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DEPARTMENT OF  
WATER RESOURCES

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ATTORNEYS FOR CITY OF POCATELLO

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PETITION	)	
REGARDING STORAGE RESET IN	)	Docket No. P-WRA-2017-002
WATER DISTRICT 01 FILED BY	)	
MILNER IRRIGATION DISTRICT	)	<b>CITY OF POCATELLO'S RESPONSE</b>
	)	<b>BRIEF</b>
	)	

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COMES NOW, City of Pocatello ("Pocatello") by and through its undersigned attorney, and hereby submits its Response Brief pursuant to the Director's *Order Re: Statements of Issues and Responses; Order Adopting Deadlines; Amended Notice of Status Conference* (Jan. 3, 2018) ("January 3 Order").

**I. RESPONSE TO ABERDEEN SPRINGFIELD CANAL COMPANY'S OPENING BRIEF**

Aberdeen Springfield Canal Company's ("ASCC") Opening Brief suggests that the Director apply Colorado law to resolve the proper reset date for Upper Snake Reservoirs. The *North Sterling* case stands for the proposition that, when a decree is silent, water administrators have discretion to determine a reset date for reservoir storage. *N. Sterling Irrigation Dist. v. Simpson* ("North Sterling"), 202 P.3d 1207 (Colo. 2009). Despite some factual distinctions, as well as the nature and scope of the litigation leading up to the *North Sterling* decision, the decision has some applicability in this matter insofar as it confirmed the principle of administrative authority to determine a reset date when decrees are silent. *Id.*

**A. The North Sterling case.**

The North Sterling Reservoir, owned by the North Sterling Irrigation District (“NSID”) is an off-channel reservoir that stores water diverted from the South Platte River. Findings of Fact, Conclusions of Law, Judgment, and Order of the Water Court at 4–6, *The North Sterling Irrigation District v. Simpson*, Case No. 05CW125, Water Division No. 1 (Dec. 11, 2007), attached as Exhibit 1; *North Sterling*, 202 P.3d at 1209. Prior to the early 2000s and the 2002 drought in Colorado, water rights in Water Division No. 1 (the South Platte River Basin) were the subject of “loose administration”, and included efforts by state water officials “to keep calls off the river” during the non-irrigation season under a so-called gentleman’s agreement. The gentleman’s agreement allowed reservoirs to fill without placing a call and at times when, arguably, there was not adequate supply in priority to support diversion to storage. Exhibit 1 at 13–14. The gentleman’s agreement extended to acquiescence to the operation of junior recharge rights and ground water rights that, under actual priority administration, would either have been curtailed or only allowed to pump under a decreed plan for augmentation.<sup>1</sup> *Id.*

During this era of loose administration when reservoirs were not actively administered, NSID and state water officials maintained parallel (and different) accounting records of NSID’s storage in North Sterling Reservoir using “low-point” operations. Exhibit 1 at 14–16, 22–23. Low-point operations involved NSID delivering irrigation water into the early fall and then, when the reservoir was at its lowest point, beginning to call for storage water to start the process of filling for the following irrigation season. *North Sterling*, 202 P.3d at 1209.

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<sup>1</sup>Under current Colorado law, junior ground water users may not pump unless and until they obtain either a court decreed plan for augmentation that sets forth the replacement sources to be supplied in time, location and amount to replace depletions to the stream from well-pumping that would otherwise injure senior surface rights *or* temporary administration approval of a “substitute water supply plan” that is available during the pendency of the augmentation plan application process in water court. C.R.S. §§ 37-92-305(5), 37-92-308; *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003).

In *Simpson v. Bijou Irrigation Company*, 69 P.3d 50 (Colo. 2003), decided on the heels of the 2002 drought, the Colorado Supreme Court reminded state water officials that the 1969 Water Rights Determination and Administration Act requiring water administration in priority was, in fact, the law, ending the “gentleman’s agreement” era of hands-off water administration on the South Platte River. For NSID, imposition of active water administration spelled the end of its historical “low-point” operations for purposes of reset of North Sterling Reservoir. State water officials refused to satisfy NSID’s calls for diversion to storage under the low-point scheme and limited NSID’s operations to a defined storage season (or fixed water year) from November 1 to October 31<sup>2</sup> and compliance with the one-fill rule. Exhibit 1 at 6–7. The administrative basis for the fixed water year was a 1936 letter from M.C. Hinderlider, then-State Engineer, which set forth the policies to be applied to storage right administration based on several Colorado Supreme Court decisions. *See*, May 11, 1936 Letter from M.C. Hinderlider to All Division Engineers and Water Commissioners (“1936 Letter”), Exhibit 2.

NSID objected to this change in administration. Exhibit 1 at 6–7. NSID argued that low-point operations were not inconsistent with their storage decrees, which were silent on the issue of a storage reset date, and that imposition of a fixed water year interfered with their decreed water rights. *Id.*; *North Sterling*, 202 P.3d at 1209. After motions practice and an evidentiary hearing, the Water Court rejected these arguments. *See generally*, Exhibit 1.

The Colorado Supreme Court affirmed the Water Court, and found that the Engineers were within their discretion to reject administration using low-point operations and to impose a

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<sup>2</sup>Note that the “accounting year” term and condition that is found in some municipal storage decrees (and that is referred to in the ASCC Opening Brief) does not modify the default state policy of a November 1 to October 31 storage season, but relates instead to decree terms requiring municipalities to prepare and maintain water accounting to track amounts *in* storage (as opposed to amounts stored). Usually such decree terms ensure lawful operation of changed irrigation water rights for municipal purposes, including ensuring the replacement of return flows in time, location and amount.

fixed storage season as set forth in the 1936 Letter. *North Sterling*, 202 P.3d at 1210, 1215. In answering NSID's arguments that administration of reservoir storage using a fixed water year interfered with their ability to fill North Sterling Reservoir, the Colorado Supreme Court commented that NSID could call for its storage water in priority at any time during the calendar year or water year; what potentially foreclosed NSID diversions was whether or not it had exceeded its volumetric limitations under the one-fill rule. *Id.* at 1212, 1213.

