



CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGED

SUPPLEMENTAL EXECUTIVE SESSION MEMORANDUM

TO: Douglas County Board of County Commissioners

CC: Lance Ingalls, Esq., Douglas County Attorney

FROM: Stephen H. Leonhardt, Esq.

DATE: May 2, 2022

SUBJECT: RWR Proposal and April 2022 Meetings

This memorandum supplements our Executive Session Memorandum dated March 23, 2022, with new material factual information and related legal analysis of the proposal from Renewable Water Resources, LLC (“RWR”), based on meetings held during April 2022. The first section summarizes the meetings that have occurred, and the second section of this memorandum summarizes the new factual information and legal analysis on several issues based on those meetings.

The new information summarized below has not changed any of the 26 conclusions listed in the Executive Summary of our March 23 memorandum.

I. Meetings held during April 2022

1. ARPA legal discussion

Just after we finalized our March 23 memorandum, RWR contacted us to schedule a discussion with RWR’s attorneys at Brownstein Hyatt Farber Shreck, regarding that firm’s analysis of potential uses of ARPA funds. John Kim referred to that analysis in his January 27, 2022 letter to the Board, providing RWR’s amended proposal.

Lance Ingalls and I attended the virtual meeting on April 1, 2022 with Brownstein attorneys Wayne Forman, Bella Sewall Wolitz and Katy Duncan; John Kim also attended for RWR. The resulting information is summarized in part II.F of this memorandum regarding ARPA. Lance and I agreed that the information and explanation from RWR’s attorneys did not change our conclusions on ARPA as presented in our March 23 memorandum.

2. Meeting with RWR and Neighbors

Commissioner Laydon, Dan Avery and I attended a series of meetings in the San Luis Valley on April 23, 2022. RWR hosted the first meeting on its property; several RWR representatives and several neighbors attended. The sign-in sheet from this meeting is attached as ***Exhibit A*** to this memorandum. Some of the neighbors desired anonymity in their attendance (for reasons discussed in the “Local Hazards” section below). Thus, the sign-in sheet was presented as optional, and several of the attendees did not sign it. ***Due to the attendees’ desire for anonymity, please maintain the confidentiality of all information regarding this meeting, including Exhibit A and other information on those who attended.***

Those attending this meeting for RWR were Sean Tonner, Bill Owens, John Kim, Sean Duffy, Mike Dill (ranch manager), Glenn Porzak (water attorney), and Bruce Lytle (water consultant). The neighbors included Jerry Berry, a nearby farmer who also spoke at the January 31 meeting in Castle Rock; [REDACTED] another nearby farmer. There were about 5-6 others there who said little or nothing.

3. RWR Water Facilities Tour

Just after the first meeting, Sean Tonner and Bruce Lytle led us on a tour of water facilities on the ranch. We visited a large well pumping from the Unconfined Aquifer; San Isabel Creek near where it enters RWR property; and another location on San Isabel Creek about 3-4 miles downstream. The main information and observations from this tour are summarized in part II.A of this memorandum regarding water availability.

4. Meeting with [REDACTED]

[REDACTED] rancher in Saguache County, hosted us for a meeting [REDACTED]. Sean Tonner, Sean Duffy and Mike Dill of RWR also attended this meeting.

5. Meeting with Local Public Officials

Our final meeting was with several local public officials at Nino’s Restaurant in Monte Vista. The sign-in sheet from this meeting is attached as ***Exhibit B*** to this memorandum. Some of the most active participants in this meeting were State Representative Donald Valdez, Alamosa Mayor Ty Coleman and Councilman Michael Carson, Rio Grande County Commissioner John Noffske, Alamosa County Commissioner Lori Laske, Monte Vista Mayor Dale Becker, Marisa Fricke (RGWCD Subdistrict 1 program manager), and Karla Shriver (long-time water leader and former Rio Grande County Commissioner). All of these officials spoke in opposition to the RWR proposal. Reporters Chris Lopez (Alamosa Citizen) and Priscilla Waggoner (Alamosa News) also attended this meeting.

