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<p>DISTRICT COURT, WATER DIVISION 7, STATE OF COLORADO</p> <p>Court Address: LaPlata County Courthouse 1060 E. 2nd Avenue Durango, CO 81302</p>	<p><b>▲ COURT USE ONLY ▲</b></p>
<p><b>CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE PAGOSA AREA WATER AND SANITATION DISTRICT AND THE SAN JUAN WATER CONSERVANCY DISTRICT</b></p> <p><b>IN THE SAN JUAN RIVER AND ITS TRIBUTARIES</b></p> <p><b>IN ARCHULETA COUNTY</b></p>	<p>Case No.: <b>2004CW085, On Remand</b></p> <p>Div.: 7                  Ctrm.:</p>
<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE</b></p>	

THE COURT, having considered the pleadings of the parties and the evidence presented, does hereby find and conclude as follows:

**FINDINGS OF FACT**

1. Pagosa Area Water and Sanitation District (“PAWSD”) and San Juan Water Conservancy District (“SJWCD”) (together hereinafter referred to as the “Districts” or “Co-Applicants”) filed the subject Application for Water Rights on December 20, 2004. The Districts’ addresses are:

Pagosa Area Water and Sanitation District  
P.O. Box 4610  
Pagosa Springs, Colorado 81157

San Juan Water Conservancy District  
P.O. Box 4632  
Pagosa Springs, Colorado 81157

2. All notices of the application were given in the manner required by law and the Court has jurisdiction over the subject matter of this proceeding and over all persons and property affected hereby, irrespective of whether those persons or owners of property have appeared.

3. Statements of Opposition were filed by Koinonia, LLC, Trout Unlimited, the Park Ditch Company, Inc. and the “Weber Entities” (a collective name for the separate entities of Donald L. Weber, Kathryn L. Weber, Donald Andrew Weber, J.I. Hathaway Family Trust, Running Iron Ranch, LLC, and Weber Ranches of Pagosa, LLC; all listed on one Statement of Opposition c/o Kathryn L. Weber). The time for filing Statements of Opposition has now expired. No other party has made an appearance in this matter.

3.1 Koinonia, LLC, stipulated to a draft of a final decree on April 28, 2006, and said stipulation was approved by this Court on April 28, 2006.

3.2 The Park Ditch Company, Inc., stipulated to a draft of a final decree on December 8, 2005, and said stipulation was approved by this Court on April 5, 2006.

3.3 The Weber Entities stipulated to a draft of a final decree on September 16, 2005, and said stipulation was approved by this Court on September 22, 2005.

3.4 The Colorado Water Conservation Board informally participated in this matter through drafting and stipulation to the language contained in paragraph 11.1.6 herein.

3.5 This Decree is more restrictive on the Co-Applicants than prior drafts of the final decree, to which each of the parties above have stipulated.

4. The Division Engineer for Water Division 7 filed a Summary of Consultation with the court on December 20, 2005, based upon publication of the Application in the December 2004 Water Court Resume for Water Division 7. Counsel and staff for the State Engineer and Division 7 Engineer’s offices informally participated in this matter through drafting and stipulation to the language contained in paragraph 45.6 herein.

5. Trial to the Court was held on May 3, 4 and 5, 2006, at which evidence was presented by Co-Applicants and Objector, Trout Unlimited.

6. On July 15, 2006, this Court issued a final decree. Trout Unlimited filed a post-trial motion seeking modification of the final decree, to which the Applicants submitted a response along with a modified final decree, to which Trout Unlimited replied. On September 15, 2006, this Court partially granted Trout Unlimited’s motion and issued a final decree.

7. Trout Unlimited appealed the final decree to the Colorado Supreme Court in accordance with C.A.R. 1(e). After briefing and oral argument, the Supreme Court issued an opinion articulating the elements of proof required and remanded the case, by Mandate issued November 15, 2007, back to this Court for further proceedings as this Court deems necessary to determine additional findings of fact on topics specified by the Supreme Court.

8. PAWSD is a quasi-municipal corporation of the State of Colorado organized under §32-1-101 *et seq.*, C.R.S. PAWSD owns and operates a municipal water system that

provides treated and raw water for multiple beneficial uses within its service area, including the Town of Pagosa Springs, Colorado, and the majority of residential development within Archuleta County, Colorado. PAWSD has the statutory authority to appropriate water rights, to have and exercise the power of eminent domain and dominant eminent domain, to plan and construct water development projects, and to establish instream flow rights for recreational purposes, among other powers.

9. SJWCD is a quasi-municipal corporation of the State of Colorado organized under §37-45-101 *et seq.*, C.R.S. SJWCD provides water conservation, water resources planning, stream improvement, water rights protection and development services within its service area. SJWCD has the statutory authority to appropriate water rights, to have and exercise the power of eminent domain and dominant eminent domain, to sponsor water resources projects, to construct water development projects, to develop and operate augmentation plans and to establish instream flow rights for recreational purposes, among other powers.