**B. Applicability of *North Sterling* to the reset matter.**

At its core, the *North Sterling* case stands for the proposition that if a decree is silent on the matter of reset, the State Engineer (or Director, as the case may be) has the authority to establish a reset date. *Id.* at 1208. In the *North Sterling* dispute, the question was whether state water officials had discretion to impose active administration on storage rights (including NSID's) when the decree was silent on the reset date by limiting diversions to the fixed water year set forth in the 1936 Letter and the one-fill rule. In this manner, the case is analogous to the question before the Director: that is, whether agency discretion is consistent with Water District's ("WD01") 40 years of active administration of storage decrees that are silent on the reset date by using a variable reset date to maximum utilization of water resources. *Id.*

In the context of the reset dispute, while there is no Idaho Department of Water Resources ("IDWR" or "Department") equivalent to the 1936 Letter, the Staff Memo discusses certain actions taken in 1978 to create a new administrative program that would permit resetting storage in the fall. Reset Date Staff Memorandum from Tony Olenichak, to Gary Spackman, at 2 (Dec. 1, 2017) ("Staff Memo"). The active administration of reservoirs by WD01 using these precepts is consistent with agency discretion, particularly where, as here, there is no indication (or allegation) that the flexible storage season administered by WD01 since 1978 has resulted in any storage right exceeding the one-fill rule. The rule announced in the *North Sterling* case that

“because NSID’s storage decrees are silent on the issue of how diversions are to be accounted for under the one-fill rule, the Engineers had the authority to develop an administrative policy on how to effect the one-fill limitation” (*North Sterling*, 202 P.3d at 1210) applies equally to the issues in dispute in this matter.

## **II. RESPONSE TO SWC’S OPENING BRIEF**

### **A. The Director does not have a legal basis to establish reset based on reservoir operations during the pre-1978 era of loose administration in WD01.**

The Surface Water Coalition (“SWC”) argues, apparently rhetorically, that the partial decrees establish a reset date of January 1 based on the period of use term. SWC Opening Brief at 2–3. As explained in Pocatello’s Opening Brief, a “period of use” is not a reset date, and this interpretation should be rejected.

After raising this rhetorical straw man, SWC goes on to request the Director *not* administer reservoirs in WD01 with a January 1 reset date because “the rights have not been administered in that manner at any point in history.” *Id.* at 4. SWC instead seeks a return to pre-1978 operations in WD01: a fall reset date that “does not interfere with natural flow rights with priorities senior to American Falls or Palisades.” *Id.* at 11.

SWC claims a right to such administration based on the fact that in some years prior to 1978, its entities received natural flow in this manner during the fall. SWC Opening Brief at 6–8. In practice, this would permit natural flow rights senior to American Falls and/or Palisades Reservoir to divert water after reservoir reset begins, out of priority, and before the senior 1909 Lake Walcott storage water right. *Id.* SWC provides no legal authority or argument to support these proposed operations, which would subordinate senior storage rights to certain natural flow rights that SWC holds.

SWC's argument that the Director should revive this pre-1978 WD01 operation in conjunction with a fall reset date is without basis. Pre-1978 WD01 reservoir operations for purposes of reset (and the attendant operation of natural flow) are not consistent with principles of maximum utilization. In contrast, the Director's discretion does support continuation of administration using a variable reset date—with no selective subordination—that has been the norm in WD01 for nearly 40 years. As outlined in the Staff Memo, variable reset administration “maximize[s] the beneficial use of water above Milner Dam each year.” Staff Memo at 6.

Indeed, since 1978 WD01 has consistently administered reset to maximize storage above Milner Dam and honor the prior appropriation system. The Staff Memo identifies approximately 19 years of administration using a September 15 reset date, and administration using other dates in the fall based on climatic conditions and efforts to maximize reservoir fill. This is the administrative “expectancy” that SWC and others have experienced. This administrative expectancy was incorporated into a 2012 stipulation between SWC and other parties, including IDWR, for entry of the partial decrees at issue in this matter so long as the stipulated-to elements remained “consistent with historic administration.” Pocatello's Opening Brief, Exhibit 4, at 4–6.

Contrary to SWC's statements, the change in WD01 administration in 1978 was not because of a change to “a new computerized accounting program”. The Staff Memo makes clear that “[c]ontinuing development of new water rights, new diversions, reservoirs, and the severe drought in 1977 prompted the need for stricter water right regulation.” Staff Memo at 2. Prior to 1978, water rights were not regulated in WD01 for the entire calendar year. *Id.* However, in response to these above-listed changes, WD01 made several formal changes to how it administered water rights, including the creation of a reset date. *Id.* at 2–3. Just like Colorado,

where the 2002 drought resulted in active administration of water users including NSID, *see* §I.A. and B. *infra*, WD01 created an active administrative construct in 1978 to ensure “all water rights were regulated according to priorities for the entire calendar year [and] [n]o distributions of natural flow to junior water rights were made ahead of other unfilled senior water rights.” *Id.* at 2.

SWC is in the same position post-1978 that NSID was in after 2002. The fact that SWC was previously permitted to operate its natural flow rights at the expense of senior reservoir storage is no longer relevant, and does not afford water officials a basis to impose reservoir reset administration by reference to the pre-1978 practice. *See North Sterling*, 202 P.3d at 1213 (“We first affirm the water court’s finding that, although NSID has historically operated the reservoir on a low-point basis, its rights have been administered consistent with a fixed, November 1 water year.”). SWC has not formally contested the fall reset administrative practices before, nor has it previously argued that it was entitled to pre-1978 administration. SWC has had multiple opportunities to raise this issue, including during the negotiations leading up to the stipulation in 2012 and in the context of SWC’s own delivery call. SWC’s novel position that the Director should now impose reset administration based on water rights operations that ended decades ago should be rejected.

