DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631	▲ COURT USE ONLY ▲
CONCERNING THE APPLICATION FOR WATER RIGHTS OF PARK COUNTY SPORTSMEN'S RANCH IN PARK COUNTY	Case No. 96CW14

ORDER CONCERNING POST-TRIAL MOTIONS

This Order concerns Applicant's Motion for Post-trial relief filed September 13, 2001, Opposers' Motion for Attorney Fees, filed on August 10, 2001, and Opposers' Motion for Joinder of the City of Aurora as a Party for the Determination of Liability for Attorney Fees or Alternatively a Determination of Law, filed August 10, 2001.

I. Post-trial Relief

Applicant seeks a reversal of the court's June 1, 2001 Order dismissing the Application in this matter and requests a continuation of the trial. Applicant brings its motion per C.R.C.P. 59(a).

In ruling upon Applicant's motion, the court reiterates the principle that, where the court is the trier of fact and a party brings a C.R.C.P. 41(b)(1) motion to dismiss the action, the court must weigh all the evidence, determine questions of credibility, and draw all reasonable inferences regardless of which party such inferences may favor. *Teodonno v. Bachman*, 158 Colo. 1, 4, 404 P.2d 284, 285 (1965). The standard is not whether the plaintiff established a prima facie case, but whether judgment in favor of defendant is justified on the evidence presented. *Teodonno*, 404 P.2d at 285; *Campbell vs. Commercial Credit Plan, Inc.,* 670 P.2d 813 (Colo. Ct. App. 1983).

The court ruled in its June 1, 2001 Order that the information generated by PCSR's *ModFlow* model runs was not sufficiently reliable, and thus, did not permit a reasonably accurate determination of the timing, amount, and location of stream depletions or aquifer depletions, or the timing and amount of aquifer recharge. Such determinations are a necessary part of any analysis of the viability of a plan for augmentation. Without reliable evidence of the above information, it is impossible for the court to consider or propose any terms or conditions that will allow the plan for augmentation to operate without injury to vested water rights. PCSR's alternative plan, to establish depletions and recharge in quantity

and time by way of a monitoring program, is prospective, incapable of predicting depletions until after they have occurred, and cannot satisfy PCSR's burden of proof at trial. PCSR's augmentation plan depends upon the availability of water that it can divert in priority, which in turn depends upon stream flow dynamics of the various tributaries of the South Platte river that feed PCSR's collection system. The timing, frequency and quantity of water available from PCSR's collection system are critical to the adequacy of the augmentation plan. PCSR's surface water expert used a model known as RIBSIM in order to determine the amount of surface water available to PCSR under its proposed 1996 appropriation. The validity and reliability of this model is not disputed, but like any computer model, the accuracy of the results depends upon the accuracy of the data and the validity of the assumptions used by the modeler. The court concluded in its June 1, 2001 Order that it did not have sufficient information concerning the amount of available surface water. As a result, it ruled that the Applicant had not met its burden of proof concerning the timing and amount of water available for augmentation purposes. Because Applicant failed to satisfy its burden of proof concerning its proposed appropriations, its out-of-priority pumping, or its proposed plan for augmentation, the court thus dismissed the application at the close of Applicant's case-in-chief per Rule 41(b)(1).

1. Factual Analysis –

The court begins with its introductory findings from the June, 2001 Order of dismissal. The Applicant (PCSR) proposes to create *storage* by withdrawing 140,000 acre-feet (AF) from the South Park Formation, a saturated aquifer. The resulting cone of depression will constitute the "storage vessel." The withdrawn water will be discharged into the South Platte River stream system for delivery to the City of Aurora under an existing contract between the City of Aurora and PCSR.

