there is a rebuttable presumption that the RGDSS Model (the version in use at the time an augmentation plan application is filed) accurately determines the amounts of depletions and fluctuations in artesian pressures caused by new groundwater withdrawals.

In the 2015 Groundwater Use Rules, Rule 5.9 declared that "the RGDSS Model is presumed to be the most reliable Groundwater Model currently available for determining stream depletions within the modeled area." Rule 24.1 further confirmed the rebuttable presumption that the stream depletions modeled by the RGDSS are reliable. Rule 24.3.1 requires that the State Engineer update the RGDSS Model with new and updated information, if doing so will better represent the hydrologic system within Water Division 3. Accordingly, the RGDSS Model is not static and is subject to periodic updates as new or more reliable data becomes available.

2. RWR's Augmentation Plan

In order to receive the Water Court's approval of new withdrawals of water from the Confined Aquifer, RWR's augmentation plan must demonstrate that those withdrawals will not injure other vested water rights. In accordance with the foregoing rules, RWR's plan must provide for 1) one-for-one replacement of withdrawals in the Confined Aquifer, from the same Response Area from which the withdrawals occur; 2) maintain artesian pressures within historical levels (or limit groundwater withdrawals to the historical average levels from 1978-2000); and 3) replace any depletions to the Unconfined Aquifer or the stream system to prevent injury to vested water rights and to avoid violations of the Rio Grande Compact. RWR's augmentation plan is still in the early, conceptual stages; RWR has not yet developed an augmentation plan in sufficient detail to demonstrate that its plan will meet the requirements of the Rules and avoid injury to other water rights.

a. Retirement of Wells to Satisfy One-for-One Replacement Obligation

RWR proposes to develop up to 22,000 acre-feet per year from the Confined Aquifer by a series of wells located on its property. The well locations are in Response Area 4, which includes the San Luis Creek area in the northern San Luis Valley. To develop this amount of groundwater, in compliance with existing requirements under the Confined Aquifer Rules and Groundwater Use Rules, RWR will have to retire a sufficient number of wells in the Confined Aquifer (and within

[25] *Id.*

Response Area 4) to ensure that an equal number of acre-feet per year remain in the aquifer to satisfy the one-for-one replacement requirement. To comply with this requirement, RWR's augmentation plan must identify the wells, and the amount of withdrawal from each well, that will be retired in order to offset RWR's annual withdrawal of 22,000 acre-feet. RWR plans to compensate interested well owners for the retirement of their wells, but has not yet identified any specific wells to be permanently retired (though RWR has stated it is aware of willing sellers). In identifying and acquiring these wells, RWR cannot consider any wells and lands that are subject to conservation easements, because these water rights are not eligible for retirement. Additionally, RWR cannot take credit for the curtailment of groundwater withdrawals that may otherwise be mandated under the Confined Aquifer Rules.

However, as further discussed below, RWR cannot comply with one of these requirements because there is insufficient groundwater pumping in all of Response Area 4 to offset pumping of 22,000 AF/ year. (RWR's engineer provided a State Engineer data summary showing average annual pumping between 9,800 – 11,500 AF/year, depending on what timeframe is used.) Thus, RWR will not be able to meet the legal requirements for its augmentation plan, absent a change to the rule requiring replacement to be made in the same response area. The prospects for such a change are further discussed below.

b. Change of Water Rights for Retired Wells

Moreover, in order to retire wells historically used for, and permitted solely for, irrigation, RWR will need to include a change of water rights for the specified wells in its Water Court application, to allow these wells to be used for augmentation purposes. To ensure that the proposed withdrawals do not injure senior water rights, RWR will also have to replace the historical return flows that resulted from the irrigation use of the retired wells. Once included in RWR's augmentation plan, those wells will no longer be used for irrigation, and water from that irrigation use will no longer return to the stream/ aquifer system to satisfy other water rights. Most of those return flows have accrued to the Unconfined Aquifer, so RWR will be responsible for replacing those return flows to that aquifer, in time, location, and amount sufficient to avoid injury.

c. Replacement of Injurious Stream Depletions Caused by New Withdrawals

Regarding injurious depletions to the stream system caused by its new withdrawals, RWR's current projections indicate that its new withdrawals of 22,000 acre-feet of water from the Confined Aquifer will have less than a 3 % (660 acre-feet) impact to the Unconfined Aquifer and surface streams. RWR has proposed to dedicate some or all of its existing surface water rights to the augmentation plan specifically to replace injurious depletions to the stream system. RWR has confirmed that these surface water rights include its decreed irrigation rights that are associated with its ranch in Saguache County (all located on San Isabel Creek), and that RWR also has the option to purchase an additional 1,200-1,500 acre-feet of surface and ground water rights if necessary to replace injurious stream depletions. Moreover, RWR has stated that it is willing and prepared to acquire additional water rights if its modeling projects the need for augmentation supplies at additional locations.

Because RWR's currently-owned water rights are decreed for only irrigation and stock watering, RWR will need to change the use of these water rights to allow their use for augmentation purposes in RWR's augmentation plan. Moreover, to ensure that RWR will be able to use these surface water rights to replace return flows that historically accrued to the stream system at a later time (lagged return flows), RWR may also need to develop one or more ponds to store this water on its property for future release to the stream system. These changes of use will be additional claims that must be included with RWR's augmentation plan application in Water Court.

d. RWR's Inability to Comply with Existing Sustainability Requirements

The current rules and regulations (summarized above) require that: (1) RWR's annual diversions from its wells will be limited to the average annual amount pumped from the Confined Aquifer from 1978-2000; and (2) RWR's retired wells must be located in, and have historically withdrawn water from, the Confined Aquifer in Response Area 4. Response Area 4 is a sparsely populated area of the San Luis Valley surrounding San Luis Creek, with limited historical water use (around 10,000 AF/ year during the 1978-2000 timeframe). Even if 100% of the wells in Response Area 4 are retired, RWR will not be able to provide for one-for-one replacement in the amount needed to support its proposed 22,000 acre-feet per year of withdrawals. For that reason, without a change in the current rules to allow more flexibility in the location of withdrawals and retirement, RWR will neither be able to withdraw the amount of water necessary to satisfy the needs of this project, nor retire a sufficient number of wells to provide the required one-for-one replacement.

[redacted]

3. Prerequisites to Filing Water Court Application

Before filing a water court application for its augmentation plan, RWR must satisfy several requirements, the failure of which could result in denial of RWR's augmentation plan or, at least, reduce the amount of water to which RWR is allowed to develop. RWR can begin undertaking

some of these objectives now or in the near future, but many of these tasks cannot be completed until after RWR identifies the wells to be retired to support its augmentation plan, which itself is contingent upon the success of rulemaking or legislation to afford RWR more flexibility in the location of the retired wells.