6. Meeting with U.S. Interior Department Attorneys

The Regional Solicitor for the U.S. Department of the Interior (“DOI”), Laura Chartrand, contacted me in late April to request discussion on Douglas County’s consideration of RWR’s proposal. I met virtually with Ms. Chartrand and two attorneys from her office (Eric Dude and Michael Gheleta) on April 29 to discuss their questions and current legal review, which relates to the Wirth Amendment. As you may recall, Senators Bennet and Hickenlooper discussed the Wirth Amendment in their recent letter to the Secretary of the Interior, Deb Haaland, regarding the RWR proposal. Their letter led the Regional Solicitor’s office to consider these issues.

II. Further Information and Analysis from Meetings

This section summarizes the further factual and legal information gleaned from our meetings, with some analysis of how this information bears on the issues relevant to RWR’s proposal, most of which were analyzed in our March 23 legal memorandum. Several of the sections below correspond to sections of our earlier memorandum; other sections relate to issues not directly addressed in that memorandum.

1. Water Availability

The main point of RWR’s water facilities tour was to demonstrate the function of the alluvial fans at the base of the Sangre de Cristo mountain range to recharge the underlying aquifers. We observed newly installed flow measurement and regulation devices on San Isabel Creek, where the creek splits into two threads and RWR can control the rate of flow into each. A few miles to the west, on the Valley floor, the creek flow was only about 10% of the original flow. Since there are no diversions between these two points, the remaining 90% of the creek flow is lost to seepage into the aquifers. I have seen many examples of stream loss across Colorado, but none so dramatic as this.

Bruce Lytle explained that as flows increase (in normal spring runoff), a higher percentage of the flow will continue downstream, while higher amounts of water (but a lower percentage of the higher total) recharge the aquifers. As flows decrease (later in the summer), 100% of the flow will be lost, resulting in a dry stream at the lower point. Bruce also indicated that the recharge to the aquifer on the sloped land (the original point we observed) goes partly to the Confined Aquifer and partly to the Unconfined Aquifer. At the lower point on the Valley floor, all the recharge goes to the Unconfined Aquifer, as the Confined Aquifer is covered by a blue clay layer beneath the Valley floor. The flow demonstration illustrates the occurrence of rim recharge on the rim of the San Luis Valley, which annually replenishes the Confined Aquifer water supply available to RWR’s wells.

Some opponents have questioned the amount of rim recharge that is available to RWR, and whether that amount is decreasing during the mostly dry years since 2000. I posed that question to Bruce Lytle again last week. His presentation on January 18 indicated that average annual recharge of 39,000 acre-feet/ year was available in the vicinity of RWR’s property. He subsequently acknowledged that figure was based on older data, and the updated long-term

average was likely closer to 35,000 AF/ year. Last week Bruce responded to my question, indicating that “the average recharge from 2000-2010 is approximately 13.4% lower than the average from 1970-2000. So that would reduce the average annual recharge just in the project area from approximately 39,000 ac-ft to 33,775 ac-ft.” This amount varies significantly with precipitation from year to year; the average is still greater than RWR’s proposed annual pumping of 22,000 AF. However, as explained in our March 23 memorandum, the available water is not “unappropriated,” so it may be pumped and used only after approval of an augmentation plan that is sufficient to prevent injury to senior water rights and to sustainability of the aquifers.

2. Right to Sell Water Rights

Some speakers (including RWR’s neighbors who met with us on April 23) have spoken in favor of the right to sell one’s water rights. Mr. Berry compared it to the right to sell one’s cattle or hay. Another neighbor said, “It’s the law. You can sell.” Commissioner Noffske and Councilman Carson recognized that farmers often view the ability to sell their water rights as their retirement plan. However, they said most farmers would prefer to sell to others who will keep the water in the San Luis Valley rather than move the water to a wealthier part of Colorado.

In Colorado, a water right that is decreed for specific beneficial uses is a property right that can be bought and sold for those uses. However, RWR does not have such a right and will not have one until it can satisfy the anti-speculation doctrine and adjudicates rights to tributary groundwater with an augmentation plan that allows pumping the water. While RWR investors may have paid a premium based on the potential to develop water rights, RWR does not have a legally protected property right in the water.

Similarly, the farmers who currently pump from the Confined Aquifer for irrigation use have a right to sell their wells and groundwater rights for the same uses. They also have the option to sell the right to retire their wells and irrigation use, either to RGWCD subdistricts for water management plans to improve aquifer sustainability, or to another party (such as RWR) to use in an augmentation plan for new wells. The right to sell water rights for changed uses is not absolute; it depends on the buyer presenting evidence that the augmentation plan or other changes are legally sufficient and will not injure any other water rights. Absent approval of such changes, the buyer of water rights has a right only to continue the originally decreed uses (pumping the original wells to continue irrigation at the original location).