10. The Districts filed this application in order to adjudicate conditional water rights for a joint water resources development project (the “Dry Gulch Project”) that will provide for the future water demands of customers served by the Districts.

11. The Districts seek a decree confirming conditional direct flow and water storage appropriations from the San Juan River for the structures and locations described below (the “Subject Water Rights”):

#### 11.1 Dry Gulch Reservoir

11.1.1 Legal description of dam and reservoir: Dry Gulch Reservoir will be an off-channel reservoir located on Dry Gulch, an ephemeral tributary to the San Juan River. The center point on the dam axis is located on the section line separating Sections 5 and 8, Township 35 North, Range 1 West, of the N.M.P.M., at a point 1,300 feet west from the Southeast corner of said Section 5. Dry Gulch Reservoir will occupy all or portions of the following quarter-sections, all located in Township 35 North, Range 1 West, of the N.M.P.M.: all of the SW/4, the S/2 of the NW/4, the S/2 and NE/4 of the NE/4, and the S/2 and NW/4 of the SE/4 of Section 4; the SE/4 of the SE/4 of Section 5; the N/2 and SE/4 of the NE/4 of Section 8; and all of the NW/4, all of the NE/4, the N/2 of the SW/4, and the NW/4 of the SE/4 of Section 9.

11.1.2 Dry Gulch Reservoir shall be filled by collecting native runoff and streamflow occurring within the Dry Gulch watershed, and by diversions from the San Juan River at either, or both, the Dry Gulch Pumping Station and Park Ditch river headgate. Dry Gulch Reservoir will be located within Dry Gulch and will inundate a portion of the Park Ditch. Legal description of filling structures:

11.1.2.1 The point of diversion for the proposed Dry Gulch Pumping Station will be in the San Juan River as it flows through the SE/4 of the SW/4 of Section 5, Township 35 North, Range 1 West, of the N.M.P.M., at a point 3,100 feet from the east section line and 750 feet from the south section line of said Section 5.

11.1.2.2 The point of diversion for the existing Park Ditch is located on the east bank of the San Juan River at a point 11 chains and 10 feet east and 8 chains and 43 feet north of the quarter corner between Sections 27 and 22, Township 36 North, Range 1 West, of the N.M.P.M., from which point the ditch extends in a generally southwesterly direction.

11.1.3 Source: Dry Gulch, an ephemeral tributary to the San Juan River, and the San Juan River.

11.1.4 Date of Appropriation: December 20, 2004, established by the filing of the Application in this case. Water has not yet been applied to beneficial use by exercise of the water storage rights.

11.1.5 Amount claimed: The Co-Applicants seek a 23,00 ac-ft, CONDITIONAL, water right, with the right to fill at up to 100 cfs in combination from all sources of water by the exercise of the Dry Gulch Reservoir water storage right, and with the right to refill at the same rate up to 29,000 ac-ft whenever in priority after initial annual filling is achieved. The Co-Applicants propose to exercise the water storage right claimed herein in conjunction with SJWCD's existing Dry Gulch Reservoir water storage right for 6,300 ac-ft to achieve on initial filling of 29,300 ac-ft. The Co-Applicants propose to exercise the initial fill and refill rights together in any water year to provide the flexibility necessary to benefit from varying hydrologic conditions, but will limit the use of such rights to store no more than 29,000 ac-ft total (by the use of either or any combination of the fill and refill rights) in any water year.

11.1.6 Uses: Water derived from the Subject Water Rights may be used for all municipal uses, including, but not limited to, domestic, industrial, commercial, mechanical, fire protection, sewage treatment, watering of parks, lawns, gardens and other public spaces, irrigation, agriculture, recreation (including releases to benefit decreed recreational in-channel rights), piscatorial and wildlife preservation (including releases to benefit instream flow rights decreed to the Colorado Water Conservation Board), lake and reservoir evaporation, and aesthetic purposes, and for replacement, adjustment and regulation of the Co-Applicants' respective storage and delivery systems, and those of its users, among themselves and with others. Water derived from the Subject Water Rights may also be used to provide raw water by contract to certain customers for irrigation. Co-Applicants may divert, store and use the water directly, by and for exchange, augmentation, substitution, replacement or

otherwise, as may be appropriate to maximize its lawful use. The water may be placed to use within the PAWSD or SJWCD service areas as such now exist or may exist in the future. In addition to all of the uses described herein, prior to storage, water derived by the exercise of the Subject Water Rights at the described points of diversion may be used by relinquishing a portion thereof to the stream to satisfy bypass flow requirements of any federal permits obtained for development of the Dry Gulch Project.

#### 11.1.7 Reservoir dimensions:

11.1.7.1 Total surface area of the reservoir at high water line (elevation 7,400 feet above M.S.L.) will be approximately 621 acres.