1. To satisfy concerns about RWR's proposal being speculative, as discussed above, RWR must enter into a contract to provide water to an end user (in this instance, Douglas County), who then must develop a specific plan for how the water will be used. If RWR and Douglas County cannot demonstrate, to the Water Court's satisfaction, that their plan to develop water in the San Luis Valley is not speculative, then the Water Court will deny the application. [redacted]

2. The success of RWR's proposal is also contingent on a future change to the applicable rules and regulations in the San Luis Valley, either through rulemaking or legislation. Under the present rules, RWR's annual withdrawals are limited to the average historical withdrawals from 1978-2000, and RWR may only retire wells from the same Response Area from which its withdrawals are made. These rules will both limit the amount of RWR's annual withdrawals and will hinder RWR's ability to retire enough wells to provide one-for-one replacement of its withdrawals from the Confined Aquifer. As discussed above, changing these rules is necessary to ensure that RWR can withdraw its proposed 22,0000 acre-feet per year, and retire a sufficient number of wells to satisfy the required one-for-one replacement. However, an attempt to change these rules, either through rulemaking or the legislative process, may take multiple years to complete, depending on the level of opposition the proposal garners.

3. RWR must identify, negotiate, and purchase the wells from which water in the Confined Aquifer will be retired. The amount of water to be retired must be equivalent to the amount of water that RWR proposes to withdraw from the aquifer each year to satisfy the requirement for one-for-one replacement. At the moment, under the current rules, RWR can begin negotiating with well owners in Response Area 4, but as noted above, even if RWR acquires (and retires) all of the wells currently operating in Response Area 4, RWR will not be able to retire enough water to offset more than 11,500 acre-feet of withdrawals per year. For that reason, RWR's negotiation and acquisition of a sufficient number of wells for retirement would not be completed until after the existing rules are amended.

4. RWR must identify whether its currently-owned surface water rights will be sufficient to replace stream depletions under its augmentation plan, once they have been changed to allow for such use. If necessary, RWR will need to acquire additional water rights for augmenting injurious stream depletions (including exercising any purchase options it may have for suitable water rights). To the extent that RWR will need to store the changed water rights on its property to replace lagged return flows

through periodic releases of water, RWR will also need to identify storage locations on its property.

5. To demonstrate that RWR's project will not result in injury, RWR's engineers must complete preliminary engineering analysis, including model runs, demonstrating that RWR is appropriately replacing all injurious depletions resulting from its new withdrawals and replacing historical return flows from the changed retired wells and its changed surface water rights. Because this modeling is dependent on specific location and amount data from the retired wells, this modeling cannot be completed until after the retired wells are identified.

4. Terms and Conditions for Augmentation Plan and Change of Water Rights

To ensure that the terms of its proposed augmentation plan and change of water rights are sufficient to prevent injury to other water users, RWR must incorporate certain terms and conditions in its augmentation plan. By statute, applicants seeking approval of augmentation plans and changes of use must have the opportunity to propose adequate terms and conditions to prevent injury to vested water rights.[26] In general, RWR's engineering analysis must ensure that depletions from RWR's new wells will not exceed the historical depletions of the retired wells and the changed surface water rights, in order to prevent injury to senior water rights, violations of the Rio Grande Company, and any other violations to the applicable rules and regulations impacting Water Division 3. Making such a showing is essential to satisfying both the no-injury requirement and the one-for-one replacement rule.

The development of these terms and conditions for both RWR's augmentation plan and changes of use will also require a showing of the historical use of the wells that are being retired and the surface water rights that are being changed to replace stream depletions. To make such a showing, RWR's engineers must analyze the amount, timing, and location of historical depletions to both the Confined and Unconfined Aquifers for each of the retired wells and the surface water rights. Part of this analysis will also consider the replacement of any lagged depletions to the aquifer caused by the past pumping of the retired wells. This analysis will assist RWR in replacing the historical depletions associated with the use of these water rights, which will ensure that no vested water rights are injured when these water rights are no longer used for their historical purposes.

5. Retained Jurisdiction

Water rights decrees typically require the parties to anticipate, based on data available at the time of the application, the future impacts of plans for augmentation and changes of water rights. For this reason, the Water Court's initial finding of no injury is "necessarily imprecise, because the court cannot be expected to accurately predict the actual future effects" of such a

[26] C.R.S. § 37-92-305(3), (5), and (8).

plan.[27] Thus, any decrees approving plans for augmentation or changes of water rights must be subject to reconsideration by the Water Court on the question of injury to vested water rights.[28] The period during which the Court may reconsider the terms of such decrees is called the period of "retained jurisdiction," and the Court typically has discretion for the length of time it will retain jurisdiction to consider whether the terms and conditions imposed upon plans for augmentation and changes of water rights are sufficient to prevent injury, based upon actual operations under the terms of the decree.[29] The critical inquiry of the Water Court, in determining whether to invoke its retained jurisdiction, is "whether operational experience obtained after the entry of the . . . decree indicates that vested water rights and conditionally decreed water rights may not be sufficiently protected against injury under provisions of the existing decree."[30]

New withdrawals of groundwater from the Confined Aquifer are permitted only if such withdrawals will not adversely impact the sustainability of the aquifer on an ongoing basis. Accordingly, Groundwater Use Rule 6.1.2 requires that the Water Court's retained jurisdiction in a well augmentation plan must include reopening to comply with any changes to the rules, such as the reexamination of aquifer sustainability, based on refinements to the RGDSS. Additionally, since the plan will require retirement of irrigation wells, the change of their water rights from irrigation to augmentation use, and the removal of their historical acreage from irrigation, the Court will also retain jurisdiction to ensure the adequate revegetation of those historically irrigated lands. [31] This requirement will ensure that the historically irrigated parcels, once removed from irrigation, will not "revert to desert or suffer weed infestation that would threaten their future usefulness," among other considerations.[32]

Based upon RWR's proposal to date, RWR will be responsible for prosecuting the augmentation plan and change of water rights application through the entry of a final and unappealable decree from the Water Court. However, any burdens arising following the entry of such a decree, including responding to any petitions seeking to invoke the Court's retained jurisdiction and compliance with all terms and conditions imposed by that final decree, likely will fall on Douglas County, though RWR may be open to negotiating whether to retain any responsibility for satisfying post-decree obligations.

III. ADDRESSING SOCIO-ECONOMIC AND ENVIRONMENTAL IMPACTS

Several concerns have been raised regarding the socio-economic and environmental impacts of RWR's proposal. The Water Court process may address some of these concerns, to a limited extent. These concerns will also be addressed, likely more comprehensively, through the federal, state and local permitting processes as Douglas County seeks to obtain permits needed to complete the project. While RWR has suggested that it may be willing to entertain a further agreement with Douglas County to share responsibilities for permitting and construction of the

[27] *Upper Eagle Reg'l Water Auth. v. Wolfe,* 230 P. 3d 1203, 1212 (Colo. 2010).
[28] C.R.S. § 37-92-304(6).
[29] *Id.*
[30] *Upper Eagle,* 230 P. 3d at 1215.
[31] *See* § C.R.S. 37-92-305(4.5)(a).
[32] *Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 86 (Colo. 1996).

pipeline (as a public-private partnership), that is not part of the current proposal. Unless otherwise agreed, any permitting after the Water Court decree is entered will be Douglas County's sole responsibility.