PCSR proposes to store water, during times that the South Platte River system is free, by diverting excess stream flows into recharge reservoirs and ditch fields that will be located upon the upper surface of the South Park Formation. According to PCSR, the water thus diverted and stored will percolate into the underlying aquifer, recharging it and reducing the size of the cone of depression that has resulted from PCSR's pumping. PCSR claims the amount of this recharge as the actual volume of water it will store. The cone of depression will exist until pumping ceases and the cone is eliminated by recharge from natural sources, or until pumping ceases and PCSR recharges the aquifer with an outside water source. Once the effects of PCSR's pumping reach the South Platte River system, the depletion to the stream will be continuous over the life of the project. When the cone of depression reaches the stream and the hydraulic head in the aquifer system drops below the stream surface, water in the stream will begin to recharge the aquifer system. Such recharge may occur from any of the several streams that flow across and above the South Park formation. From the point in time that the effect of PCSR's

pumping reaches the stream until an indefinite time after PCSR permanently ceases its pumping activity and the cone of depression is eliminated, stream depletion will be continuous. The rate and volume of stream depletion will necessarily equal the rate and volume of recharge of the aquifer. Except at times when the South Platte River system is free, the depletions attributable to PCSR will be out-of-priority and injurious to downstream senior diverters. PCSR proposes to augment these out-of-priority depletions by increasing its pumping rate above that necessary to fulfill its contract obligations with Aurora, thereby providing replacement water to the stream. PCSR proposes to discharge this additional water directly into the South Platte River system.

Such increased pumping will generate one of two consequences. If the outer boundaries of the cone of depression are not co-extensive with the total stream system overlying the South Park formation, the rate of stream depletion will increase as pumping is increased and the cone of depression spreads outward. Under these conditions, the increased pumping will lead to greater depletions from the stream system. When the cone of depression becomes coextensive with the overlying stream system, stream depletions will be at their maximum. As long as the hydraulic head remains below the surface of the stream, recharge will occur[1], fluctuating with changes in stream stage. Under these conditions, increased pumping will increase the time required to recharge the aquifer and eliminate the cone of depression. PCSR has not presented evidence that the timing and amount of these depletions can be accurately predicted. As a result, it is unclear how much water will be required to replace these depletions, and when this water will be necessary.

The net result of the PCSR's proposed water project is that the water deficit in the South Park formation will increase indefinitely until some uncertain future time after PCSR ceases pumping. In order to compensate for its out-of-priority stream depletions PCSR could release, directly to the stream system, water stored in its North Branch collection system[2]. To fulfill this obligation, PCSR must first establish the timing and amount of out-of-priority stream depletions. The court assumes that such depletions will be continuous, year-round; however, neither the rate nor the approximate time have been established within a reasonably probable range. Therefore, PCSR cannot determine the volume of water that it must have in storage at a given point in time.

2. Legal Analysis -

An application that includes a plan for augmentation is evaluated by the Water Court based on the same no-injury analysis as is used in evaluating an application for a change in water right. *Simpson v.*

[1] as delimited by the area of stream-aquifer contact, vertical conductivity and stream stage.
[2] Curtailed pumping would be lagged and would decrease the rate of out-of-priority stream depletions, but would not replace depletions.

Yale Investments, Inc., 886 P.2d 689, 696 (Colo. 1994); *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980). Thus, in order to grant an application for water rights and water storage rights that includes a plan for augmentation, the court must determine that the application and plan will not result in injury to other vested rights. § 37-92-305(3), 10 C.R.S. (2001) ("A change of water right or plan for augmentation . . . shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."); *Matter of May*, 756 P.2d 362 (Colo. 1988). An applicant has the initial burden of showing the absence of injury from a changed water right. § 37-92-304(3), 10 C.R.S. (2001); *Thornton v. Bijou Irrigation Co*., 926 P.2d 1 (Colo. 1996). It follows that the applicant has the same burden in an application that includes a plan for augmentation. *Kelly Ranch v. Southeastern Colorado Water Conservancy Dist.* 191 Colo. 65, 77, 550 P.2d 297, 306 (1976); *Danielson v. Castle Meadows*, 791 P.2d 1106 (Colo. 1990). Only if the applicant can make a prima facie showing of no injury does the burden of going forward shift to objectors to show evidence of potential injury. *Thornton v. Bijou Irrigation Co*., 926 P.2d 1 (Colo. 1996).

In order for an applicant to make a prima facie showing of no injury, it must provide the court with reliable evidence concerning the amount and timing of depletions and the existence of legally available replacement water. This information is a prerequisite to any determination of injury. Section 37-92-305(8), 10 C.R.S. (2001) provides in part:

> In reviewing a proposed plan for augmentation and in considering the terms and conditions which may be necessary to avoid injury, **the referee or the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water which would be provided by the applicant,** and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right. . . . (emphasis added).