3. Water Supply Impacts

Some of RWR’s supporters observed that some opponents have spread misinformation about the project’s impacts to water supplies. [REDACTED] said the RWR project could not impact the Town of Crestone’s water supply, which comes from alluvial wells, and would generally improve aquifer levels by replacing more than 1-for-1 the amount withdrawn.

[REDACTED] said the project could be a win-win if it was done right, but many potential impacts to water supplies would need to be considered and addressed. If some wells are retired, the removal of irrigation water will impact neighboring farms by changing return flow and

recharge patterns across property lines. The dry land soaks up some of the water from adjacent irrigation. Some of these impacts will not be apparent until 10-20 years after the wells are retired. Like irrigation systems in the Arkansas Valley and South Park that have been impacted by conversion of irrigation water rights to municipal use, the irrigation wells in the San Luis Valley are an interconnected system so that one part cannot be removed without impacting others.

Several of the local officials expressed concern for water supply impacts. Representative Valdez described ongoing struggles to make the Confined and Unconfined Aquifers sustainable, exacerbated by drought conditions the past several years. Mayor Coleman said that exporting water creates much potential for harm that cannot be easily resolved. Councilman Carson explained that there was only about 11,600 AF/year available to pump from the Confined Aquifer in RWR's part of the Valley, and RWR would take all of it (if not more), without continuing the return flows that the historical irrigation has provided to the aquifers and streams. He said the wells would draw down the water table over a 20-mile radius, impacting flows in Crestone Creek which provide endangered species habitat.

Commissioner Noffske analogized the RWR project to the Summitville Mine, which provided short-term benefit (and many jobs) to the San Luis Valley at one point, but has left long-term damage with a Superfund site, not foreseen at the time the mine was approved. Similarly, Commissioner Leske said the community should not accept immediate gratification while incurring the risk of long-term damage. Mr. Carson quoted from a recent film on water transfers from the Arkansas Valley, in which a farmer said he had sold his water rights but wouldn't do it again because the community suffers.

4. Aquifer Sustainability

In the RWR-hosted meeting, [REDACTED] said he uses wells in the Unconfined Aquifer within Subdistrict 4. He said RWR doesn't want to jeopardize sustainability of the aquifers because the success of RWR's project will require ongoing sustainability. In the afternoon meeting, Ms. Shriver said artesian wells in the Confined Aquifer are running dry; new pumping from the aquifer should not be allowed while they are struggling to restore sustainability.

5. Rio Grande Water Conservation District (RGWCD)

The Rio Grande Water Conservation District (RGWCD) and its subdistricts were the subject of much discussion in the April 23 meetings. RGWCD is the legal entity, created by statute in 1967, charged with safeguarding for Colorado all water available to Colorado in the Rio Grande and its tributaries.¹ RGWCD is governed by a board of directors; the directors are appointed by the Boards of County Commissioners of the five counties located in the San Luis Valley.² RGWCD has been a leading opponent to the RWR project and previous water export proposals. State Senator Cleave Simpson is RGWCD's General Manager.

¹ CRS §§ 37-48-101 and -102.

² CRS § 37-48-103.

RGWCD is authorized to create subdistricts,³ and has created six groundwater management subdistricts to manage groundwater pumping in six portions of the San Luis Valley, corresponding to the “response areas” used in the RGDSS computer model. A map of all six subdistricts (and the RGWCD) is attached as *Exhibit C* to this memorandum. The subdistricts most relevant to this discussion are Subdistrict 4, located along San Luis Creek in the northeastern San Luis Valley (where RWR’s property is located); Subdistrict 5, located just to the west on Saguache Creek; and Subdistrict 1, located in the Closed Basin area in the center of the San Luis Valley, north of the Rio Grande and south of Subdistrict 5. RGWCD’s Board of Directors appoints a board of managers for each subdistrict. To meet requirements for aquifer sustainability and augmentation under SB 04-222 and the State Engineer’s resulting Rules (as discussed in our March 23 memo), each subdistrict has developed a Plan of Water Management, approved by the Water Court, and annually develops annual replacement plans that are subject to approval by the State Engineer. On May 1, the State Engineer approved the 2022 annual plans for five of the subdistricts (all but Subdistrict 5, which remains under review).