A. Limited Statutory Requirements to Address Socio-economic and Environmental Impacts in Water Court Proceeding

As mentioned above, revegetation of previously irrigated lands likely will be an issue in the Water Court proceeding on RWR's augmentation plan. When changing water rights from agricultural irrigation to other beneficial uses, C.R.S. § 37-92-305(4.5)(a) requires the Water Court to "include reasonable provisions designed to accomplish the revegetation and noxious weed management of lands from which irrigation water is removed." This statute implements the Water Court's authority "to impose conditions to protect against injury to natural resources other than water."[33] Such requirements can impose substantial burdens on the owner of the changed right to assure that appropriate revegetate and weed control is implemented. Revegetation can also require use of a substantial part of the water right being changed, until revegetation is completed—sometimes 10 to 20 years or more after the Water Court's decree is entered. The City of Aurora has dealt extensively with such requirements in its water transfers out of the Arkansas River Valley, particularly the Rocky Ford Ditch.

RWR's proposal likely fits within the statutory definition of "significant water development activity," which may trigger additional considerations for the Water Court. "Significant water development activities" are defined as "any removal of water that results in the transfer of more than one thousand acre-feet of consumptive use of water per year by a single applicant or an applicant's agents."[34] A "removal of water" is a change in an absolute decreed agricultural water right "from irrigated agricultural use in one county to a use not primarily related to agriculture in another county."[35] In cases where HB 1041 regulations (discussed below) do not apply to such an activity, the Water Court may impose terms and conditions in the decree to offset reductions in property tax revenues that may result from the transfer of water from irrigated agricultural use. Here, we understand that Saguache County's HB 1041 regulations will apply to RWR's proposal to pump groundwater from that county while removing water from agricultural irrigation in the county. Thus, the "significant water development activity" restrictions will apply in Water Court only to the extent that RWR will be removing more than 1,000 AF of consumptive use water from agricultural irrigation in another county, and the removal is not covered by that county's HB 1041 regulations. Otherwise, and particularly in Saguache County, these impacts will need to be addressed through the County's HB 1041 process.

The necessity for federal, state and local permits is a very limited issue in water court proceedings to obtain conditional water rights. The Applicants must show that their project "can and will" be completed, which requires some demonstration of feasibility, even while future

[33] *Id.*, 926 P.2d at 86.
[34] C.R.S. § 37-92-103(10.7).
[35] C.R.S. § 37-92-103(10.4).

contingencies remain.[36] The necessity for future permits does not defeat such a showing, unless it is impossible to obtain the required permits.[37] Following this logic, RWR does not intend to obtain permits or rights of way for the project prior to obtaining a Water Court decree.[38] Instead, the owner of the project and water rights following the decree (Douglas County, if it accepts the proposal) would then need to obtain all permits required for construction of the pipeline and other facilities.

B. Loss of Agricultural Production

RWR's proposal will remove irrigation water from several thousand acres of land currently irrigated from Confined Aquifer wells in the San Luis Valley. While other parts of Colorado have experienced similar "dry-up" of irrigated lands when water rights are transferred from agricultural to municipal use, the San Luis Valley has not. Moreover, the retirement of lands from irrigation for RWR's augmentation plan will be in addition to the reductions of pumping (mainly in the Unconfined Aquifer), which may include permanent retirement of some irrigated land, that will be required to comply with the sustainability requirements of the 2015 Groundwater Use Rules. Irrigated agriculture dominates the San Luis Valley's economy and culture, so the threats to large amounts of the Valley's irrigated agriculture pose a major concern to many residents.

Irrigated lands comprise much of the San Luis Valley's property tax base, so the potential removal of irrigation water would have major impacts to property tax revenues relied on by local governments. Economists point to a "multiplier effect" from irrigated agriculture, posing additional indirect threats to local economies and tax revenues. [redacted]

C. Colorado Water Plan

The Colorado Water Conservation Board (CWCB) adopted the Colorado Water Plan in 2015, establishing the framework for state water policy, and is currently updating the Water Plan. As discussed in recent County meetings by Lauren Ris (CWCB Deputy Director) and James Eklund (former CWCB Director and Water Plan architect), the Water Plan is State policy, not law. It defines the State's strategies for meeting future water needs, including the "gap" between municipal water supplies and demands, taking a balanced approach in collaboration with the State's nine Basin Roundtables. The Water Plan recognizes Douglas County's population growth and reliance on non-renewable groundwater, and the resulting "need to develop renewable surface-water supplies and additional water storage for the south metro area."

[36] C.R.S. § 37-92-305(9)(b); *see Bijou*, 926 P.2d at 43-44.
[37] *FWS Land & Cattle v. Colo. Div. of Wildlife*, 795 P.2d 837 (Colo. 1990).
[38] Kinnear LLC Memorandum, January 2022.

RWR's proposal is contrary to the Colorado Water Plan in several key respects, as Ms. Ris and Mr. Eklund discussed. The Plan seeks to minimize the loss of agricultural production by promoting alternatives to permanent dry-up of irrigated lands, such as temporary lease-fallowing agreements, in order to keep agriculture-dependent communities whole, without infringing the right to buy and sell water rights. For any project to divert water from one river basin to another, the Water Plan emphasizes the need for cooperative agreements with water organizations in the basin of origin, and for sharing the water supplies developed in a project in order to meet water needs in both basins. The Basin Roundtables play a key role in this process. As Ms. Ris pointed out, RWR has not yet sought any support for its proposal in either the Metro or the Rio Grande Basin Roundtable. The proposal is not one of the numerous projects identified in the updated Basin Implementation Plans recently approved by the Basin Roundtables. Finally, the Water Plan emphasizes the need to fill water supply gaps, but Lisa Darling of SMWSA stated (in the County's February 28 meeting) that the "gap" for SMWSA's members, which include most Douglas County water suppliers, is being filled by other projects now underway, without the County's participation in the RWR project.

The Water Plan is significant, in part because it establishes the State's criteria for providing support for projects in the permitting process. While the CWCB has not yet taken a position, Governor Polis and Attorney General Weiser have voiced their opposition to the proposed project, in part because of its inconsistencies with the criteria spelled out in the Water Plan. Governor Polis stated the opposition of the Rio Grande Basin was a major factor in his opposition to the proposal.

[redacted]

D. County 1041 Permits

The Colorado Areas and Activities of State Interest Act[39] was adopted as House Bill 1041 in 1974, and is still commonly known as "HB 1041." It gives counties substantial regulatory power over activities of state interest within their boundaries. HB 1041 identifies several areas and activities of state interest that local governments may elect to regulate. The listed activities include "site selection and construction of major new domestic water systems" and "efficient utilization of municipal and industrial water projects." The statute requires permit applications and public hearings, after which the local government is to approve permits for projects that comply with its regulations and guidelines, and deny permits for those that do not.[40] The statute provides limited criteria for local governments' exercise of this authority; local governments may set further criteria when they adopt regulations under HB 1041.