This language requires an applicant to provide evidence of depletions in timing and amount, as well as evidence of legally available augmentation water.[3] The Colorado Supreme Court stated in *Weibert v. Rothe Bros.*, 200 Colo. 310, 618 P.2d 1367 (1980), that, pursuant to § 37-92-305(8), the adequacy of a plan for augmentation turns upon the adequacy of the replacement water rights. It found in *Kelly Ranch*

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[3] *See* James N. Corbridge and Teresa A. Rice, Vranesh's Colorado Water Law, Revised Edition, pp. 156 – 162 (University of Colorado Press, 1999). According to the authors "a typical plan for augmentation submitted under the statutory guidelines contains several components. First, a general description of the plan, its general scope of application, and the major premise for its development is set forth. Next is a detailed explanation of its operation. This explanation includes figures and in-depth explanations of the methods used for the determination of the estimated diversion requirements, estimated consumptive use, estimated water losses, and the anticipated timing of all diversions and return flows. Next is an explanation of the methods, both preferred and contingent, chosen to replace water, the historical use of the rights contained therein, and the specific scheme by which depletion will be accounted for by the historic consumptive use of rights." (p.156). The authors also state that "a plan must account for both the place and timing of diversion and return flow, as well as the volume and rate of flow of the water involved." (p. 162) (*Citing Weibert v. Rothe Bros., Inc.*, 200 Colo. 310, 618 P.2d 1367 (1980)).

v. Southeastern Colo. Water Conservancy Dist., 550 P.2d 297 (Colo. 1976), that the burden was upon the proponent of a proposed plan for augmentation to prove the amount of return flow from in-house use of water withdrawn from wells on the property. The Court ruled in *Danielson v. Castle Meadows*, 791 P.2d 1106 (Colo. 1990) that if the water court finds the projected depletions to be injurious, it shall impose terms and conditions on the plan for augmentation to alleviate injury caused by depletions to the affected streams. This language accompanied a remand of the case to the trial court to determine injury as a result of depletions, adding that, "if upon remand the water court is unable to make a determination as to whether the depletions will be injurious, it shall retain jurisdiction on the issue of injury caused by post-withdrawal depletions for such a time period as it deems appropriate." *Id.* It follows from this that the water court must first have evidence of projected depletions before it can determine injury. Applicant relies on *Danielson* for the proposition that the water court may retain jurisdiction to determine whether injurious depletions will occur as a result of out-of-priority pumping. Contrary to the Applicant's position, retained jurisdiction is to be used to determine if the projected depletions will have an injurious effect, not to quantify depletions and available augmentation water following the entry of a decree.[4] *See*, § 37-92-304(6), 10 C.R.S. (2001).

PCSR argues that § 37-92-305(3) grants it the right to propose terms and conditions if the court determines that its application will have an injurious effect on other vested rights. It further argues that in a trial concerning an application that includes a plan for augmentation, the Water Court is required to make an inquiry as to whether terms and conditions are feasible to prevent injury and it must be satisfied that imposition of any terms and conditions is impossible before it is justified in entering an order of dismissal of the application. *Mannon v. Farmer's High Line Canal and Res. Co.* 360 P.2d 417 (Colo. 1961). PCSR asserts that it is the Water Court's duty to hear testimony regarding the alleged injurious effects of the change and also to aid the parties in crafting decree conditions that will prevent such injury. *Farmers High Line Canal and Res. Co. v. City of Golden*, 975 P.2d 189 (Colo. 1999). PCSR states that one of the tasks of the Water Court is to point out the defects in the component parts of the plan, so that the applicant can have an opportunity to remedy them. It argues that if the plan is feasible, the underlying and overriding purpose of the court is to attempt to make it workable. *Citing*, *Kelly Ranch v. Southeastern Colo. Wtr. Cons'y Dist*. 550 P.2d 297 (Colo. 1976) (*citing* § 37-92-305(3) and (4)).