11.1.7.2 The maximum height of the dam will be approximately 160 feet.

11.1.7.3 The maximum total length of the dam will be approximately 3,000 feet.

11.1.8 Reservoir capacity: Total capacity of the reservoir is estimated at 25,300 ac-ft, of which 25,000 ac-ft will be active capacity and 300 ac-ft will be dead storage.

#### 11.2 Dry Gulch Pumping Station

11.2.1 Legal description of point of diversion: same as described in paragraph 11.1.2.1 herein.

11.2.2 Source: San Juan River and its tributaries.

11.2.3 Date of Appropriation: December 20, 2004, established by the filing of the Application in this case. Water has not yet been applied to beneficial use by exercise of the water rights.

11.2.4 Amount claimed: 50 cfs, CONDITIONAL, for direct flow purposes and/or for storage in reservoirs owned or controlled by the Co-Applicants.

11.2.5 Uses: same as described in paragraph 11.1.6 herein.

12. The Colorado Supreme Court directed this Court to evaluate whether the Co-Applicants have proved their intent to make non-speculative conditional appropriations on the basis of four elements articulated as determinations (1) of a reasonable water supply planning period, (2) of substantiated population projections based on a normal rate of growth for the period, (3) of the amount of available unappropriated water above the Co-Applicants' current

water supply that is reasonably necessary to serve the projected population for the reasonable water supply planning period, and (4) that the Co-Applicants can and will put the conditionally appropriated water to beneficial use within a reasonable period of time.

### Water Supply Planning Period

13. The evidence presented at trial with the greatest bearing on a determination of a reasonable water supply planning period consists of the Co-Applicants' future demand and water supply facilities report (Exhibit 75) presented through Mr. Harris' testimony, Mr. Harris' long term projection of water demand (Exhibit 60) and Trout Unlimited's various engineering scenarios presented through Mr. Gerstle's testimony and related exhibits. Mr. Harris testified about the difference between planning for water supply facilities and for water rights, explaining that facilities typically have a shorter life-span than water rights because of the perpetual nature of water rights. Mr. Harris' facilities report established a 40-year water demand projection, and then applied that demand projection to various facility alternatives to determine the preferred facility. This Court finds that, based on Mr. Harris' analysis, Dry Gulch Project is the preferred facility based on cost, feasibility, proximity to the existing water system and other factors.

14. Considering the circumstances of this case, use of 2040 (a 35-year planning period) for determining the relative cost effectiveness and feasibility of potential facilities was reasonable. A longer water supply planning period is justified for establishing water rights appropriations, particularly given the nature of the claims made and the Co-Applicants' existing water rights and water systems. The Supreme Court concluded that a 50-year planning horizon is reasonable for water rights planning purposes, and concluded that a planning period exceeding 50 years may be justified.

15. Mr. Harris testified about the engineering practicality of designing, permitting, and constructing a reservoir to the largest size that the site, need for water, and the owner's economics, can justify. He stated that it typically takes 15 to 20 years to get a large reservoir project operational, and that the Dry Gulch Reservoir could not be constructed and ready for use until about 2025. He further testified that if the planning period is too short, once Dry Gulch Reservoir is operational, initiation of planning for the next 50 years would have to immediately begin due to the long necessary lead time to enlarge Dry Gulch Reservoir. He opined that enlarging Dry Gulch Reservoir would entail a great duplicity of effort and cost associated with construction, obtaining land, permits, wetland mitigation facilities and water rights, and the interruption of operations at the existing facility.

16. Based on the testimony and evidence, this Court finds that about 20 years will be required from the time of filing the Dry Gulch Project water right application in 2004 until the Dry Gulch Reservoir is constructed and fully operational. Water from the reservoir may be available in about 2025. During this 20-year period, the activities will include: land acquisition; environmental field studies and evaluations; engineering field work and designs; permit studies and approvals by Federal agencies including the Corp of Engineers; dam design approval by the Colorado State Engineer; financing acquisition; bid documents and contractor selection;

construction of the facilities; and filling of the reservoir. This Court also finds that a similar amount of time may be required if Dry Gulch Reservoir were to later be enlarged.

17. This Court has considered the Supreme Court Opinion, in which the City of Thornton's 50-year planning period from the date the application was considered and endorsed, and finds it is sufficient for this water right application. This application involves claims for a large storage reservoir at a site chosen because of its uniquely favorable economic, engineering and environmental characteristics. Although the 50-year planning horizon may result in extra costs to the Co-Applicants in the future for reservoir expansion, additional claims for water rights must be based upon more certain data to be presented to the Court at future proceedings.