The RWR project will be subject to HB 1041 regulation and permitting in three counties: Saguache County, where the RWR wells and most or all of the retired wells will be located; and Chaffee and Park Counties, which the pipeline will cross before discharging into the South Platte

[39] C.R.S. Title 24, Article 65.1.
[40] C.R.S. § 24-65.1-501(3).

River. Douglas County may have the opportunity to negotiate intergovernmental agreements with one or more of these counties, either before or after applying for permits under HB 1041.

1. Timing and Strategy Considerations

RWR does not plan to apply for such permits before obtaining a Water Court decree. As noted above, any post-decree permitting likely will be Douglas County's responsibility, if it pursues the project.

Saguache County's regulatory concerns (summarized below) likely will overlap some of the issues in the Water Court proceeding. Accordingly, Douglas County may wish to file a permit application in Saguache County under HB 1041, and/or request discussion of an IGA with Saguache County, while the Water Court application is pending, to provide for some coordination in review of the overlapping issues. However, any permitting in Chaffee and Park Counties will be only for the pipeline portion of the project, and clearly should wait until after the water rights are decreed.

If a county were to deny a permit under HB 1041, or impose conditions that Douglas County views as unreasonable, judicial review of the county's decision would be very limited. The reviewing court would determine only whether the regulating county exceeded the boundaries of its legal authority under HB 1041, and whether there was sufficient evidence in the record to support its decision.[41] Moreover, as a political subdivision of the State, a county lacks standing to sue another local government for a taking of conditional water rights through the HB 1041 permitting process.[42]

[redacted] we summarize some key aspects of Saguache County's current HB 1041 regulations below. However, while we note that RWR's proposed pipeline would be subject to HB 1041 regulation in Chaffee and Park Counties, we have not yet conducted a similar analysis of those counties' regulations.

2. Saguache County's HB 1041 Regulations

Two types of activities that Saguache County regulates under HB 1041 are "major new domestic water systems" and "municipal and industrial water projects."[43] RWR's project fits within the definitions of both of these activities. A "major new domestic water system" is:

> A system for provision to the public of water for human consumption or a system for the provision to the public of water which will be used in exchange for water

[41] *See City of Colorado Springs v. Eagle County*, 895 P.2d 1105, 1109-10 (Colo. App. 1994).
[42] *Id.* at 1119.
[43] Saguache County, Guidelines & Regulations for Areas & Activities of State Interest of the County of Saguache, State of Colorado, Chapters 9 and 12 (hereinafter "Saguache County Regulations").

> for human consumption, if such system is proposed to serve a population equivalent of one hundred (100) or more residential dwelling units and, if proposed, irrigation of lawns and gardens associated therewith, or the equivalent thereof in other uses. This term includes the activity of removal of water from historically irrigated lands, as a "development" per the definition of the same as Section 5-104.[44]

The definition of "municipal and industrial water projects" is:

> (a) a system and all integrated components thereof through which a municipality(ies) and/or industry derives its water supply from either surface or subsurface sources. This includes a system and all integrated components thereof through which a municipality or industry derives water exchanged or traded for water it uses for its own needs. The term includes pipelines used or intended to convey raw or treated water from the source development area to end users. This term also includes stormwater and wastewater disposal systems of a municipality(ies) and/or industry.
>
> (b) This term includes the activity of removal of water from historically irrigated lands, as a "development" per the definition of the same at Section 5-104.[45]

RWR's proposed project includes a well field in Saguache County that would withdraw groundwater from the county and deliver it to Douglas County through both natural and artificial means. RWR's proposed project fits both definitions, as a system of delivery for water to Douglas County. Similarly, both the Chapter 9 and Chapter 12 regulations apply to systems that are "wholly or partially within the unincorporated territory" of Saguache County.[46] Therefore, even though RWR's project is not wholly within Saguache County, it is subject to the County's permitting requirements.

Moreover, RWR's project requires retirement of wells irrigating agricultural lands, at least most of which will be located in Saguache County. The County's HB 1041 regulations also recognize historically irrigated land as significant wildlife habitat, and therefore as "areas of state interest" under HB 1041.[47]

When another county in Colorado is developing a project in Saguache County that would typically require a permit, the county can seek an intergovernmental agreement (IGA) rather than a permit.[48] Therefore, once Douglas County is serving as developer of the project, it could either apply for a permit or first seek an IGA. Chapter 2 of the Saguache County Regulations lays out the procedure for the permitting process. Saguache County Regulations § 2-207 states in relevant part:

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[44] Saguache County Regulations § 9-103.
[45] Saguache County Regulations § 12-103.
[46] Saguache County Regulations §§ 9-105 (1) & 12-105 (1).
[47] Saguache County Regulations §§ 5-102 and -103.
[48] Saguache County Regulations § 2-207.

> Upon the request of . . . a political subdivision of the state . . . proposing to engage in a designated activity of state interest, the requirements of these Regulations may be met by the approval of an intergovernmental agreement between the County and the . . . political subdivision applicant. The County may, but shall be under no obligation to, approve such an intergovernmental agreement in lieu of a permit application and review as provided by these Regulations. In the event such an agreement is approved by the County, no permit application to conduct the activity of state interest shall be required, provided that all of the following conditions are met.

The regulation then goes on to list five conditions that must be met in an IGA. Essentially, the counties must abide by the "purpose and intent" of the regulations and the Permit Authority must hold a public hearing in accordance with the hearing procedures listed in the regulations.[49] Of course, Saguache County is not legally obligated to reach an agreement with Douglas County, but that may be the most efficient method; Douglas County Commissioners should first explore the potential for an IGA with Saguache County. If the two Counties cannot reach an agreement, Douglas County will not be prevented "from electing at any time to proceed under the permit provisions of these Regulations. Additionally, any entity which has previously proceeded under the permit provisions of these Regulations may at any time elect to proceed instead under this section 2-204."[50]

As noted above, Saguache County also regulates development or dry-up of historically irrigated lands under Chapter 5 of its HB 1041 regulations, which requires further environmental analysis for such development. The sections governing water projects (Chapters 9 and 12) invoke this further regulation, providing that to the extent a project "relies upon the removal of water from historically irrigated lands within the scope of 'development' defined at Section 5-104, the project proponent must also apply for and receive a permit under Chapter 5 of these Regulations, unless exempt from that Chapter under Section 5-105." The definition of "development" in Section 5-104 includes "any sale or transfer of land located within the areas described on **Exhibit F** or of the water rights used to irrigate such lands, when the effect of such sale or transfer is to separate ownership of the land from the water rights."[51] However, the exemptions in Section 5-105 include:

> This Chapter does not apply to development of water resources upon lands which are . . . legally obligated to be withdrawn from irrigation pursuant to a decree of the District Court, Water Division No. 3, that allows the previous irrigation water to be used as a part of a plan for augmentation … which will remedy injurious depletions caused by groundwater withdrawals of wells located within Saguache County.