**B. The 2013 1-6 Order does not resolve the question of reset in favor of AFRD#2.**

SWC also claims that a February 11, 2013 *Final Order Regarding Instructions to Water District 01 Watermaster*, In the Matter of Water Right No. 1-6 (“2013 1-6 Order”) affirmed administration of Partial Decree No. 1-6 with “an ‘effective priority date’ of March 28, 1921, or one day senior to the ‘winter water savings’ space, from the September 15<sup>th</sup> ‘reset’ date until the end of the irrigation season.” SWC Opening Brief at 10 (emphasis added). The implication that

the 2013 1-6 Order affirmed such a rule is incorrect, and the implication that the 2013 1-6 Order excepts water right no. 1-6 from routine reset operations is in error.

The Matter of Water Right No. 1-6 was initiated by the Director in response to arguments by American Falls Reservoir District No. 2 (“AFRD#2”) that “the Watermaster is incorrectly accounting for water right no. 1-6.” 2013 1-6 Order at 1. The dispute was over the “quantity” element of water right no. 1-6, which provides:

“The right to divert as natural flow during each irrigation season under this water right, having a March 30, 1921, priority, as follows: From May 1 of each irrigation season continuing during that season so long as there is natural flow available for that priority, the first 1,700 cubic feet per second of flow to be available one-half (1/2) to American Falls Reservoir District No. 2 and one-half (1/2) to American Falls Reservoir, except that in any year in which American Falls Reservoir is full to capacity on April 30 or fills after that date, taking into account any water that may be temporarily stored to its credit in upstream reservoirs, all water diverted by American Falls Reservoir District No. 2 within the maximum of 1,700 cubic feet per second during the year prior to the initial storage draft on American Falls Reservoir after the reservoir finally fills in that year shall be considered as natural flow under water right No. 1-6. Nothing herein shall prevent American Falls Reservoir District No. 2 from diverting water under said license prior to May 1 of a given irrigation season but all such diversions shall be charged as storage in the event the reservoir is not full on April 30 of that season or does not fill after April 30 of that season.”

*Id.* at 1–2 (citation omitted). AFRD#2 alleged that this provision “authorizes the use of water for both irrigation and storage.” *Id.* at 2. The Director rejected this argument, finding that the 1-6 partial decree only authorized use for irrigation purposes, and that the “quantity” provision of the decree “restricts AFRD2’s diversions under water right no. 1-6 by expressly limiting the timing and quantity of the diversions.” *Id.* at 3.

The Director went on to provide direction to the Watermaster on how to administer the quantity provision, consistent with historic administration. *Id.* at 4–8. The Order is not comprehensive insofar as it relates to administration of reservoir storage in WD01. Indeed, there is no mention in the 2013 1-6 Order of a reset date, day of allocation, accounting for flood



control releases, or administration of fish augmentation water. In other words, the 2013 1-6 Order cannot be used as the basis for administrative actions regarding reset of water right no. 1-6.

Significantly, even since the entry of the 2013 1-6 Order, the WD01 Watermaster has continued to administer a fall reset date which has not permitted AFRD#2 to divert natural flow water right no. 1-6 after the reset date. *See* Staff Memo at 3 (“The September 15<sup>th</sup> date continued to be the reset date used in the water right accounting for the next 19 years.”). As pointed out by the Director, AFRD#2 did not challenge this Order or the implementation of it by WD01. *See* January 3 Order at 3 n.4. The 2013 1-6 Order was not served on parties to Subcase 1-6, who would have a reasonable interest in such an order, and was not published and noticed to other water users that could be affected by any supposed change in the administration of water right no. 1-6—if it somehow announced a new policy and subordinated storage rights to 1-6, additional notice of interested parties would have been required.

**C. The Idaho Supreme Court has affirmed the Director’s discretion to go beyond an appropriator’s decree in making water rights management and administration decisions.**

Pocatello agrees with SWC that “[a]part from interpreting the decreed storage water rights, the Director and Watermaster must also administer the water rights pursuant to Idaho law.” SWC Opening Brief at 4. As the Idaho Supreme Court has recognized on several occasions, the Director is required to manage and administer water rights—including the storage rights that are at issue in this matter—in a manner that recognizes all the tenets of Idaho water law. *In re Distribution of Water to Various Water Rights Held By or For the Benefit of A & B Irrigation Dist.* (“SWC Delivery Call”), 155 Idaho 640, 315 P.3d 828 (2013).

The *SWC Delivery Call* decision involved “[w]hether the Director may utilize a baseline methodology—a methodology based upon the senior water right holder’s projected need in considering whether that right holder has been materially injured.” *Id.* at 647, 315 P.3d 835. At issue was the Director’s approach to determining whether SWC water rights were materially injured, which generally started from the determination of a “baseline quantity”:

“The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable-carryover. The Director then determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities.”

*Id.* at 648, 315 P.3d at 836 (citation omitted). As part of the methodology, the Director utilized forecasts of available water and compared those to prior years to evaluate and predict material injury. *Id.* at 643, 315 P.3d at 831. As explained by the Watermaster, this is similar to administration of a variable reset date, which “would largely be based on the ability to forecast future conditions.” Staff Memo at 6.

SWC appealed the methodology, making the same arguments advanced here: that decree terms limited the Director’s ability to make management and administration decisions. *Id.* at 649, 315 P.3d at 837 (“[a] decreed or licensed water right, contends the Coalition, creates a presumption that the full extent of the right has already been defined by its beneficial use.”). The Snake River Basin Adjudication Court and Idaho Supreme Court disagreed, finding “[t]he Director may, consistent with Idaho law, employ a baseline methodology for management of water resources and as a starting point in administration proceedings.” *Id.* at 650, 315 P.3d at 838.