The court agrees with PCSR that once an applicant has satisfied its initial burden by presenting a prima facie case, the court may not dismiss an application that includes a plan for augmentation, but

[4] In pertinent part, § 37-92-304(6) provides that "Any decision of the water judge . . . dealing with a change of water right or a plan for augmentation shall include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury.. . . [S]uch period . . . may be extended upon further decision by the water judge that the nonoccurrence of injury shall not have been

instead must hear evidence of injury from the objectors and work with the parties to propose terms and conditions that will eliminate proven injury. *See*, *Mannon v. Farmer's High Line Canal and Res. Co.* 360 P.2d 417 (Colo. 1961); *City of Colorado Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952); *Farmers High Line Canal and Res. Co. v. City of Golden*, 975 P.2d 189 (Colo. 1999). The language of § 37-92-305(3), however, presupposes that injurious depletions have been determined in time and amount as part of the applicant's prima facie case. The crux of the dispute in the matter at hand, therefore, is whether PCSR has satisfied its burden of presenting a prima facie case, or more specifically, whether it has presented sufficient evidence to withstand Opposers' Rule 41(b)(1) motion to dismiss. The burden of proof concerning injury does not switch, and the court's duty to fashion terms and conditions does not arise, until the applicant has satisfied its initial burden. The burden of proof may switch to the objector once an applicant has presented its prima facie showing of no injury, because the objector is in a better position to prove injury. *Public Service Company of Colorado v. The Board of Water Works of Pueblo*, 831 P.2d 470 (Colo. 1992). By the same reasoning, the burden of proof should be on the applicant to prove, by a preponderance of the evidence, the timing and amount of depletions, and the legal availability of replacement water if the application includes a plan for augmentation. This is so because the applicant is in the better position to prove these initial elements. Whether the applicant has satisfied this burden is a question of fact to be determined by the court after considering the applicant's evidence and the record at trial. All of PCSR's arguments are based on the premise that it has satisfied its initial burden of showing an absence of injury. The court disagrees with PCSR's premise.

PCSR argues that it has presented uncontradicted evidence that satisfies its prima facie case. This argument implies that the court must consider PCSR's evidence as true unless the objectors present evidence that contradicts it. The court, as the trier of fact, is not bound by PCSR's evidence, even if uncontradicted. *Swanson v. Martin*, 120 Colo. 361, 364, 209 P.2d 917, 918 (1949); *House v. Smith Administrator*, 117 Colo. 305, 187 P.2d 587 (1947) ("Nor does it follow that because a witness is not directly contradicted by another witness that the testimony is undisputed."); *Pioneer Construction Company v. Doris L. Richardson*, 176 Colo. 254; 490 P.2d 71 (1971). It may make its own inferences and reach its own conclusions from all of the evidence. *Teodonno v. Bachman*, 158 Colo. 1, 4, 404 P.2d 284, 285 (1965); *Blair v. Blair*, 144 Colo. 442, 446, 357 P.2d 84, 86 (1960); *Public Service Company of Colorado v. The Board of Water Works of Pueblo*, 831 P.2d 470 (1992). As the trier of fact, the court may believe all, some, or none of the evidence when it makes its analysis. *Pioneer Construction Company v. Richardson,* 176 Colo. 254, 490 P.2d 71 (1971). Having considered the evidence under the above standards, the court finds that PCSR has not presented a prima facie case, either for its claimed storage rights or for its plan for augmentation.

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conclusively established. All decisions of the water judge, including decisions as to the period of reconsideration

PCSR correctly states that Colorado law does not require an out-of-priority diverter to replace 100% of its withdrawals. *See*, *Park County Sportsmen's Ranch v. Bargas*, 986 P.2d 262, 275 (Colo. 1999). PCSR is nevertheless required to replace 100% of its withdrawals that would cause material injury to other users if not replaced.

PCSR also claims that Colorado law does not distinguish between "recharge" and "storage." It supports this claim with the apparent argument that because "artificial recharge" is an element of underground "storage," the two concepts should be considered the same. There is a difference between recharging an aquifer, and using "artificial recharge" in order to store water in an aquifer. Although it is possible to recharge an aquifer using artificial means, such recharge is not automatically equivalent to storage. In order to store water, the artificial recharge must be introduced into an existing unsaturated portion of the aquifer. The party may create unsaturated space by removing water, in priority, to which it already has a right. However, if the recharging party creates the storage space by removing water to which it does not have a vested right, any artificial recharge of this "created" space is merely replacement of that water that has been taken out-of-priority.