[49] The procedures for the public hearing can be found in Saguache County Regulations § 2-302.
[50] Saguache County Regulations § 2-207 (5).
[51] Saguache County Regulations § 5-104 (1) (d). Exhibit F is not attached to the online Regulations, and instead is "maintained in the Office of the Saguache County Land Use Administration." However, because the RWR project is transferring water from historically irrigated lands, it is likely this section applies.

Therefore, if Douglas County gets an augmentation plan decree from Water Court prior to seeking a permit or IGA, the Chapter 5 protections for irrigated lands will not apply to the project; Douglas County would be "legally obligated" to withdraw land and water from irrigation due to the one-for-one rule. This would exempt Douglas County from the more extensive environmental analyses required by Chapter 5. [redacted]

[redacted].

E. Federal and State Environmental/Land Use Permits

In addition to County 1041 permits, the RWR project is likely to require multiple permits or other approvals from the federal government and the State of Colorado. These permitting considerations are outlined below.

Under RWR's proposal, the new groundwater supplies withdrawn from RWR's wells will be exported from the San Luis Valley via pipeline and will then be transported to the Front Range by both pipeline and a natural river channel. The current proposal provides for a single pipeline from a common collection point at Moffat in the San Luis Valley, where the water will then be piped over Poncha Pass and Trout Creek Pass into the South Platte River basin. Depending on the agreed-upon pipeline alignment, the pipeline will terminate downstream of either Antero Reservoir or Eleven Mile Reservoir. The water will then be conveyed within the South Platte River channel to a storage and diversion location (most likely at Chatfield Reservoir) for distribution to users in Douglas County. This proposal is likely to require various federal permits and, as a result, trigger federal environmental review under the Wirth Amendment and the National Environmental Policy Act ("NEPA"). Chatfield Reservoir is a federal facility owned by the Army Corps of Engineers, so any storage of RWR water there may require further federal approval, depending on the terms of any previous approvals or contracts with entities storing the water.

1. The Wirth Amendment Test for Federal Permits and Approvals

As discussed in recent meetings, a unique federal law governs permitting for projects to export water from the San Luis Valley. The Wirth Amendment was adopted by Congress in 1992, as part of Public Law No. 102-575, the Reclamation Projects Authorization and Adjustment Act,

and was amended upon the subsequent creation of the Great Sand Dunes National Park and Preserve. This law, as amended, provides (in full):

> TITLE XV—SAN LUIS VALLEY PROTECTION, COLORADO
>
> SEC. 1501. PERMIT ISSUANCE PROHIBITED.
>
> (a) No agency or instrumentality of the United States shall issue any permit, license, right-of-way, grant, loan or other authorization or assistance for any project or feature of any project to withdraw water from the San Luis Valley, Colorado, for export to another basin in Colorado or export to any portion of another State, unless the Secretary of the Interior determines, after due consideration of all findings provided by the Colorado Water Conservation Board, that the project will not:
>
> (1) increase the costs or negatively affect operation of the Closed Basin Project;
>
> (2) adversely affect the purposes of any national wildlife refuge or Federal wildlife habitat area withdrawal located in the San Luis Valley, Colorado; or
>
> (3) adversely affect the purposes of—
>
> (A) the Great Sand Dunes National Monument;
>
> (B) the Great Sand Dunes National Park (including purposes relating to all water, water rights, and water-dependent resources within the park);
>
> (C) the Great Sand Dunes National Preserve (including purposes relating to all water, water rights, and water-dependent resources within the preserve);
>
> (D) the Baca National Wildlife Refuge (including purposes relating to all water, water rights, and water-dependent resources within the national wildlife refuge); and
>
> (E) any Federal land adjacent to any area described in subparagraph (A), (B), (C), or (D).
>
> (b) Nothing in this title shall be construed to alter, amend, or limit any provision of Federal or State law that applies to any project or feature of a project to withdraw water from the San Luis Valley, Colorado, for export to another basin in Colorado or another State. Nothing in this title shall be construed to limit any agency's authority or responsibility to reject, limit, or

> condition any such project on any basis independent of the requirements of this title.
>
> SEC. 1502. JUDICIAL REVIEW.
>
> The Secretary's findings required by this title shall be subject to judicial review in the United States district courts.
>
> SEC. 1503. COSTS.
>
> The direct and indirect costs of the findings required by section 1501 of this title shall be paid in advance by the project proponent under terms and conditions set by the Secretary.
>
> SEC. 1504. DISCLAIMERS.
>
> (a) Nothing in this title shall constitute either an expressed or implied reservation of water or water rights.
>
> (b) Nothing in this title shall be construed as establishing a precedent with regard to any other Federal reclamation project.

This law calls for both federal and state roles in making the required determinations. First, the CWCB is to make findings regarding whether the project will adversely affect the cost or operations of the Closed Basin Project, or the purposes of the Baca or other national wildlife refuges in the San Luis Valley, the Great Sand Dunes National Park and Preserve, or other adjacent federal lands. As Lauren Ris indicated in meeting with the County, the CWCB has not implemented this law and does not yet have any procedures in place for making these findings. However, the CWCB has invested heavily in the RGDSS model, so it is likely that the CWCB will use this model (the same one the Water Court is to use, under the State Engineer's Rules) in making these findings.

After "due consideration" of these CWCB findings, the Secretary of Interior is to make final determinations as to whether adverse effects will occur to the listed federal interests. These determinations are to be binding on all federal agencies, including the U.S. Forest Service, Army Corps of Engineers and other agencies outside the Interior Department. If the Secretary determines these will be any such adverse effects, then no federal agency may issue any permit, right-of-way or other approval for the project.

The Closed Basin Project and Great Sand Dunes National Park[52] both have water rights decreed in Water Division 3. The RWR augmentation plan should address the protection of those rights, whether or not the U.S. appears as an objector in the Water Court case. We anticipate that

[52] In Case No. 04CW35, the U.S. was decreed a right to all groundwater in the Unconfined Aquifer beneath the National Park. This right protects against any depletion to the Unconfined Aquifer beneath the park, even if caused by diverting water from the Confined Aquifer.

RGWCD will defend the Closed Basin Project rights, as it has in past litigation, [53] and may also defend the Sand Dunes water rights. If the Baca NWR has decreed rights (we haven't yet researched this point), those rights also should be protected in the augmentation plan case.