As discussed in several of the meetings the Board hosted during February, Subdistrict 1 has encountered major challenges in restoring the sustainability of the Unconfined Aquifer as water levels continue to decline from pumping during persistent drought conditions. To comply with the relevant Rules, Subdistrict 1 will need to substantially reduce pumping from historical levels, which likely will include rotational fallowing of some irrigated lands and permanent retirement of others. Senator Simpson has sponsored Senate Bill 2022-28, to provide state financial support (from ARPA funds) for RGWCD and the Republican River Water Conservation District in eastern Colorado, providing them with additional funds to buy and retire irrigated acreage and thus reduce groundwater use in order to comply with interstate compacts and sustainability rules. SB 28 has passed the State Senate and appears to be headed toward passage in the House. Subdistrict 5 has experienced a different set of challenges, needing to obtain sufficient surface water rights to replace depletions to Saguache Creek and its tributaries.

During the RWR meeting on April 23, Governor Owens observed that “governments sometimes make mistakes, including water districts,” getting ingrown and self-centered. Mr. Berry told us that the RGWCD Board of Directors had forced him to resign from the Subdistrict 4 Board of Managers when his support for RWR became known, even though he was the president of that board and is the largest water user in that subdistrict. He said Subdistrict 4 had been on a path toward compliance with the Rules by paying to fallow acreage; now the Subdistrict will not pay him to fallow his land, nor will they refund his fees. Mr. Berry said Subdistrict 4 needs to acquire more surface water rights to replace stream depletions. He believes that RGWCD is on a path to exclude small family farmers due to the high fees they charge, leaving only the large corporate farmers that benefit from current policies. He said RGWCD (especially Subdistrict 1) needed to be more aggressive in buying and retiring lands, but it was “political suicide” and “stigmatizing” to fight RGWCD.

█████ owns land and water rights in Subdistrict 5. █████ noted this subdistrict is buying water rights to put into a new annual replacement plan, since the initial plan was rejected

³ CRS § 37-48-108.

as insufficient. [REDACTED] said these concerns are legitimate, since Saguache Creek flows are impacted substantially by pumping large irrigation wells. However, animosity is growing between groundwater and surface water users. Many ranches in the area are tied up in conservation easements that make the water unavailable for retirement, even to make the aquifers sustainable. The Colorado Cattlemen's Land Trust, holder of many conservation easements in the area, is starting to allow fallowing in 3 of every 10 years, but will not allow permanent retirement or transfer of irrigation water. [REDACTED] indicated that some farmers would prefer to sell their water rights, rather than lose the right to irrigate if wells are curtailed. (If the water rights are sold, such as to Douglas County via RWR, then the buyer will take on the risk of curtailment if required by the State Engineer in the future.) [REDACTED], [REDACTED] selling farmers are looking for buyers who will pay higher prices than RGWCD. [REDACTED] said that even when RGWCD has bought water rights, they have temporarily fallowed lands rather than permanently retiring them, raising suspicion that RGWCD wants to sell the water rights.

[REDACTED] Mr. Dill (of RWR) also said Subdistrict 5 lacked in transparency; they often schedule meetings with the minimum 24-hours posted notice, and no notification to interested parties, and then consumed most of their meeting time in executive session. They indicated Subdistrict 5 did not disclose what fees it would charge until sending bills at the end of the last irrigation season, and even then did not disclose what cost items they were charging as fees. Sean Tonner indicated that in Subdistrict 4, some of RGWCD's "friends" have been able to negotiate lower fees than those generally charged.

Mike Dill of RWR said RGWCD is dominated by the large farmers in Subdistrict 1 and areas farther south; Subdistricts 4 and 5 have very little voice. He said RWR does not want RGWCD to receive money from its proposed community fund, since the RGWCD board members favor their friends. He, Mr. Berry and [REDACTED] complained about various impacts from operation of the Closed Basin Project (CBP), and [REDACTED] said he gets no benefit from the CBP. The CBP is a federal project, owned and operated by the U.S. Bureau of Reclamation, in collaboration with the State of Colorado and the RGWCD.⁴ It plays a large role in Colorado's strategy for meeting its obligations to New Mexico and Texas under the Rio Grande Compact (a federal law⁵). To the extent that the CBP impacts water users in the San Luis Valley, it both reflects and mitigates the Compact's limits on Colorado's total water use from the Rio Grande and its tributaries. Thus, I don't think RGWCD can be fairly charged with water users' complaints over operations of the CBP, given the many higher-level legal constraints that govern that project.