Even before the effects of PCSR's pumping are felt by the stream, the cone of depression will absorb surface water that would otherwise reach the stream. The South Park formation is saturated and creates perennial springs that will diminish or dry up entirely once the water table falls below the surface of the aquifer system. PCSR will be responsible for replacing these amounts as well. All of PCSR's pumping will be out-of-priority because it has no existing surface or underground rights. Any water it places into the aquifer will be replacement water that it cannot claim as stored water. Because of the unreliable results generated by PCSR's *ModFlow* model, the court cannot determine how much water will be required for augmentation, or when it will be required. Thus, PCSR cannot claim the water it is using for recharge as "storage water."

The court concludes that water cannot be stored in a saturated aquifer that is tributary to an over-appropriated stream system. All water replaced to the cone of depression must be allocated to replacement of out-of-priority pumping, because all out-of-priority depletions are presumed to be injurious.

Although it may be possible to store water in a saturated aquifer that is tributary to a non-over-appropriated stream system, the available storage would be limited to an amount equal to or is less than the amount by which recharge exceeds injurious depletions. The amount of such stored water available for withdrawal must be reduced by the amount lost to the stream between the time of recharge and the time of withdrawal. [5]

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and extension thereof, shall become a judgment and decree . . . and be appealable upon entry . . ."

[5] It appears to the court that economical underground storage is limited to storage in unsaturated aquifers.

If the court's conclusion is incorrect, PCSR could "store", as it proposes to do, only under the following facts. Because the South Park formation is a tributary aquifer and because the South Platte River system is over-appropriated, stream depletions must first be fully replaced. The proposed "storage" amounts to no more than PCSR's capitalizing on the time lag between the commencement of its pumping and the time when the effects of this pumping reach the stream system. In order to utilize this advantage, and to avoid depletions to the stream, PCSR must create a firm supply of water in an amount sufficient to replace the depletions that will result from PCSR's pumping, and which will be continuous over time. Before PCSR can determine the required volume of the firm supply, it must establish the timing and amount of depletions with reasonable certainty. As stated above, PCSR did not clear this initial hurdle.

Assuming – contrary to the court's findings in its order of dismissal – that PCSR had met its burden to establish stream depletions and that the RIBSIM model accurately predicted average annual stream flow, PCSR's plan remains fatally flawed. At times when recharge from surface storage is insufficient to offset aquifer depletions, PCSR will augment such depletions by pumping directly from the South Park formation into the stream. This practice will increase out-of-priority depletions. At times when the river is free, PCSR will not always be able to divert and store the entire available stream flow. Average annual stream flow does not equal annual yield available for storage/recharge. This inequality is inherent in the fact that, during periods of heavy rainfall, PCSR's North Branch collection system may collect more water than can be stored in PCSR's recharge reservoirs. Once the reservoirs are full, the excess will spill from the reservoirs into the stream and will be unavailable for storage. The occurrence of such events has not been addressed in PCSR' case-in-chief. Hence, the court is left without sufficient information to conclude that PCSR's water project can operate without injury to other users, even under the assumptions and inferences that are most favorable to PCSR.

II. Attorney Fees

Opposers seek an award, jointly and severally, against Park County Sportsmen's Ranch (PCSR), Kenneth J. Burke, and the City of Aurora (Aurora)[6], for all fees incurred after the date of July 31, 1998. Opposers claim that the application became frivolous after this date because PCSR, Kenneth J. Burke, and the City of Aurora as the principal of PCSR, knew or should have known that the application would fail at trial. Opposers argue that the application is dependent on the success or failure of the plan for augmentation, which in turn is dependent on the data collected from the *ModFlow* and RIBSIM models used by PCSR, and on PCSR's claims to precipitation, irrigation runoff, and evapo-transpiration.

[6] Opposers Town of Fairplay, Indian Mountain Corporation, and James Campbell do not seek attorney fees against Kenneth J. Burke or the City of Aurora. Opposer, Centennial Water and Sanitation District do not seek attorney fees against the City of Aurora.

Opposers claim that PCSR and Burke were aware, as of July 31, 1998, that the groundwater model could not be defended at trial and would not predict aquifer characteristics with reasonable probability. Opposers further argue that PCSR's use in its augmentation plan of precipitation, irrigation return flows, and salvaged evapotranspiration was not allowed as a matter of law. Finally, Opposers claim that PCSR's method for storing water underground is contrary to Colorado law.