RWR's previous attorney (until mid-March 2022), Kevin Kinnear, agreed that RWR should take responsibility for addressing the required Wirth Amendment findings at the same time that the augmentation plan is adjudicated. We understand Bruce Lytle intends to run the RGDSS model to support these findings, once the necessary information is available to model the replacements that RWR will make under the augmentation plan. These model runs should indicate whether there is any potential for harm to the Closed Basin Project (which is closely related to the question whether the project will impact Colorado's compliance with the Rio Grande Compact), and whether the project will cause any harm to Great Sand Dunes National Park, the Baca NWR and other protected areas. RWR can then join Douglas County in seeking the necessary findings from the CWCB, and then from the Department of the Interior. [redacted]

2. NEPA compliance required for federal approvals

Generally, NEPA requires that the federal government and its agencies "use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."[54] To achieve this objective, NEPA requires that federal agencies (including the U.S. Forest Service, the Bureau of Reclamation, the Corps of Engineers, and others) prepare an environmental compliance document that analyzes and discloses the environmental consequences of "major federal actions significantly affecting the quality of the human environment".[55] The NEPA process is intended to clarify whether an action proposed by a Federal agency will have impacts that "significantly impact the quality of the human environment" and, if so, to disclose those impacts to agency decisionmakers (and the public) and allow the agency to make informed decisions regarding the actions it may implement. Federal actions subject to NEPA includes the construction of a project (in whole or in part) on Federal lands, approving a Federal permit for a project, providing Federal funding for a project, or any other action where a federal agency's decision is required.

Once the agency determines that it is considering undertaking a major federal action that triggers further review under NEPA, the agency must determine the level of review that NEPA

[53] The Closed Basin Project's water rights have been an issue in the past AWDI and Confined Aquifer Rules litigation described above.
[54] 43 U.S.C. § 4331(a).
[55] 42 U.S.C. § 4332(2)(C).

requires. For water projects like RWR has proposed, it is likely that the agency will require an environmental impact statement ("EIS"), which details the direct, indirect, and cumulative environmental impacts of a proposed federal action and requires the consideration of reasonable alternatives to the proposed action. In proceeding with the development of an EIS, the project proponent must work with the federal agency (or agencies, as applicable) to provide details about the proposed project and why it is necessary, determine the anticipated environmental impacts of the project, determine how those effects will be mitigated or avoided, and consider a range of reasonable alternatives. As part of this process, the public is allowed to comment, and the agency is required to consider those comments in reaching its decision on the federal action.

The permitting process for water projects of the magnitude that RWR proposes typically take several years to complete, at a substantial cost (in many cases, millions of dollars) to the project proponent. Moreover, once a decision has been issued under NEPA, it is likely that the issuance of any federal permits would be litigated before the project could proceed. Under the current proposal, RWR does not intend to obtain any federal (or other) permits before going to Water Court, so the post-decree permitting responsibilities and costs (including legal costs) will likely fall upon Douglas County.

3. Clean Water Act Permits

a. Section 402 (NPDES) Permitting

As mentioned above, RWR's proposal involves the discharge of water imported from the San Luis Valley directly into the South Platte River system. As authorized by the Clean Water Act ("CWA"), the National Pollutant Discharge Elimination System ("NPDES") permit program manages water pollution by regulating point sources that discharge pollutants (other than dredged and fill materials) into waters of the United States.[56] Point sources include discrete conveyances of water, including pipelines that deliver water into surface streams. The EPA authorizes Colorado to administer the NPDES permit program for permits authorizing discharges to state waters. The Colorado Water Quality Control Act prohibits discharges of pollutants into state waters, unless those discharges occur in accordance with a state or federal permit: "No person shall discharge any pollutant into any state water from a point source without having obtained a permit from the [Water Quality Control Division]."[57] Discharge permits issued by the State of Colorado's Water Quality Control Division include enforceable limitations on pollutants to ensure that dischargers will not cause or contribute to violations of water quality standards.

NPDES discharge permits are not required under the CWA for activities known as a "water transfer," which, generally, is an "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal or commercial use."[58]

[56] 33 U.S.C. § 1342.
[57] C.R.S. § 25-8-501(1).
[58] 40 C.F.R. 122.3 (upheld by *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 486 F.3d 492 (2nd Cir. 2017)).

Relevant to RWR's proposal, though the South Platte River is considered a "waters of the United States," groundwater (including the aquifer system of the San Luis Valley) is not. Accordingly, because RWR's proposal does not involve the conveyance of "waters of the United States," the federal Water Transfers Rule likely does not apply to exempt RWR's conveyance of groundwater to the South Platte basin from obtaining a discharge permit.

However, the State of Colorado has adopted a similar exemption for water transfers, which provides that "activities such as diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or release of water from lakes, reservoirs, or conveyance structures, in the exercise of water rights shall not be considered to be point source discharges of pollution."[59] The Colorado rule relating to water transfers is particularly significant for RWR's proposal to convey water from the San Luis Valley to Douglas County: under this rule, the diversion and carriage of water through the proposed pipeline and into the South Platte River, pursuant to the decreed water rights for this project, may not constitute a discharge that requires a permit. [redacted]

Concerns have been raised specifically regarding the arsenic levels found in the Confined Aquifer of the San Luis Valley.[60] Elevated arsenic levels in drinking water supplies could lead to circulatory system problems and increased cancer risks. Our understanding is that the source of concern over the reportedly high arsenic levels in the Confined Aquifer is the Safe Drinking Water Act ("SDWA"). The SDWA establishes standards and treatment requirements for public water supply systems to regulate contaminants, including arsenic, within drinking water supplies. The SDWA only applies to public water systems and does not apply to private wells or systems that serve fewer than 25 people. For this reason, water pumped from private wells in the San Luis Valley are not subject to the SDWA's treatment standards, and the water delivered from the San Luis Valley may, therefore, have elevated arsenic levels. Any water that is pumped from the San Luis Valley will be delivered to storage in Douglas County, so it is likely that arsenic levels would be addressed under NPDES discharge permit under the CWA.

b. Section 404 (Dredge and Fill) Permitting

In addition to the NPDES discharge permits discussed above, the CWA also generally prohibits the unpermitted discharge of pollutants, including dredged and fill materials, from a point source into waters of the United States. The discharge of dredged or fill material into waters of the United States is regulated and permitted by the U.S. Army Corps of Engineers ("Corps") under Section 404 of the CWA.[61] At this time, Colorado has not requested delegation of the Section 404

[59] C.C.R. 1002-61.3 (emphasis added).
[60] *See Letter from Eric J. Harmon, P.E. to Douglas County Commissioners* (March 5, 2022).
[61] 33 U.S.C. § 1344(a), (d), (g).

program, and the Corps continues to administer this program in Colorado. The scope of the Corps' permitting jurisdiction under Section 404 is currently subject to federal rulemaking, as the Corps' and the EPA propose to modify the definition of the "waters of the United States" (WOTUS) that are subject to the CWA. The definition of WOTUS is also likely to be addressed by the U.S. Supreme Court by mid-2023, since the Court recently decided to hear a dispute on this issue raised by Michael and Chantelle Sackett, involving unpermitted fill activities on their Idaho property.