The discretion afforded the Director pursuant to the *SWC Delivery Call* decision provides authority to the Director to administer reset in WD01 pursuant to the variable reset date-approach in use since 1978 because, as noted by WD01 staff in the Staff Memo, variable reset date

administration maximizes beneficial uses of the water supply. Staff Memo at 6. In *SWC Delivery Call*, the Court noted that the baseline approach is used “both for management of the resource and in determining material injury in the context of a water call.” 155 Idaho at 650, 315 P.3d at 838. The Court stated that because there are management issues not addressed in decrees that are nevertheless part of water rights management decisions under Idaho law, “the Director has discretionary authority in a water management case that is not available to him in a water rights case.” *Id.* at 652, 315 P.3d at 840. There, as here, the Director is not bound by decree terms instructing the Department to administer reset (as no such terms exist), and he has the ability to continue administration of a variable reset date pursuant to the tenets of Idaho water law. *See* Pocatello’s Opening Brief § III.

**III. RESPONSE TO SHOSONE-BANNOCK TRIBES’, PALISADES WATER USERS, INC. AND CITY OF IDAHO FALLS, U.S. BUREAU OF INDIAN AFFAIRS, AND UPPER VALLEY STORAGE HOLDERS**

Pocatello generally agrees with the arguments made by the above-listed parties in their opening briefs in favor of the Director concluding that the partial decrees do not determine a reset date for the federal on-stream reservoirs in WD01 and that a January 1 reset date is improper, and incorporates those arguments herein by reference.

Dated this 26th day of January, 2018.

WHITE & JANKOWSKI LLP

By

  
Sarah A. Klahn

ATTORNEYS FOR CITY OF POCATELLO

## CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2018, I caused to be served a true and correct copy of the foregoing **CITY OF POCATELLO'S RESPONSE BRIEF** in Docket No. **P-WRA-2017-002** upon the following by the method indicated below:

  
\_\_\_\_\_  
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FILED Document - District Court  
DATE FILED: December 11, 2007 12:33 AM  
CASE NUMBER: 05CW125  
CO Weld County District Court 19th JD  
Filing Date: Dec 11 2007 10:33AM MST  
Filing ID: 17610503

**Plaintiff:** THE NORTH STERLING IRRIGATION DISTRICT; and

**Intervenor-Plaintiffs:** THE CITY OF BOULDER, CENTENNIAL WATER AND SANITATION DISTRICT, and PAWNEE WELLS USERS, INC.;

v.

**Defendants:** HAROLD D. SIMPSON, P.E., in his capacity as Colorado State Engineer; and JAMES R. HALL, in his capacity as Division Engineer for Water Division No. 1; and

**Intervenor-Defendants:** THE CITY OF WESTMINSTER; IRRIGATIONISTS' ASSOCIATION WATER DISTRICT 1; THE NORTHERN COLORADO WATER CONSERVANCY DISTRICT; BIJOU IRRIGATION COMPANY; BIJOU IRRIGATION DISTRICT; THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT; THE GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT; THE WELL AUGMENTATION SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT; THE CACHE LA POUDRE IRRIGATING COMPANY; THE CACHE LA POUDRE RESERVOIR COMPANY; WESTERN MUTUAL DITCH COMPANY; FARMERS INDEPENDENT DITCH COMPANY; CAMPBELL DEVELOPMENT, INC.; FOX ACRES COMMUNITY SERVICES CORPORATION; THE CITY OF AURORA; RIVERSIDE IRRIGATION DISTRICT; RIVERSIDE RESERVOIR & LAND COMPANY; FORT MORGAN RESERVOIR & IRRIGATION COMPANY; and THE JACKSON LAKE RESERVOIR & IRRIGATION COMPANY

▲ COURT USE ONLY ▲

Case No.: 05 CW 125

**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT, AND ORDER OF THE WATER COURT**

This matter concerns the administration of the water storage rights of the North Sterling Irrigation District (“North Sterling”) in North Sterling Reservoir by the State and Division Engineers (the “Engineers”). A five-day trial to the water court was held between September 10, 2007 and September 14, 2007. Having reviewed the record, the pleadings, the evidence presented at trial, and being otherwise fully informed and advised, the court finds and concludes as follows.

## **I. Procedural History**

### *A. North Sterling’s Complaint*

North Sterling filed its Complaint for Declaratory Judgment Pursuant to §§ 13-51-101 et seq., C.R.S. and C.R.C.P. 57 against the Engineers on June 16, 2005. Mr. Hall is the division engineer for Water Division No.1. When the complaint was filed, Harold “Hal” Simpson was the state engineer. Mr. Simpson has since retired. At the time of trial, Ken Knox was the acting state engineer. The Engineers are responsible for the administration of water rights in Colorado. See §§ 37-80-101 to -120, 37-92-101 to -602, C.R.S.

The complaint as filed asserted four claims for relief: (1) unlawful imposition of a storage season by the Engineers; (2) *res judicata* and *collateral estoppel*; (3) unconstitutional taking of property; and (4) violation of Due Process.

### *B. Intervention By Additional Parties*

The City of Boulder (“Boulder”), Centennial Water and Sanitation District (“Centennial”), and Pawnee Well Users, Inc. (“Pawnee”) intervened as plaintiffs. These parties, together with North Sterling, are collectively referred to herein as “Plaintiffs.”