#### Water Demand and Population Projections

18. Mr. Harris and Ms. Campbell, Manager of PAWSD, testified that PAWSD uses equivalent units to measure the water demand for the water system. The water use of a single family home is equal to one equivalent unit of water demand and a formula is used to determine the number of equivalent units associated with commercial and industrial water connections. Ms. Campbell testified that PAWSD maintains current records of equivalent units so that at the end of each month, the exact number of equivalent units served by PAWSD is known, which allows the trend in growth of equivalent units to be monitored irrespective of population estimates. Using the U.S. Census population estimate for 2000, Mr. Harris found a relationship of 1.5 persons of permanent population per each equivalent unit served within the PAWSD water system in that year (Exhibit 75, page 7). This determination reflects the water use of part-time residents and commercial customers, and equates water use data to permanent population values, upon which census estimates are based. With the relationship of water demand to permanent population established at 1.5, Mr. Harris used that factor to convert growth rates in equivalent units to permanent population within the Districts' service areas.

19. Mr. Harris testified that the per capita water usage of permanent residents was determined from actual records of water treated for potable use. In Table D of Exhibit 75, Mr. Harris used annual volumes of water treated from 1995 to 2000 to determine an average of 215 gallons per day per permanent resident for the six-year period using the factors in paragraph 18 above.

20. Mr. Harris' water demand projections through 2040 were based on his extrapolations of data based on actual growth in equivalent unit demand observed in the PAWSD municipal water system from 1995 through 2000, together with population growth data over a longer 30-year historical period. He extrapolated the future growth in water demand from the historic PAWSD growth rate in equivalent units over the 2000 to 2010 period, and longer-term population growth as indicated by U.S. Census data from 1980, 1990 and 2000. The result of his analysis is shown in Table E of his 2003 Report (Exhibit 75).

21. Mr. Harris extended his 40-year water demand projections to 100 years, using the long-term historical annual population growth rate in Archuleta County of 1.9 percent (Exhibit 60). In contrast, Mr. Gerstle relied upon permanent population forecasts made by the State

Demographer's Office to project future population in the Co-Applicants' service areas. Both experts found the long-term use of a 1.9 percent growth rate to be reasonable beyond 2040, but disagreed about the accuracy of the State Demographer's forecasts. Both experts assumed that the Co-Applicants' service area population is approximately 95 percent of the total population of Archuleta County.

22. An area of contention between the experts concerned the level of water conservation that will occur during the planning period. Mr. Gerstle testified that over the planning period, natural and programmed conservation would result in a reduction in per capita water usage from the currently observed 215 gallons per capita per day to 175 gallons per capita per day. Mr. Harris predicted a more conservative reduction from 215 to 200 gallons per capita per day. Mr. Gerstle's projection was based on published reports concerning water use observed in large metropolitan areas rather than resort mountain communities such as Archuleta County.

23. Two key factors are important when evaluating the experts' approaches to water demand forecasts. The first is the expected reliability of the methods used, and the second is the relationship between water demand to permanent populations in communities containing a large number of second homes and a predominant tourist economy. Mr. Harris testified that extrapolation of recent actual equivalent unit data is a more accurate method to forecast future demand than the State Demographer's forecasts of permanent population based on 10-year census estimates. He stated that when he questioned the State Demographer's Office about the past accuracy of its population forecasts, the State Demographer's Office admitted to an underestimate of 40 percent in their 10-year projection of the 2004 Archuleta County population made in 1994. On cross-examination, Mr. Gerstle testified that he had not checked the accuracy of the State Demographer's past forecasts. All forecasting methods must extrapolate from existing data, and Mr. Harris' method takes into consideration the demonstrated actual annual growth in water demand and the unique relationship of water demand to the population served by PAWSD's water system. Mr. Gerstle's preferred method relies on population estimates derived from census data verified every 10 years. This Court finds and concludes that Mr. Harris' methods of extrapolating forecasts from actual equivalent unit data observed within PAWSD's water system is a substantiated procedure for predicting the future water needs of the local community. Such a method is based on observed equivalent unit growth data and sound mathematical techniques to extrapolate water demand projections at normal rates through the 50-year planning period.

24. This Court finds and concludes from Mr. Harris' analysis of the PAWSD actual water usage data, that there are an average of 1.5 permanent residents for each equivalent unit of water demand, the current water use per permanent resident is 215 gallons per day, and that use of equivalent units provides the best method to determine current water use and to provide the basis for projecting future water demands. Considering all of the facts and circumstances of this case, this Court determines and concludes that Mr. Harris' projections of water demand in the year 2055 are based on the demonstrated relationship of water demand to population in the PAWSD municipal water system and are reasonable and normal for that system. Further, Mr.

Harris' water demand projections reflect a reasonable reduction in per capita water use from the current 215 gallons per day to 200 gallons per day in 2035 due to the effects of natural conservation described by Mr. Gerstle and the conservation plan employed by PAWSD. Ms. Campbell testified about the comprehensive conservation plan that PAWSD has implemented. Although active conservation programs of PAWSD may result in even greater reductions in per capita water demand, that phenomena will become apparent in future years, and can be evaluated in future diligence proceedings in the context of the reality checks. To test the accuracy of the water demand projections, this Court has included provisions in the terms and conditions of this decree to allow adjustment of the claims if warranted.