Under Section 404, a project proponent that seeks to discharge dredged or fill material into waters of the United States must limit adverse impacts to the aquatic environment to those that cannot otherwise be practicably avoided or limited. Under Section 404(b)(1), permits must authorize the practicable alternative causing the least damage to the aquatic ecosystem so long as it does not have other significant environmental consequences. This requirement is also known as the "LEDPA" provision, or the "least environmentally damaging practicable alternative."[62] The goal of such a requirement is to ensure that wetlands, streams, or other aquatic resources are not adversely impacted if another alternative is available that would avoid or minimize those damages. Avoiding these adverse impacts to the aquatic environment may require modifying the project design, configuration, or operation.

To streamline the issuance of commonly-requested permits under Section 404, the Corps has identified categories of general permits, known as Nationwide Permits ("NWPs"), that authorize certain activities that are anticipated to cause only minimal adverse environmental effects. Once issued by the Corps, a NWP does not require additional action by the State of Colorado to become effective. Under Colorado's Water Quality Control Act, NWPs that are issued under Section 404 of the CWA "shall be certified for use in Colorado without the imposition of any additional state conditions."[63]

The NWP applicable to the construction of water pipelines crossing waters of the United States is NWP 58, "Utility Line Activities for Water and Other Substances." NWP 58 was issued by the Corps in January 2021 and will expire on March 14, 2026. The permit covers "activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity." While there are no current legal challenges to NWP 58, the Corps is planning a comprehensive rulemaking in 2022 to re-examine all NWPs issued in 2021 "to identify NWPs for reissuance, modification, or issuance, in addition to identifying potential revisions to general conditions and definitions in order to be consistent with Administration policies and priorities." The planned rulemaking tracks with other agency actions after Executive Order 13990, which called for "immediate review of agency action taken" during the Trump administration. Any potential revisions to the NWP will likely be affected by the proposed revisions to the "definition of waters of the United States" rule that are currently underway, as discussed above.

To qualify for coverage under NWP 58, a project must meet both the general conditions of the NWP and regional conditions for Colorado. Under the general conditions for NWP 58, the

[62] 40 C.F.R. 230.10(a).
[63] C.R.S. § 25-8-302(1)(f).

RWR proposal would likely be considered a "single and complete linear project," defined as a "project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations." The general conditions further state that "for linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland …, are not separate waterbodies, and crossings of such features cannot be considered separately." If the final pipeline route crosses multiple waterbodies at distinct locations, it is possible that each crossing would require an independent authorization under NWP 58. The general conditions also require mitigation of impacts "to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal."

Regional conditions under NWP 58 require pre-construction notification to the Corps' District Engineer prior to commencement of any activity that "involves the construction of new water diversions and intakes." For activities located in waters identified as "Gold Medal" by the Colorado Wildlife Commission, pre-application consultation with Colorado Parks and Wildlife is "highly recommended." The Arkansas River is a "Gold Medal" water throughout Chaffee County, so this consultation likely will be required prior to the pipeline's construction.

4. Rights-of-Way Across Federal Lands and within State Highway Areas

If the pipelines necessary to implement RWR's proposal to deliver water to the South Platte River cross federal lands administered by the United States Forest Service ("USFS") or the Bureau of Land Management ("BLM"), Douglas County will need to obtain right-of-way ("ROW") grants allowing the construction and operation of the pipeline on federal lands. The USFS and BLM are authorized under federal law to issue ROW grants for pipelines and other facilities and systems for the transportation and distribution of water.[64] Each ROW authorization will specify the lands that are necessary for constructing, operating, and maintaining the pipeline, and will be limited so as to protect public health and safety and to avoid damage to the environment.[65] If an applicant seeks approval for a ROW either in or adjacent to an area in which a third party has already received a ROW authorization (for example, a state highway ROW through BLM lands), BLM will notify the third party and will consider that party's recommendations as to how the new proposed authorization will affect the third party's ability to conduct their existing activities within the ROW.[66]

The State of Colorado Department of Transportation ("CDOT") has established rules and regulations under the State Highway Utility Accommodation Code, for accommodating utilities (including water pipelines) to be located within the state highway right-of-way. These regulations recognize that utility facilities are essential to the general public and are intended to ensure that utilities are accommodated within the state's right-of-way without adversely affecting highway

[64] *See* 36 C.F.R. 251.53(l)(1) [USFS] and 43 C.F.R. 2801.9(a)(1) [BLM].
[65] *See* 36 C.F.R. 251.56 and 43 C.F.R. 2805.11.
[66] *See* 43 C.F.R. 2807.14.

safety and the existing transportation facilities.[67] CDOT may only accommodate utilities within the state highway right-of-way if doing so will not impair safety or the aesthetics of the highway, and if the utility accommodation does not otherwise conflict with federal state, or local law.[68]

Under these regulations, CDOT requires ROW permits for utilities prior to performing any utility accommodation work (including installation and maintenance) within the state's highway right-of-way.[69] CDOT has recognized that some utility permits may require third-party approval, including some instances in which the proposed utility is located within both the state highway right-of-way and on federal lands. In such cases, if the state highway right-of-way is specifically limited to highway purposes, then the utility applicant must obtain the approval of the federal agency having jurisdiction of the underlying lands, and comply with the agency's terms and conditions.[70] At this time, relevant to RWR's proposed pipeline alignment, we have not reviewed the state's ROW for Highway 285 to determine whether the ROW's purpose is limited to highway-only use. Additionally, with regard to pipeline construction within the state highway right-of-way, the utility must comply with applicable state water quality regulations and obtain all necessary water quality permits, including NPDES discharge permits if needed.[71]

Under these regulations, CDOT may deny a proposed utility use or occupancy of the state highway right-of-way, based on highway user needs, safety considerations, aesthetic concerns, or if the requested utility accommodation otherwise endangers public health, safety, or welfare.[72] However, provided that the requested utility accommodations comply with the regulatory requirements and do not impact safety or aesthetic considerations, CDOT does not have the authority to deny a utility permit due to political motivations.

IV. RWR'S PROPOSAL TO DOUGLAS COUNTY

This section summarizes our analysis of further issues raised by RWR's proposal to Douglas County.

RWR proposes to sell the decreed amount of water rights to Douglas County for $19,500 / acre-foot, applying Douglas County's $10 million payment as a deposit toward that amount. The amount of acre-feet is not the amount that will be delivered to Douglas County; rather, it is the decreed amount of water that the Water Court will allow RWR/ Douglas County to pump from the RWR wells (what water lawyers call "paper water" rather than "wet water"). The amount set by the Water Court will likely be an upper limit on the amount that can be pumped, either on an annual or multi-year average basis. The actual amount of water delivered will be reduced by:

a. Any potential shortfalls in physical water availability to the wells;

[67] 2 C.C.R. 601-18:1.1.2-1.1.3.
[68] 2 C.C.R. 601-18:3.1.1.
[69] 2 C.C.R. 601-18:2.2.1.1.
[70] 2 C.C.R. 601-18:2.2.4.1.1.
[71] 2 C.C.R. 601-18:3.1.7.13.
[72] 2 C.C.R. 601-18:2.2.6.1 and 18:3.1.6.

b. Any reductions necessary to meet augmentation plan requirements under the Court's retained jurisdiction (including any reductions to meet sustainability requirements and water needed for revegetation requirements); and

c. Transit loss (assessed by the Division Engineer on a per-mile basis, which will total over 10%) as the water is delivered down the South Platte River from the proposed pipeline.