Numerous parties filed responsive pleadings and aligned themselves with the Engineers. These parties are: Bijou Irrigation Company and Bijou Irrigation District (together, “Bijou”); the City of Westminster; Irrigationists’ Association, Water Division 1; Central Colorado Water Conservancy District and the Groundwater Management District of the Central Colorado Water Conservancy District (together, “Central”); Western Mutual Ditch Company (“Western”); Farmers Independent Ditch Company (“Farmers”); Fox Acres Community Services Corporation (“Fox Acres”); Campbell Development, Inc.; Northern Colorado Water Conservancy District; Lower South Platte Water Conservancy District; New Cache La Poudre Irrigating Company; Cache La Poudre Reservoir Company; City of Aurora, acting by and through its Utility Enterprise (“Aurora”); Riverside Irrigation District and Riverside Reservoir and Land Company (“Riverside”); Fort Morgan Reservoir and Irrigation Company (“Fort Morgan”); and Jackson Lake Reservoir and Irrigation Company (“Jackson Lake”).

The court approved Fox Acres’s and Campbell Development, Inc.’s withdrawal of their responsive pleadings on August 9, 2007.



### *C. Previous Rulings and Determinations of the Court*

The court entered several substantive orders that clarified the issues for trial and are herein incorporated by reference. *See In re Marriage of McSoud*, 131 P.3d 1208, 1213 (Colo. App. 2006) (“law of the case doctrine is a discretionary rule that generally requires prior relevant rulings made in the same case to be followed.”). The court notes several, but not all, of the previous determinations.

On September 6, 2006, the court entered its Order Determining that Publication Notice Under § 37-92-302(3), C.R.S., Was Proper and Ordering Publication of the Complaint in Newspapers of Certain Water Division 1 Counties.

On May 2, 2007, the court entered its Order Regarding Motions for Determination of Questions of Law. A water year is year-long administrative period under which a date certain is selected when diversions to storage rights are credited towards a storage right’s annual fill. North Sterling’s storage rights are subject to the one-fill rule. *See, e.g., Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 224, 98 P. 729, 733-34 (1908). The Engineers have the authority to limit North Sterling’s diversions based on the water year to administer North Sterling’s storage rights pursuant to the one-fill rule. Because North Sterling’s storage right decrees are silent concerning the application of the one-fill rule to its storage rights, the Engineers must make an administrative determination on how to apply the one-fill rule.

On October 15, 2007, the court entered its Order Regarding Motions for Summary Judgment. The issue of the specific water year for North Sterling’s storage rights was not previously litigated or determined such that the doctrines of claim or issue preclusion apply. This order entered summary judgment for Defendants and against Plaintiffs on the second, third, and fourth claim for relief.

### *D. Issues for Trial*

The fundamental issue litigated at trial under North Sterling’s sole remaining first claim for relief was thus: what is the administration that governs North Sterling’s storage rights for the purpose of implementing and enforcing the one-fill rule? The arguments of the parties, tendered to the court following trial, are outlined below in general terms.

Plaintiffs claim that North Sterling should be administered pursuant to “low-point administration.” Plaintiffs assert that, as evidenced by North Sterling’s internal records, North Sterling’s storage rights were appropriated and have been operated historically pursuant to a variable “seasonal year” based on the filling and release of water from North Sterling Reservoir. Plaintiffs also argue that the Engineers’ historical administration of North Sterling Reservoir and other reservoirs in Water Division No. 1 do not provide a basis for administering North Sterling’s storage rights pursuant to a fixed, November 1st water year. Plaintiffs contend that low-point administration would not injure other water users and that administration other than low-point administration would result in injury to North Sterling’s storage rights.



Defendants contend that North Sterling should be administered pursuant to a fixed, 365-day (or 366-day during a leap year) water year beginning on November 1st and ending on October 31st (the “November 1st water year”). In the absence of language in a storage decree that states otherwise, Defendants argue that the Engineers do and have administered the one-fill rule for irrigation reservoirs in Water Division No. 1 through the application of the November 1st water year. Defendants further contend that the historical administration of North Sterling’s storage rights is consistent with a November 1st water year. Finally, Defendants argue that North Sterling’s claims are barred by laches.

#### *E. Trial*

Numerous parties appeared at trial. As Plaintiffs, Boulder, Centennial, and Pawnee appeared with North Sterling. Aligned with the Engineers, Central, Western, Farmers, Aurora, Riverside, Fort, Morgan, and Jackson Lake appeared (collectively, “Defendants”). The remaining parties to this matter did not appear or participate in post-trial briefing.

For Plaintiffs, the following lay witnesses testified: Mr. Simpson, Mr. Hall, and Carol Ellinghouse. As experts, James T. Yahn, manager of North Sterling, testified as an expert in operation of North Sterling Reservoir and Lee Rozakalis testified as an expert in water resources planning, water rights analysis, and water rights administration.

The court ordered that, North Sterling could not present evidence quantifying the amount of economic injury caused by the Engineers’ alleged imposition of a November 1st to October 31st administrative “storage year” because the court previously dismissed the takings and due process claims in its order dated October 15, 2007.

For Defendants, the following lay witnesses testified: Brent Schantz, Mabel Cunning, Richard Stenzel, Alan Berryman, Don Chatman, Lisa Darling, and Ken Knox. Mr. Hall testified as an expert in water rights administration and water resources engineering; Ed Armbruster testified as an expert in hydrology and water resources engineering, including water rights accounting and administration; and Bruce Kroeker testified as an expert in water resources engineering, surface and groundwater hydrology, and water rights analysis, accounting and administration.

## **II. Factual Background**

### *A. Water Rights and Water Storage Rights of the North Sterling Irrigation District*

North Sterling is an irrigation district organized under the Irrigation District Law of 1905. §§ 37-41-101 to -160, C.R.S. North Sterling encompasses approximately 41,000 acres of land, approximately 33,000 to 34,000 of which are irrigated each year based on available water supplies. North Sterling owns the water storage rights that are the subject matter of the complaint.