### Appropriation Amounts

25. Ms. Campbell testified that PAWSD's existing water rights in the Stollsteimer Creek watershed had no yield in the extreme 2002 drought year. She also testified that PAWSD's water rights from the San Juan River would not have yielded as much as they did in 2002 if the facilities of a senior appropriator downstream had not been under construction. Mr. Harris and Ms. Campbell testified that a substantial portion of the San Juan River water rights that PAWSD currently relies upon have an appropriation date of 1983 – a very junior priority when compared to existing water rights within the watershed, the prospect of a Colorado River Compact call based on a 1922 priority and the likelihood of sustained droughts as evidenced by historical tree ring studies.

26. Mr. Schmidt, Ms. Wessells, Ms. Campbell and Mr. Harris provided testimony on the PAWSD policy of providing for reserve storage equal to the water system annual demand, herein described as the One-year Safety Supply Margin. The Court finds by a preponderance of the evidence that the One-year Safety Supply Margin is reasonably necessary to ensure a reliable water supply for the Co-Applicants' water system, and to provide for the mix of beneficial uses for which the appropriation was made. Mr. Harris included carryover storage equal to the Safety Supply Margin in his modeling. Mr. Gerstle's models assumed reliance upon and use of the entire storage capacity of the reservoir in the driest year modeled, scenarios that would leave no water in the reservoir for the Co-Applicants' Safety Supply Margin nor for the claimed recreation, piscatorial and wildlife uses of the reservoir.

27. To supply the projected water demands in 2055, this Court hereby finds and concludes that the water rights decreed herein should be reduced from the water demand projected in 2100. The Court finds that no formula exists for the modification of the originally claimed amounts, and that the volumetric limits contained herein, and the "reality checks" set forth below allow further adjustment of the conditional rights granted herein, based upon actual future data. Accordingly, the Court finds that the need for storage claimed herein should be reduced to 25,300 ac-ft. Of the amount needed, the Co-Applicants have stated that SJWCD's existing water rights for Dry Gulch Reservoir, totaling 6,300 ac-ft, will be used leaving the need for only 19,000 ac-ft under the claims made herein.

28. The modified water storage right claims in this matter total 19,000 ac-ft of initial fill with the ability to refill when in priority so that a total of no more than 25,000 ac-ft diverted

from the San Juan River and placed into storage may occur in one year. Such limit shall not apply to water available in priority to the Co-Applicants under this decree, but which is voluntarily or involuntarily bypassed. The water demands for the 50-year planning period justify awarding a conditional water storage right for 19,300 ac-ft, with the right to fill and refill to a maximum annual total of 25,300 ac-ft.

29. Water diversion rates for directly supplying the projected water demands and to provide for storage in Dry Gulch Reservoir and other Co-Applicant reservoirs were reduced by this Court from the claims initially made in the application. This Court heard testimony by Mr. Harris that a 100 cfs diversion rate would be adequate for exclusively filling the Dry Gulch Reservoir, and that an 80 cfs direct diversion rate may be adequate for meeting the peak demand and/or filling reservoirs, so that together, total diversions under the water rights decreed herein shall not exceed 180 cfs at any time. These diversion rates were decreed by this Court with the understanding that the 80 cfs diversion was needed to satisfy the peak daily water demand in 2100. This remand decree adopts a planning period until 2055, and this Court finds that the 80 cfs direct diversion amount for the Dry Gulch Pumping Station shall be also be reduced to 50 cfs, subject to the “reality checks” set forth herein.

30. Further, Mr. Harris testified that inherent in his flow rate calculations is an assumption that environmental permits issued by federal agencies for the proposed project will require that a bypass of flow in the San Juan River be made at any time the Districts’ water rights are diverted for this project. Ms. Campbell testified that the U.S. Forest Service had imposed a bypass requirement on a recent PAWSD pipeline diversion. Mr. Harris estimates that for this project, the bypass may be twice the instream flow water right that has been adjudicated by the Colorado Water Conservation Board. Mr. Harris stated that his model took into consideration the adjudicated senior instream flow water rights as well as a hypothetical federal permit bypass. Mr. Harris testified that there is a direct relationship between the necessary diversion rates and the size of the flow bypass that is required, because a higher bypass creates a restrictive limit upon the periods of time that water may be diverted. With fewer opportunities to divert, the higher diversion rate will allow a quicker fill during higher streamflow periods. On cross-examination, Mr. Gerstle agreed with this principle.

31. The Court finds that the 100 cfs diversion strictly for storage shall not be reduced because of the uncertainty of additional bypass requirements associated with federal environmental permits. This diversion is subject to the “reality check” provisions set forth below in paragraph 45.2, to be considered at future diligence proceedings.