1. Analysis -

A court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification. §13-17-102(4), C.R.S. An action that lacks substantial justification is one that is substantially frivolous, substantially groundless, or substantially vexatious. §13-17-102(4), C.R.S. A claim or defense is frivolous if the proponent of the claim or defense can present no rational argument based on the evidence or the law in support of that claim or defense. *Western United Reality Inc., v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). A claim or defense is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *Western United Reality Inc., v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). The Colorado Supreme Court has ruled that a party's claim is substantially frivolous or substantially groundless if the party knew, or should have known, that it could not prevail at trial. *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 380 (Colo. 1994). The determination whether a claim or defense is frivolous or groundless under §13-17-102 is within the discretion of the trial court. *Travers v. Rainey*, 888 P.2d 372, (Colo. Ct. App. 1994). A trial court must, however, make sufficient findings to permit meaningful appellate review of the award. *Bilawsky v. Faseehudin*, 916 P.2d 586 (Colo. Ct. App. 1995).

Section 13-17-103 enumerates a number of factors to be considered in determining whether to award attorney fees, including:

a. The extent of any effort made to determine the validity of an action before asserting it;

b. The extent of any effort made to reduce the number of claims, once they've been found to be invalid;

c. The availability of facts to assist a party in determining the validity of a claim;

d. The parties' relative financial positions;

e. Whether the complaint was prosecuted in bad faith;

f. Whether or not issue of fact determinative of the validity of a party's claim or defense were reasonably in conflict; and

g. The extent to which each party prevailed.

§ 13-17-103, 5 C.R.S. (2001).

At the time of filing of the application, PCSR and Aurora had legitimate claims for groundwater rights, surface water rights, and a plan for augmentation. Opposers point out that both the surface water rights and the groundwater rights are dependent on the viability of the plan for augmentation. In order to succeed with the plan for augmentation, PCSR was required to show by a preponderance of the evidence the timing and amount of depletions to the stream and also the amount of legally available replacement water to be used for augmentation. Although PCSR now claims that it never intended its groundwater model to show these requirements, the court finds that it did so intend at the time of the application. This position continued until PCSR changed its position at or immediately before trial in July, 2000 by proposing a monitoring program in lieu of the groundwater model. As stated above, the court found the data produced by the model to be unreliable evidence of depletions and available replacement water. Opposers claim that PCSR knew, or should have known, that the *ModFlow* groundwater model could not determine with accuracy depletions or available water, and that it was not defensible at trial. As grounds for this assertion Opposers claim that the model was not properly calibrated in accordance with ASTM Standard guidelines and that no proper sensitivity analyses were conducted on the model. They also argue that the residual error values for predicted and observed water levels were excessive. Opposers state that their own experts pointed out the flaws in the model to PCSR and the court in two February, 1998 reports. Finally, Opposers point out that PCSR's groundwater expert, Dr. Harvey Eastman, disclosed to PCSR, Ken Burke, and Jim Jehn in an October 28, 1998 memo that the model would not be defensible at trial without further calibration, sensitivity analyses, and other refinements. Opposers claim that PCSR chose to ignore this advice and continued to trial without addressing the problems disclosed by Dr. Eastman.

The court concludes that , after the date of Dr. Eastman's memo and in the absence of any steps to correct the flaws in the model, PCSR's pursuit of the application was groundless. *PCSR* argues that it was entitled to rely on its experts when pursuing the application (citing *Coffey v. Healthtrust, Inc.*, 1 F.3d 1101 (10th Cir. 1993)) and thus, should not be subject to attorney fees for failures in its models. *Coffey* states that an attorney may rely on its experts' opinions, if the reliance is reasonable. PCSR ignored its expert's opinions about the defensibility of the model at trial, and proceeded to litigate its claims. Thus, its did not rely on its expert.

PCSR also should have known that it was not entitled to claim reductions in evapo-transpiration as credit in its augmentation plan. § 37-92-103(9), 10 C.R.S. (2001) (codifying the pronouncements in *Southeastern Colo. Water Cons. Dist. v. Shelton Farms*, 529 P.2d 1321 (Colo. 1975)); and *Giffen v. State*, 690 P.2d 1244 (1984) (Denying applicant's claim for an augmentation credit for water salvaged from a reduction in evapo-transpiration due to a switch in vegetation.). Following this court's ruling denying

PCSR's claim to salvaged evapotranspiration, PCSR continued to use this credit as a component of its augmentation plan.