North Sterling diverts water from the South Platte River into North Sterling Reservoir via the North Sterling Inlet Ditch. North Sterling diverts in District 1 and North Sterling Reservoir is located in District 64. The inlet ditch is approximately sixty miles long. It takes about two days for water diverted at the river headgate of the inlet ditch to reach North Sterling Reservoir. If the amount diverted is less than 100 cubic feet per second ("cfs"), the water may take several weeks to reach North Sterling Reservoir. If the amount diverted is seventy-five cfs or less, the water may never reach North Sterling Reservoir.

North Sterling Reservoir has a capacity of 74,590 acre-feet, covering approximately 3,000 surface acres with approximately 144 miles of shoreline. Seepage losses from North Sterling Reservoir are relatively low compared to other major irrigation reservoirs that divert from the South Platte. Water stored in North Sterling Reservoir is released via the North Sterling Outlet Canal and delivered to laterals to serve landowners within the district. The outlet canal is approximately sixty-five miles long. Because North Sterling has a long inlet ditch and a relatively low rate of delivery under its 1908 priority, North Sterling Reservoir requires a long time to fill.

North Sterling owns storage water rights (also, "storage rights") for the North Sterling Reservoir with Priority Nos. 53A and 79 on the South Platte River. These priorities were confirmed in Case No. 2142 and there are additional decrees concerning the storage rights. None of the decrees pertaining to the storage rights limits diversions to any specific time period.

There are several decrees in Case No. 2142 pertaining to North Sterling's storage rights. The first decree was entered on January 5, 1922. The decree was amended on: May 25, 1925; January 13, 1936 (the "1936 Decree"); and May 9, 1944 ("1944 Decree") as additional portions of the storage rights were made absolute. The decree was also amended on March 17, 1947 following the resolution of Case No. 3146, in which the Riverside Reservoir and Land Company filed a petition to re-open the 1944 Decree. A modified decree was entered on March 21, 1949 (the "1949 Decree") following the Colorado Supreme Court's resolution of an appeal from Case No. 3146 in *North Sterling Irrigation Dist. v. Riverside Reservoir & Land Co.*, 119 Colo. 50, 200 P.2d 933 (1948).

The 1949 Decree made final Priority No. 53A for 69,446 acre-feet to be diverted at a rate of 300 cfs with a priority date of June 15, 1908 (also, the "1908 priority"). A final decree was entered on November 28, 1950 that made final Priority No. 79 for 11,954 acre-feet at a rate of 411 cfs with an appropriation date of August 1, 1915 (also, the "1915 priority"). North Sterling has no re-fill right.

There are two additional decrees regarding North Sterling's storage rights. The decree in Case No. 88CW234, dated June 29, 1989, added recreational, wildlife, and piscatorial uses to existing decreed uses. The decree in Case No. 96CW1034, dated July 21, 2006, confirmed a change of 15,000 acre-feet of the storage rights to include direct delivery or release from storage

for industrial, commercial, and fire protection purposes, and for augmentation and exchange, in addition to the previously decreed uses.

North Sterling also has a direct flow and a recharge water right. North Sterling owns a direct flow water right that is confirmed in the 1936 Decree for diversion from the South Platte River at a rate of 460 cfs with an appropriation date of May 27, 1914. The decree in Case No. 96CW1034 confirmed: (1) the North Sterling Recharge Water Right, in the amount of 294 cfs absolute and 306 cfs conditional for diversion from the South Platte River under a May 8, 1996 appropriation date; and (2) the North Sterling Recharge Water Right, First Enlargement, in the amount of 600 cfs conditional, for diversion from the South Platte River under an appropriation date of December 31, 2002 (these rights together, North Sterling's "recharge rights"). The North Sterling Recharge Water Right is limited to diversions of a maximum of 7,800 acre-feet in a single water year, not to exceed a maximum of 46,600 acre-feet over any twenty consecutive water years. The North Sterling Recharge Water Right, First Enlargement is also limited to a maximum diversion of 24,000 acre-feet in a single water year, not to exceed a maximum of 138,600 acre-feet over any twenty consecutive water years.

*B. Current Dispute Between North Sterling and the Engineers*

The current dispute giving rise to this litigation began in 2001. In 2001, North Sterling attempted to place a call for water with Ms. Cunning, water commissioner for Water District 1 from 1989 to 2002, under its storage rights. The request was denied. Mr. Yahn, the manager of North Sterling, contacted the Office of the Division Engineer to determine why the call was not being honored. When North Sterling was not allowed to call for water under its storage rights, North Sterling diverted the water that was available at its headgate under its recharge rights.

Mr. Schantz, current water commissioner for Water Districts 1 and 64, testified he was aware that the Engineers applied a November 1st to October 31st administrative "storage year" to the administration of North Sterling's storage rights sometime prior to the time that he became a water commissioner for District 1 in 2002 and water commissioner for District 64 in 2005.

In June of 2003, North Sterling's Board of Directors met with Mr. Schantz and Mr. Hall, division engineer, to discuss the November 1st to October 31st administrative "storage year." Based on North Sterling's understanding, it would not be allowed to call for water prior to November 1st. On October 28, 2003, Mr. Yahn sent a letter to Mr. Hall requesting placement of a call under North Sterling's senior 1908 priority beginning November 1, 2003.

In 2004, North Sterling requested that a call be placed under its 1908 priority before November 1st and Mr. Hall responded to Mr. Yahn by letter dated September 20, 2004. This letter informed North Sterling that storage water rights are entitled to one annual fill and that the Engineers would honor calls on the 1908 priority for the 3,386 acre-feet that had not been diverted under that priority. The letter also stated that after this water was diverted, the Engineers would honor calls for the full amount available under the 1908 priority when the historic "storage season" began anew on November 1st. However, the letter stated that the

Engineers would not honor a call under the 1915 priority unless sufficient water is available because of the intervening 1910 Prewitt Reservoir storage right that was unsatisfied. The letter also stated that the Engineers' records indicate that North Sterling historically diverted during October only under free river conditions. The letter further stated that if North Sterling did not fulfill its storage decrees based on the November 1, 2004 start date in time to use the water for irrigation, North Sterling could divert water beginning in October of 2005 to make up the lost storage. The letter did not reference any existing policy or rule as the basis for its position.