32. Experts for both parties testified that they had used the same hydrologic modeling method for determining how the Dry Gulch Project water rights would be used to divert and store water during the 5-year drought period that was modeled. The experts agreed that the modeling method was a reasonable and generally accepted method relied upon in their profession. The availability of water in the San Juan River to meet the many modeling scenarios was not disputed by the experts. Therefore, this Court determines and finds that the amount of unappropriated water claimed by the Co-Applicants during the 50-year planning

period is available and reasonably necessary to serve the projected population for a reasonable water supply planning period under the facts and circumstances of this case. To prevent the water demand projections from resulting in speculative claims, this Court has included provisions in the terms and conditions of this decree to enable review of the trends in future data to allow adjustment of the claims if warranted.

### Can and Will

33. A necessary element of proof in any application for conditional water rights is a determination that the conditionally appropriated water can and will be diverted, stored, or otherwise captured, possessed and controlled, and will be put to beneficial use, and that the project can and will be completed with diligence and within a reasonable period of time. §37-92-305(9)(b), C.R.S. The evidence presented by the Co-Applicants at trial consists of testimony by the presidents of each of the Districts concerning the establishment of water impact fees through cooperation of the SJWCD with the Town of Pagosa Springs and Archuleta County to contribute funding for purchasing the land necessary for the project. Mr. Schmidt, President of SJWCD, testified about his negotiations, on behalf of the Boards, for the purchase of the land for the Dry Gulch Project.

34. Ms. Campbell testified that the PAWSD Board of Directors enacted a water resources fee, initially set at \$6,343, that is being imposed on each new equivalent unit of water demand added to the PAWSD water system by residential and commercial growth. The funds generated by this fee will be used for development of the Dry Gulch Project. Mr. Harris testified about his participation in the development of the water resources fee, and stated that the amount of the fee is predicated on the development costs of a reservoir with a 35,000 ac-ft capacity at the Dry Gulch Reservoir site with diversion rates of 180 cfs. Costs associated with pumping facilities and a smaller reservoir may be less, and would be expected to have no detrimental impact to economic feasibility. Mr. Harris opined that 15 to 20 years is a reasonable time for the development of a water storage project of a size and scope of the Dry Gulch Project. Trout Unlimited did not present any evidence that the Districts would be unable to construct the project with diligence and within a reasonable time. The Court finds that the Districts have demonstrated that the water appropriated by this decree can and will be diverted, stored, or otherwise captured, possessed and controlled, will be beneficially used, and that the appropriations will be completed with diligence within a reasonable time.

35. The Districts have demonstrated a specific plan and intent to divert, store or otherwise capture, possess and control specific quantities of water for specific beneficial uses. Because the specific plan must depend on water demand projections into the future, this Court hereby finds that the terms and conditions imposed by this remand decree on the conditional appropriations confirmed herein are necessary and adequate to ensure that the claims awarded are not speculative and are necessary for meeting the Co-Applicants' reasonable water demands.

36. The Districts may divert or store water, under the priority awarded herein and in the amounts and rates of flow claimed, from the San Juan River and Dry Gulch, a tributary of

the San Juan River, at the specified diversion points, subject to the terms and conditions specified herein.

### **CONCLUSIONS OF LAW**

37. Timely and adequate notice of this application was given in the manner required by law and the Court has jurisdiction over the subject matter of this proceeding and over all persons and water rights affected thereby, irrespective of whether those persons or owners of water rights have appeared in accordance with §§ 37-92-203 and 37-92-302, C.R.S.

38. The Districts have entered into Stipulations with Koinonia, LLC, the Park Ditch Company, Inc., and the Weber Entities as described in paragraph 3 herein. The terms of said Stipulations are incorporated herein as enforceable terms of the decree granted herein.

39. The Districts have properly initiated the appropriation of the Subject Water Rights as of December 20, 2004, have proceeded with reasonable diligence in the development of the Subject Water Rights from the date of initiation, have demonstrated that water can and will be diverted and beneficially used, and that completion of the appropriations can be accomplished with diligence and within a reasonable time, and therefore the Districts are entitled to a decree confirming and approving the Subject Water Rights within the meaning of §§ 37-92-103(3)(a) and 37-92-305, C.R.S.

40. This decree is administrable by water officials of the State of Colorado.

### **JUDGMENT AND DECREE**

41. The foregoing Findings of Fact and Conclusions of Law are hereby adopted and incorporated into this Ruling, Judgment and Decree as if fully set forth herein.

42. The Districts are hereby decreed a conditional water storage right for Dry Gulch Reservoir confirming the right to storage in the amount of 19,000 ac-ft, along with the right to fill and refill continuously whenever in priority after the initial annual fill, as determined by the Division Engineer, has been achieved, to accumulate a total annual storage volume of 25,300 ac-ft in Dry Gulch Reservoir. Such annual limit shall not apply to water available in priority to the Co-Applicants under this decree, but which is voluntarily or involuntarily bypassed. Diversions to storage shall be made by capture of inflow tributary to the reservoir and by diversions from the San Juan River via the Dry Gulch Pumping Station and Park Ditch points of diversion, together at a combined rate not to exceed 100 cfs (not including conditional rights to store described in ¶11.2 herein), with a priority established by the appropriation date of December 20, 2004.