The remaining balance of the purchase price will be due to RWR 180 days after the Water Court's decree has become final and nonappealable, so long as the decreed amount is at least 12,000 AF/ year.

RWR proposes that Douglas County's initial payment will be refundable in the event the Water Court does not confirm water rights for at least 12,000 AF/ year. Before making the initial payment, Douglas County should request sufficient security for this refund obligation—either by holding the payment in escrow or by obtaining a lien on property RWR owns (RWR estimates the value of its Ranch is $15-20 million).

RWR's proposal does not require any agreements to store or carry water on the South Platte River. Thus, Denver's and Aurora's withholding of consent is not fatal to the proposal. However, some storage may be helpful to those who will ultimately use the water in Douglas County. We understand some of the water providers currently have storage accounts in the recently reallocated capacity of Chatfield Reservoir. However, Chatfield is a federal facility; depending on the providers' storage contract terms, storage of RWR water in their accounts could require further federal environmental reviews and approval.

RWR has promoted its "one-for-one plus" proposal, by which it will provide payments to retire irrigated lands in addition to those that must be retired under its augmentation plan (mainly in the Confined Aquifer). By paying irrigators to retire lands irrigated from the Unconfined Aquifer, RWR may help restore the sustainability of that aquifer. RWR has pointed to a December 2018 letter from State Engineer Kevin Rein, in which he threatened to curtail much of the well pumping in the Unconfined Aquifer if RGWCD Subdistrict No. 1 could not otherwise meet sustainability requirements within the required time frame. While Mr. Rein has objected to RWR's characterization of his letter, the main concern we see is the lack of context—that the forced curtailment was only a last resort in the event that no lesser measures could succeed.

State Engineer Rein and others have questioned the accuracy of another assertion in RWR's proposal, that the State Engineer had recently issued urged Metro Denver and Douglas County water providers to "seek renewable sources of water other than the Denver Aquifer." In fact, Mr. Rein has provided no recent guidance to this effect; he has simply continued the same message that many Colorado leaders have given for several years: That Denver Basin water supplies will not last forever, and that water suppliers should not rely exclusively on that source but should build portfolios of renewable water supplies. Indeed, Douglas County has been a leader in conveying and implementing this important message for over 20 years.

V. ALLOWED USES OF ARPA FUNDS

County Attorney Lance Ingalls has taken the lead in advising the County on issues arising under the American Rescue Plan Act of 2021 ("ARPA"). We have assisted in a reviewing some of the ARPA issues raised by RWR's proposal. Our review has confirmed that the RWR proposal is not eligible for any of Douglas County's ARPA funds under current federal regulations.

Under ARPA, the U.S. Treasury Department established Coronavirus State and Local Fiscal Recovery Funds ("SLFRF") to provide state, local and tribal government aid. SLFRF funds may be used only under certain statutory categories.[73] The two relevant categories are:

42 U.S.C. 803 (c) Requirements

(1) Use of funds – [a] county shall only use the funds provided under a payment made under this section to cover costs incurred by the . . . county, by December 31, 2024—

(C) for the provision of government services to the extent of the reduction in revenue of such . . . county due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the . . . county prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.

Unless the funds are used in these specific ways, they are potentially subject to recoupment from the federal government. To clarify how the statute would be enforced, the Treasury Department issued a final rule on January 27, 2022.[74] While these funds must be obligated by December 31, 2024, the funds can be spent up until December 31, 2026.[75]

The interim final rule gave a non-exhaustive list of services falling into the first category above ("provision of government services"): "Government services can include but are not limited to, maintenance or pay-go funded building of infrastructure, including roads, modernization of cybersecurity . . . health services, environmental remediation, school or education services, and the provision of police, fire, and other public safety services."[76] The final rule, however, also sets forth some limitations, "expenses associated with obligations under instruments evidencing financial indebtedness for borrowed money would not be considered provision of government services, as these financing expenses do not directly provide services or aid to citizens. Specifically, government services would not include interest or principal on any outstanding debt instrument, including, for example, short-term revenue or tax anticipation notes or fees or issuance costs associated with issuance of new debt."[77] This guidance makes clear that financing related to debt instruments is not an eligible use of the funds. While an option to purchase water rights at a future date is not *technically* a debt instrument, it functions in a similar way to provide short-term

[73] 42 U.S.C. § 803(c)(1)(A)-(D).
[74] 87 F.R. 4338-01
[75] 87 F.R. 4340.
[76] 86 F.R. at 26801.
[77] *Id.*

financing to purchase future water rights. Further, a contract of this nature does not directly relate to building infrastructure or providing emergency management services, nor to the provision of government services curtailed due to COVID, which are the targeted purposes of the funds. While the use proposed by RWR is not explicitly prohibited, it aligns with the examples that are prohibited.

The second category above relates to potential investments in water infrastructure but does not allow for acquisition of water rights. The regulation confirms: "The acquisition of water rights, laboratory fees for routine compliance monitoring, and operation and maintenance expenses are not costs associated with investments in infrastructure and thus would not be eligible under the final rule."[78]

Thus, our research has not validated RWR's statement (in John Kim's January 27, 2022 letter) that "up to $10 million of ARPA funds may be utilized in this unrestricted manner [for their proposal]." At most, the County's use of this amount of ARPA funds for "government services" (as outlined above) could help to free up a like amount of general funds for other uses, which could include the RWR proposal.

CONCLUSION

The San Luis Valley is genuinely in crisis, with persistent drought conditions (what appears to be a "new normal"), sustainability requirements for the aquifers, increasing difficulty in meeting those requirements, and the likely loss of agricultural production that will be needed to do so. Many in the SLV are legitimately concerned that RWR's proposal will only exacerbate the crisis by threatening further risks to local water supplies (whether or not those risks become reality), requiring vigilance—and major expenditures—to protect their interests in another Water Court battle, and by further decreasing agricultural production in the Valley in order to divert some of their scarce water supplies elsewhere. The SLV has not previously experienced the large-scale, permanent dryup of agricultural lands. Even if some permanent dryup may be needed to reach sustainability in the Unconfined Aquifer, much more will be required by RWR's augmentation plan. The socioeconomic and environmental implications of this dryup are difficult to predict and difficult to resolve. Some of the rhetoric from local opponents has been overblown or has misconstrued RWR's proposal. However, many of the fears are real, can't be dismissed, and won't be easily resolved.

We cannot recommend acceptance of RWR's proposal at this time. There are several enormous hurdles to the completion of this project. The two reasonable options would be to (1) reject the proposal; or (2) continue discussions with RWR (and perhaps other interested parties in Douglas County and/or the San Luis Valley) to see if agreement can be reached on an acceptable proposal.

[78] 87 FR 4412; *see also* 40 C.F.R. § 35.3520(e)(2)-(4).