In the Monte Vista meeting, Karla Shriver (currently on the Subdistrict 2 Board of Managers) defended the transparency of the subdistricts under RGWCD's direction, including use of RGWCD's database for email notifications. She acknowledged that Subdistrict 5 was less communicative than others, and perhaps less cooperative internally. (Commissioner Laske agreed that Subdistrict 2 has maintained good communication with residents.) Ms. Shriver said Senate

⁴ See Act of October 3, 1980, P.L. No. 92-514, 86 Stat. 964, as amended, P.L. No. 96-375, sec. 6, 94 Stat. 1505, 1507; *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P. 2d 627, 629 (Colo. 1987).

⁵ P.L. No. 96, 53 Stat. 785 (1939).

Bill 28 was designed to improve the viability of small farms working with the Subdistricts' management plans, to avoid the big farms taking over more land and water. She explained the Subdistricts still are working on annual plans that emphasize fallowing, to minimize the need to permanently retire lands from irrigation; any permanent dryup should occur on more marginal land around the edges of the San Luis Valley, to minimize impacts to production and other water rights. When the subdistricts buy land, they rely on fair market value supported by appraisals. Ms. Shriver and others said the Valley's residents "can help ourselves without RWR's help."

Marisa Fricke said Subdistrict 1 has been working with farmers to assess themselves fees to purchase water supplies, and temporary or permanent retirements when needed, so they can control their own destinies. Councilman Carson (who also works as RGWCD's database administrator) defended the subdistricts' efforts to be as transparent and timely as they can with short resources; Subdistrict 5 has been trying to remedy its annual replacement plan with very tight deadlines, so it has needed to conduct special meetings without the ability to provide more advance notice. Commissioner Laske said many farmers were changing their crops in order to conserve more water.

[REDACTED]

We understand RWR approached RGWCD in about 2018 to explore a win-win solution, and RGWCD rejected that approach. [REDACTED]. While RGWCD is struggling to accomplish a difficult mission, it appears that RGWCD's directors (like the County Commissioners who appoint them) effectively represent the desires and needs of their constituents in pursuing sustainability, and in opposing RWR's proposal as it now stands. To have any chance at a true "win-win" solution with the San Luis Valley, RGWCD likely will need to be part of the solution.

6. Dry-up of Irrigated Lands

Since RWR will need to retire several Confined Aquifer wells located in Subdistrict 4, RWR likely will rely on purchase of [REDACTED] water rights and retirement of his wells as a starting point. I asked [REDACTED] what would happen to his irrigated land if RWR bought his water rights and retired his wells. He said the land would revert to cattle grazing. It will take some time to reestablish the soils and native grasses. Depending on moisture and soil characteristics, some of the land may revert to meadows. Other land may be susceptible to blowing soils with difficulty establishing vegetation; the sandy native soil conditions in the San Luis Valley (prior to irrigated agriculture) resulted in formation of the Great Sand Dunes. [REDACTED] also addressed the difficulty, and importance, of reestablishing native grasses on lands from which irrigation water is removed.

In the afternoon meeting, Councilman Carson and Ms. Shriver said the irrigators in the San Luis Valley are prepared to make the necessary reductions in water use to achieve sustainability. However, if additional reductions in use are needed to offset new wells used to export water to other regions, it will be that much harder for irrigators to reach sustainable groundwater use while maintaining a sustainable irrigation economy in the Valley.

As outlined in our March 23 memorandum, the Water Court's decree likely will include terms and conditions requiring revegetation of the historically irrigated lands from which water is removed. Douglas County, as the applicant for changed water uses, likely will bear ultimate responsibility for satisfying these requirements. Maintaining satisfactory revegetation of these lands will continue to be a significant issue for other parties in the San Luis Valley for many years after the water rights are decreed.