43. The Districts are hereby decreed a conditional water right for the Dry Gulch Pumping Station confirming the right to divert water from the San Juan River for direct flow purposes and/or for storage in reservoirs owned or controlled by the Districts, including trans-basin use and storage in District 78 (Piedra River watershed), at a rate of up to 50 cfs (not

including the 100 cfs conditional right described in ¶11.1 above), with a priority established by the appropriation date of December 20, 2004.

44. The Districts may exercise the storage or direct flow rights confirmed in this remand decree independently or in any combination, with the overall limitation that the total combined diversion from all sources, including the Dry Gulch Pumping Station, Park Ditch, and tributary inflow to Dry Gulch Reservoir, shall never exceed 150 cfs at any given time, and the annual accumulation into storage shall not exceed 25,300 ac-ft of water per water year (water year defined as the 12-month period commencing on November 1<sup>st</sup> and extending through the following October 31<sup>st</sup>). Such annual limit shall not apply to water available in priority to the Co-Applicants under this decree, but which is voluntarily or involuntarily bypassed.

45. The following terms and conditions shall apply to the Districts' use and perfection of the conditional water rights herein granted:

45.1 The Colorado Supreme Court cited the use of reality checks and volumetric limitations as important to its approval of the appropriations that were the subject of the *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1 (Colo. 1996) case. The water court in *Bijou* imposed reality checks to allow a testing of the City of Thornton's projections of water demand through the hexennial diligence review process. Critical factors affecting the amount of unappropriated water reasonably necessary to meet the Co-Applicants' projected water demands in this case are (1) the uncertainty of flow bypass requirements that may be imposed by the federal permitting agencies and (2) the reliable yield of the Co-Applicants' existing water rights. Here, as in *Bijou*, the reality checks that follow can guide this Court in future diligence proceedings concerning determinations of need for the conditionally decreed water rights.

45.2 Because the size of a federally-imposed flow bypass cannot be known until permits for the Dry Gulch Project have been issued by the federal agencies having jurisdiction, and given the importance of such bypass requirements to the necessary diversion claims conditionally decreed herein, it is appropriate to revisit the water right claims based on all relevant data when such requirements are known. At such time as the Co-Applicants have obtained federal permits for the Dry Gulch Project, including the Dry Gulch Pumping Station and the Dry Gulch Reservoir with all attendant facilities, this Court will review, within the context of the then pending or next pending diligence proceeding, all relevant data concerning the following:

45.2.1 The actual growth in equivalent units documented by the records of the Districts from 1995 through the date that the federal permits are issued for use in projecting the trend in such growth through 2055.

45.2.2 The actual trend in per capita water usage documented by the records of the Districts for use in projecting the conservation effects on such water usage through 2055.

45.2.3 The diversion rates necessary to meet the projected water use and storage demands in 2055 taking into account the federal bypass requirements, if any, and any relevant hydrologic and water rights call data observed between 1995 and the date that federal permits are issued and the effects of such data on the water rights yield of the PAWSD water system. Such data could impact the Co-Applicants' projections of water availability to existing water rights and the need for storage.

45.2.4 Any beneficial or adverse effects of climate change on the Co-Applicant's water system yields and need for the claimed storage.

45.3 The total annual volumetric limitation of 25,300 ac-ft imposed upon the conditional storage rights described above in ¶42 provides the same protection to future appropriators as volumetric limits imposed in the *Bijou* case and, when considered in conjunction with the reality checks described in ¶45.2 above, keep the amount of water appropriated herein within the Co-Applicants' projected water demand.

45.4 The Districts shall install and maintain meters, measuring devices and other structures as required by the Division Engineer for Water Division No. 7 to properly account for the water diverted and beneficially used pursuant to this remand decree.

45.5 The Districts shall develop accounting forms that accurately account for the use of the water diverted and/or stored by exercise of the Subject Water Rights separately from other water rights owned and exercised by the Districts. Such accounting forms shall be submitted to the Division Engineer prior to the diversion and use of water by exercise of the Subject Water Rights, and may be revised from time to time thereafter as deemed appropriate, or as may be required by the Division Engineer.