The court thus finds that PCSR's Application became groundless as of October 28, 1998, the date upon which it knew, or should have known that it could not succeed at trial.

III. Joinder of Aurora

Opposers argue that the City of Aurora should be joined in the present action solely for the basis of determining whether it should be liable for attorney fees. As grounds for joinder Opposers assert that it is established that PCSR pursued the application on Aurora's behalf as its agent, that PCSR had contractual authority to act as Aurora's agent, and that Aurora had control over the actions of PCSR. Opposers claim that Aurora is thus a principal under Colorado law, is vicariously liable for the acts of its agent, and should be a party in the determination of attorney fees and costs.

1. Analysis -

A principal is liable for any acts of an agent done within the actual or apparent authority of the agent. *Brascum v. American Community Mutual Insurance Co.*, 984 P.2d 675, 679 (Co. Ct. App. 1999); *Commercial Standards Ins. Co. v. Rinn*, 65 P.2d 705, 706 (Colo. 1937). Knowledge of any of the agent's act, within the scope of its authority, is imputed to the principal. *Brascum*, at 679; *Brown Grain and Livestock, Inc. v. Union Pacific Resource Co.*, 878 P.2d 157, 158 (Co. Ct. App. 1994). If an agent acts with apparent authority, the principal will be liable for the acts of the agent, even if done solely for the agent's personal benefit, unless third parties are actually aware that the agent is not acting on behalf of the principal. *Grease Monkey International, Inc. v. Montoya*, 904 P.2d 468, 475-76 (Colo. 1995). Finally, Colorado law allows the imposition of attorney fees against a municipality under § 13-17-101 et seq., 5 C.R.S. (2001). *See*, *Colorado City Metropolitan District v. Graeber and Sons, Inc.*, 897 P.2d 874 (Co. App. 1995).

The court ruled in its June 13, 2000 *Order Denying Partial Summary Judgment re: Anti-speculation* that a principal-agent relationship exists between Aurora and PCSR. The court found that this relationship was established by contract and that Aurora had sufficient control over PCSR to establish the relationship. Aurora's assertion that this principal-agent relationship was established merely to satisfy the anti-speculation requirements of § 37-92-103(3) is disingenuous. Contrary to Aurora's arguments, the court finds that the "Agreement" between Aurora and PCSR was established in order that PCSR would diligently pursue the Application on behalf of Aurora and in order that Aurora would have control of PCSR. Although PCSR's authority to act may have been limited to pursuing the Application, it clearly

acted as an agent with respect to that matter. Aurora was a participant in the application process, and although not a "designated party" in the proceedings, was present for a majority, if not all, of the trial per the appearance of its attorney, Lynn Obernyer. Finally, the fact that PCSR stood to benefit from a successful application is not grounds to relieve Aurora of its obligations as a principal.

Summary of Findings and Conclusions

1. **Applicant, Park County Sportsmens' Ranch, has not met its burden of establishing, with reasonable probability and within a reasonably predictable range, the timing and amount of stream depletions that will result from its withdrawal of water for the South Park formation.**

2. **The Applicant has failed to establish, with reasonable probability and within a reasonably predictable range, the timing and volume of water available for augmentation of its pumping regime.**

3. **As an empirical fact, water cannot be stored in a saturated aquifer that is tributary to an over-appropriated stream system.**

4. **This Application, insofar as it is based upon the *ModFlow* model, became groundless as of October 28, 1998.**

5. **The Applicant's claims for augmentation credits arising from rainfall, irrigation return flows and decreases in evapo-transpiration losses, were frivolous from their inception.**

6. **The City of Aurora and PCSR stand in the relationship of principal-agent with respect to the pursuit of this Application. Therefore, the City of Aurora is liable for the costs of this action, and for attorney fees imposed against PCSR pursuant to § 13-17-101, et seq.**

Ordered by the court, November 13, 2001:

Jonathan Hays*
District Court Judge

* *This order was filed electronically pursuant to Rule 121, § 1-26. The original signed order is in the Court's file.*