7. Wirth Amendment

Congress enacted the Wirth Amendment that sets a requirement for any federal permits or approvals for projects to export water from the San Luis Valley, as discussed (and quoted) in our March 23 memo. This statute prohibits such permits or approvals unless the Secretary of the Interior determines that the project will not (among other things) "adversely affect the purposes of" several designated federal land areas, including the Baca National Wildlife Refuge (NWR). Our site visit confirmed that the Baca NWR is directly adjacent to the RWR property from which RWR proposes to pump groundwater. Thus, it likely will be difficult to show the absence of adverse effects to the Baca NWR from such pumping.

The DOI attorneys contacted me to share their questions and concerns regarding the Wirth Amendment, in the context of my legal review of RWR's proposal for Douglas County. Initially, they suggested the Wirth Amendment might apply to Douglas County's use of ARPA funds. This issue is further discussed in the ARPA section at the end of this memorandum. I asked them what their time frame would be for making Wirth Amendment determinations, in relation to the time frame for Water Court proceedings that could involve some of the same issues. They said it would depend on when the Wirth Amendment is "triggered" by an appropriate action, such as a permit application or proposed use of federal funds. Ms. Chartrand said the U.S. certainly will be an objector in any Water Court proceedings resulting from the RWR proposal. If Douglas County and/ or RWR applies for a federal permit at the same time as they apply for water rights, then the review could be simultaneous, or the DOI could make its review just after the Water Court decree is entered, taking into account the findings made and limitations imposed by the Water Court. Mr. Gheleta asked when the Water Court proceeding would happen; I told them several items would need to be in place after any agreement between RWR and Douglas County, so the application likely would be filed no sooner than the end of 2023. Since the Wirth Amendment requires the DOI to rely on findings from the CWCB, Ms. Chartrand asked if the CWCB had taken a position on the project. I told her CWCB had not taken a position, in view of its upcoming role under the Wirth Amendment; Governor Polis and the CWCB have both made it clear that his position does not dictate or imply a position by the CWCB.

Unless RWR agrees that it will obtain a favorable determination from the Secretary of the Interior alongside (or just after) the Water Court proceeding, and prior to closing, Douglas County would be taking a very substantial risk of permit denial after purchasing the water rights. Even if the Secretary makes a favorable determination before closing, there remains a risk that a later administration could reconsider that determination at the time permits are sought. However, the new Secretary would need to demonstrate reasons for departing from the initial determination.⁶

8. Local Hazards of Supporting RWR

Jerry Berry has publicly expressed his support for RWR, and has faced some consequences for his support. As noted above, RGWCD's Board of Directors removed him from the Subdistrict 4 Board of Managers for this reason. Mr. Berry feels the RGWCD's and others' opposition to RWR and its supporters is unjustified; he believes farmers should be able to contract to send their water out of the valley, just like they can export crops or cattle to other regions.

Other RWR supporters prefer to remain anonymous. [REDACTED] said that in a close-knit community, it's easier to go along with your friends' views than to buck the tide. Otherwise, he may not be able to get services when needed, such as repairing his sprinkler.

9. Community Funding Needs

In each meeting on April 23, Commissioner Laydon asked how RWR's proposed community fund could be put to use. [REDACTED] said local health-care services needed improvement, such as 24-hour urgent care, and law enforcement needs more funding so the county sheriffs can pay adequate salaries. Mr. Berry said local school finances (in Moffat) were inadequate; he believes \$50 million would be a tremendous benefit in comparison to the economic loss to the community. He pointed out that he only employs five people on his farm; he felt local governments were exaggerating the economic loss to the community if water rights were sold for export. Mr. Tonner said he had spoken with local businesses needing financial support to maintain their water use, such as a restaurant facing an \$8,000 bill to upgrade its well. [REDACTED] thought the community fund should be privately managed, with a good community-minded board of directors, rather than controlled by local governments.

In the Monte Vista meeting, Councilman Carson said the proposed \$50-60 million could do significant good, but would not offset many years of the annual revenue lost from removing the water. Commissioner Noffske analogized it to a divorce, where the harm to the family/community is even greater than the strictly economic loss. Commissioner Leske viewed the community fund as a wealthy community and developer "buying off" a poor community, which she found offensive. The money could help local budgets in the short term, but would not offset

⁶ Agency decisions must be supported by adequate reasoning and cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Bos. Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971).

the long-term “devastation.” Ms. Fricke said the Valley is not moving away from agriculture; young farmers are starting and staying in the business. They need water, rather than money, to succeed.