45.6 The Offices of the State and Division Engineers dispute whether the Co-Applicants' release of portions of the Subject Water Rights at the points of diversion for satisfying potential bypass flow requirements imposed by federal permits or made a condition of this decree is a beneficial use of water under Colorado water law. The State and Division Engineers and Co-Applicants recognize that the Subject Water Rights are comprised of both direct flow and storage components. The direct flow component will be used to meet direct flow water demand of the Co-Applicants and the storage component will be used to store water. The subject Dry Gulch Reservoir is an off-stream reservoir that relies on diversions from the San Juan River through both gravity-flow and pumped-flow fill structures. Therefore, as terms and conditions of this decree, the State and Division Engineers and Co-Applicants agree that any such release of direct flow water rights to the stream may not be considered a beneficial use by the State and Division Engineers, but the Co-Applicants reserve the right to assert that such use is a beneficial use in future proceedings concerning such rights. In addition, the State and Division Engineers and Co-Applicants agree that although a release to the stream of diversions for storage (fill) at the points of diversion for such rights may not be

considered a beneficial use by the State and Division Engineers, such releases shall be administered by such officials as an incidental loss in the exercise of such storage water rights and accounted for against any fill under the priority of the storage rights. Furthermore, Co-Applicants reserve the right to assert that such incidental losses are a beneficial use in future proceedings concerning such rights. The State and Division Engineers reserve the right to assert that any uses described herein, incidental or otherwise, are not beneficial uses in future proceedings concerning the water rights that are the subject of this decree.

45.7 Return flows from water derived from the Subject Water Rights and returned to the San Juan River after an initial use shall not be reusable by the Districts except by re-appropriation under separate water rights from those decreed herein.

45.8 The Park Ditch Company, a *pro se* Objector in this matter, operates the Park Ditch, which traverses through the Dry Gulch Reservoir site and the headgate for which has been designated as a point of diversion for filling Dry Gulch Reservoir by exercise of the Subject Water Rights. The Districts have adopted the following terms and conditions and have entered into a Stipulation with the Park Ditch Company to address the Districts' obligations to protect the water rights and other assets of the Park Ditch shareholders in connection with the Districts' construction of the Dry Gulch Project and the use of the Park Ditch as a filling structure for Dry Gulch Reservoir.

45.8.1 As a condition precedent to diverting water in the Park Ditch by exercise of the Subject Water Rights, the Co-Applicants will enter into an operations and maintenance agreement with the Park Ditch Company addressing the impacts to the Park Ditch Company caused by the Districts' use of the Park Ditch.

45.8.2 As a condition precedent to modifying the Park Ditch where it crosses the Dry Gulch Project site, the Co-Applicants will consult with the Park Ditch Company concerning the design standards for modified ditch structures through the site, the schedule that will be followed during construction of such modifications and the methods to ensure continued water deliveries to Park Ditch shareholders located down-ditch.

45.8.3 The Districts will be responsible for obtaining and bearing the cost of any U.S. Forest Service special use permits, if required by the Districts' use of the Park Ditch for other than strictly irrigation purposes.

45.9 The Weber Entities, a *pro se* Objector in this matter, own the land upon which the Dry Gulch dam would be constructed and much of the land that would be inundated by Dry Gulch Reservoir. Any activities occurring on land owned by any of the Weber Entities associated with feasibility, design and construction of Dry Gulch Reservoir shall not commence until an agreement has been executed between the Districts, or either of them, and the Weber Entities, or successors and assigns of any of

them, concerning the lands affected by such activities, or the affected lands have otherwise been acquired by the Districts, or either of the Districts independently.

45.10 Diversions from the San Juan River shall not be made by exercise of the Subject Water Rights during the seasonal periods specified below if simultaneously the streamflow in the San Juan River, as measured at the U.S. Geological Survey stream gage known as San Juan River at Pagosa Springs (gage identification no. 09342500), is at or below 50 cfs during the period March 1<sup>st</sup> through August 31<sup>st</sup>, or at or below 30 cfs during the period September 1<sup>st</sup> through February 29<sup>th</sup>.

46. The Subject Water Rights are part of the PAWSD integrated municipal water system, and diligence on any part of this system, including other water rights owned by PAWSD, may be considered as proof of diligence as to the conditional Subject Water Rights. Likewise, the Subject Water Rights are part of the SJWCD integrated plans for water resources development, and diligence on any other water resource projects or other water rights owned by SJWCD may be considered as proof of diligence as to the conditional Subject Water Rights.

47. The conditional water rights priorities awarded herein were filed in the water court in the year 2004, shall be administered as having been filed in that year and shall be administered as junior to priorities filed in previous years. As between competing rights filed in 2004, priority shall be determined by historical dates of appropriation and not affected by the date of entry of this Ruling, Judgment and Decree.

48. The Court finds and orders that if the Districts' desire to maintain the conditional Subject Water Rights, an application for a finding of reasonable diligence shall be made on or before the last day of September, 2014, or a showing made on or before such date that the conditional water rights have been made absolute by reason of completion of the appropriation. Further, the Court finds and orders that the evidentiary period for the next ensuing diligence period upon which the Court shall make determinations of reasonable diligence and/or findings of perfection shall extend from the date of the Final Decree issued in this matter on September 15, 2006.

DATED this 11th day of September, 2008.

Original Signature on File

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Gregory G. Lyman

Water Judge

Water Division No. 7

GGL/emg