On September 23, 2004, North Sterling responded by letter. This letter contended that since 1926, North Sterling has historically diverted a significant amount of water during October. The letter also contended that North Sterling has begun its annual diversions under the 1908 priority beginning in October since the 1970s. Finally, the letter contended that the Engineers may not limit North Sterling's diversions for the North Sterling Reservoir by way of an administrative "storage year."

On March 17, 2005, North Sterling sent another letter to the Engineers that developed the legal arguments made in its previous letter. The Engineers, now acting through the Office of the Attorney General, responded to those arguments on May 27, 2005 by letter. North Sterling subsequently filed its complaint in this matter.

### **III. Specific Findings and Determinations of Disputed Factual and Legal Issues**

#### ***A. Notice and Jurisdiction***

The court determines that notice and jurisdiction are proper in this matter pursuant to the court's order dated September 6, 2006. None of the lands or water rights involved in this case are within the boundaries of any designated groundwater basin.

Notice of the complaint was published in the June 2005 Water Division No. 1 Resume. The complaint was also published in full in the Supplemental June 2005 Resume. The complaint was published for five consecutive weeks in the Greeley Tribune, the Fort Morgan Times and the Brush News-Tribune. The complaint was also published for in full week in the following newspapers and counties: (1) Westminster Window (Adams County); (2) Englewood Herald (Arapahoe County); (3) Daily Camera (Boulder County); (4) Broomfield Enterprise (Broomfield County); (5) Range Leader (Cheyenne County); (6) Clear Creek Courant (Clear Creek County); (7) Daily Journal (City and County of Denver); (8) Douglas County News Press (Douglas County); (9) Ranchland News (Elbert County); (10) Colorado Springs Gazette (El Paso County); (11) Weekly Register Call (Gilpin County); (12) Golden Transcript (Jefferson County); (13) Burlington Record (Kit Carson County); (14) Fort Collins Coloradoan (Larimer County); (15) Limon Leader (Lincoln County); (16) Park County Republican & Fairplay Flume (Park County); (17) Holyoke Enterprise (Phillips County); (18) Julesburg Advocate (Sedgwick County); (19) Ute Pass Courier (Teller County); (20) Akron News-Reporter (Washington County); and (21) Wray Gazette (Yuma County).



As a result, timely and adequate notice of the complaint was published as required by law. *See* § 37-92-302, C.R.S. The court thus has subject matter jurisdiction over these proceedings and the persons and property affected hereby, irrespective of whether those persons or property owners have appeared. *See Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 634 (Colo. 1987).

*B. Burden of Proof on Plaintiffs*

Plaintiffs bear the burden of proof by a preponderance of the evidence in this matter. *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005). “Should such evidence be produced, the water court must evaluate the contested factors anew, and using a preponderance of the evidence standard, make findings of fact with respect to the contested factors.” *Id.* *See also Atlantic & Pacific Ins. Co. v. Barnes*, 666 P.2d 163, 165 (Colo. App. 1983) (“[W]hen a party brings an action challenging an administrative decision of a state official, acting as such, then the burden of proof is on the party challenging the official action.”).

*C. Historic Operation of North Sterling Reservoir*

North Sterling begins diverting under its storage rights each fall. Diversions continue throughout the winter when water is physically and legally available so that the stored water can be released for irrigation in the spring and summer months. Seepage from North Sterling Reservoir is relatively low. Water from North Sterling Reservoir constitutes approximately eighty-four percent of the water supply for the lands it irrigates. Once the outlet canal is closed, North Sterling’s irrigation operations are completed for the year and North Sterling landowners may not request further releases of irrigation water stored in North Sterling Reservoir. After irrigation operations cease in the fall and the outlet canal is closed, North Sterling Reservoir reaches its lowest gauge height. North Sterling then begins diverting water again for the following year’s irrigation operations. North Sterling fills and releases water from North Sterling Reservoir based on the annual requirements of the irrigation season.

The court notes that North Sterling’s operations are generally consistent with the fill and release pattern of other major irrigation reservoirs diverting from the South Platte River, such as Empire, Jackson Lake, Prewitt, and Riverside Reservoirs.

There are several circumstances that may delay diversions by the North Sterling for days or even months after the lowest gauge height is recorded for storage in North Sterling Reservoir. For example, there may be construction and/or maintenance on North Sterling’s water diversion, storage, or delivery structures. There may also be a call by senior water rights that precludes such diversions.

North Sterling has diverted water from the South Platte River before closing its outlet canal under its 1914 direct flow right. Such diversions pass water through the inlet ditch and North Sterling Reservoir and are delivered to farmers within North Sterling via the outlet canal.

Such diversions made in priority are generally consistent with North Sterling's "seasonal year" operation.

1. North Sterling's Internal Records

North Sterling has maintained daily records of diversions to storage, reservoir storage contents, releases from storage, and relevant information pertaining to North Sterling's operation of its water rights since February of 1911. These daily records indicate that North Sterling has diverted an average of 13,590 acre-feet of water under its storage rights after its outlet canal closes but prior to November 1st each year. This is approximately 14.2% of all diversions made by North Sterling's water rights. It is also approximately twenty percent of diversions credited to North Sterling's 1908 priority.

In addition, North Sterling's daily records have, until recently, contained a year-end summary of North Sterling's storage and irrigation operations, which was generally added to the record in September or October of each year, after such operations had been completed for the "seasonal year" for irrigation operations. North Sterling historically provided this detailed daily information to state water officials on an annual basis. More recently, however, this same information has been provided to state water officials on approximately a quarterly basis. State water officials were aware of and had daily access to North Sterling's daily records.