10. Return on Investment

A few of the speakers in Monte Vista questioned whether Douglas County would realize any return on its \$10 – 20 million investment with RWR. In particular, Councilman Carson cited the estimated cost of \$2 billion to build the pipeline to the South Platte River, and the uncertainties over future water availability.

11. Open Door to Exports

Commissioner Noffske said he was concerned, and others in the Monte Vista meeting agreed, that RWR’s pipeline for 22,000 acre-feet/ year would be the “camel’s nose under the tent,” opening the door to more and larger exports of water from the San Luis Valley to the Front Range. When similar issues have been raised in the past (such as with Aurora’s transfers of water out of the Arkansas Valley), we have seen them addressed successfully in intergovernmental agreements. An IGA could provide, for example, that Douglas County will not make any of its pipeline capacity available to other water providers, and/ or that it will not use its pipeline to take water from any other sources in the SLV, or in any greater amounts.

12. State Legislation

In addition to the current Senate Bill 28, discussed in the RGWCD section above, there are two potential Colorado state legislation issues affecting the RWR proposal:

- (1) As discussed in our March 23 memorandum, RWR intends to pursue state legislation to cure the “fatal flaw” to RWR’s proposal under the 2015 Groundwater Use Rules, which limits pumping of RWR wells to the retirement of average annual amounts pumped from the Confined Aquifer in Response Area 4 (no more than about 10,000 acre-feet/ year). RWR still has not divulged to us its draft legislation or strategy for enacting it, citing confidentiality concerns. Senator Simpson and Representative Valdez are both aware that RWR is pursuing a legislative fix, and they seem inclined to oppose anything that RWR may propose, particularly any legislation that would support (directly or indirectly) RWR’s efforts to export water from the San Luis Valley.
- (2) Last Monday morning, soon after attending the April 23 meeting in Monte Vista, Representative Valdez mentioned to the Colorado Water Congress (CWC) State Affairs Committee that he was working on a draft bill to keep water in over-appropriated river basins. He suggested he was working with leadership to bring forward a late bill before the current legislative session ends on May 11, 2022. However, we have not yet seen this bill introduced.

13. ARPA Update

As mentioned above, ARPA issues have arisen in two of our legal discussions during April. The Brownstein attorneys (for RWR) explained their conclusion that the RWR proposal could be eligible for ARPA “revenue replacement” funds. Essentially, they believe that the law allows any uses of such funds that are not specifically prohibited under the governing law and regulation. However, there is no mechanism for the Treasury Department to confirm that a particular use of funds is allowable, on points where the law is unclear or contradictory. Lance Ingalls and I further discussed this issue after considering Brownstein’s explanations, and we agree that these explanations do not change the conclusions expressed in our March 23 memorandum.

The DOI attorneys suggested the Wirth Amendment might apply to Douglas County’s use of ARPA funds, as noted above. I told them that even if the County elected to further consider RWR’s proposal, it might utilize other, non-federal funds, rather than ARPA funds. From their standpoint, it’s an “open question” whether the use of ARPA funds as a down payment on the RWR proposal would trigger Wirth Amendment review and determinations. If they conclude that it does trigger the Wirth Amendment, then Douglas County’s use of ARPA funds for this project could be disallowed absent a no-harm finding from DOI. Douglas County is unlikely to obtain such a finding prior to the required Water Court proceeding, since RWR’s augmentation plan is not yet sufficiently developed to prove the absence of injury. While we think arguments can be made that Douglas County’s discretionary use of ARPA “revenue replacement” funds would not trigger the Wirth Amendment, the DOI’s consideration of this question further supports our recommendation that Douglas County not attempt to use any ARPA funds for this proposal, but instead identify other available (non-federal) funds if it chooses to pursue the proposal.

CONCLUSION

The recent meetings and new information summarized above have not changed any of the conclusions expressed in our March 23 memorandum. We still cannot recommend acceptance of RWR’s proposal at this time; the recent meetings have confirmed the major impediments 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.

Exhibit A
CONFIDENTIAL

[illegible]

Sign-In Sheet

Exhibit B

[illegible]

Exhibit C