North Sterling has maintained water supply and delivery records since 1930. These records summarize the information contained in North Sterling's daily records for each year of North Sterling's operations. The information included in North Sterling's water supply and delivery records includes the amount of water carried over from one "seasonal year" to the next and the date of such carryover, which is the date on which the outlet canal is closed, described as "last day run" or "last day outlet closed." These records indicate that the carry-over date for water remaining in storage has occurred as early as August 21st, and as late as October 11th, based on the availability of water supplies and water requirements of crops.

North Sterling has maintained records of inlet ditch diversions since 1926. These records demonstrate that in sixty-nine of the eighty-two years of record, water was diverted to storage in North Sterling Reservoir in October. In twenty-three of those years, water was also diverted in September. Some years, calls by senior direct flow and storage water rights and repairs to North Sterling's diversion and storage structures explain the lack of diversions in September and/or October. These records are also arranged in October through September order for each "seasonal year," with a total for that time period at the end of each "seasonal year."

North Sterling has maintained records of the beginning of month storage contents in North Sterling Reservoir since 1930. These records demonstrate that water has generally been released from North Sterling Reservoir until sometime in September and that after such releases ceased, North Sterling began storing water for next year's irrigation operations. These records also demonstrate that, based on a ten-year average, October diversions under North Sterling's storage rights have ranged from 3,000 acre-feet per year to more than 15,000 acre-feet per year.

North Sterling has maintained monthly records of outlet canal releases from storage since 1927. These records demonstrate that North Sterling has historically begun releasing water from storage for irrigation as early as March and that such releases have ended as late as October, depending upon the length of the irrigation season, crop requirements and water availability.

North Sterling also maintains records of water delivered to farm headgates within North Sterling. These records demonstrate that the times at which water is delivered to farm headgates within North Sterling varies from year to year. However, the deliveries generally begin between the end of April and the first part of May and end at the same time releases from storage cease.

North Sterling's records confirm that the North Sterling has operated its storage rights pursuant to a "seasonal year" based on the irrigation season as described above. The end of the irrigation season and close of the outlet canal generally coincides with the lowest gauge height of North Sterling Reservoir.

*D. The Engineers' Administrative and Accounting Practices Regarding North Sterling's Water Storage Rights*

The court received evidence regarding the Engineers' November 1st policy (also, the "policy"). This is not the subject of a statute, rule, or regulation. Nevertheless, the evidence established that this policy states that, in the absence of specific language in a decree otherwise, reservoirs in Water Division No. 1 that are primarily used for irrigation purposes are administered pursuant to the one-fill rule pursuant to the November 1st water year. Much of the evidence focused on the initiation and legal effect of the policy. The court also received evidence regarding the historical application of the policy in Water Division No. 1.

1. Hinderlider Letter and the November 1st Policy

*a. Hinderlider Letter*

The "Hinderlider Letter" is a letter, dated May 11, 1936, addressed to "all division engineers and water commissioners" from M. C. Hinderlider, then-state engineer. This letter contains the first articulation of the Engineers' November 1st policy.

Several decisions of the Colorado Supreme Court precede the Hinderlider Letter. In *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 98 P. 729 (1908), the Court articulated the one-fill rule, that each reservoir priority is only entitled to be filled once each year. In *Comstock v. Larimer & Weld Reservoir Co.*, 58 Colo. 186, 145 P. 700 (1914), the Court held that the year may not be divided into a "storage season," when only storage rights may divert, and an "irrigation season" when only direct flow irrigation rights may divert. Finally, in *People ex rel. Park Reservoir Co. v. Hinderlider*, 98 Colo. 505, 57 P.2d 894 (1936), the Court held that decrees for direct uses of water are not superior to decrees for storage and that

state water officials must administer water rights solely on relative priority. The Hinderlider Letter cites the decision in *Park Reservoir*.

The Hinderlider Letter also discusses the administration of the one-fill rule. The letter notes that although reservoirs are only entitled to one-fill per year, the Court did not define “year” in *Windsor Reservoir*. 44 Colo. 214, 98 P. 729. The letter also notes that state water officials have “used a ‘seasonal’ year in the tabulation of stream flow records and for other purposes.” The letter then states that

As the result of climatic, crop and other conditions affecting the supply and use of water in the state, it is considered desirable to adopt what might be termed a “seasonal” year, which it is thought will permit of a more practicable and efficient administration of the aforementioned ruling of the Court limiting a reservoir to one filling in any one year. . . . Until further notice, it will therefore be assumed that the “seasonal” year will cover the period from November 1st to October 31st.

The letter continues that

A proper administration of a reservoir will, therefore, require the maintenance of a correct record of the reading of the gage rod in the reservoir on November 1st, and of the beginning and ending of each period of storage during the seasonal year, and of the beginning and ending of releases from the reservoir during the seasonal year, together with the dates of all such gauge rod readings. In other words, it is necessary that a debit and credit account on each reservoir be maintained at all times, which would charge the reservoir with storage therein and credit the reservoir with releases therefrom. Water carried over in reservoirs after October 31st shall be charged to the new seasonal year’s filling privileges, which will have the effect of decreasing the effective storage capacity of the reservoir during the new seasonal year.

A blank accounting sheet is attached to the letter.

The extent to which the Hinderlider Letter was circulated is unclear. Mr. Yahn, manager of North Sterling, testified that, prior to this litigation, he had never seen the letter and no copy of the letter was in North Sterling’s files. Mr. Simpson, former state engineer, similarly testified that he had not seen a copy of the letter prior to this litigation. Mr. Simpson did not provide a copy of the Hinderlider Letter to water commissioners during his tenure and was uncertain if the letter had been circulated to water commissioners by Mr. Hall, the current division engineer. Mr. Simpson had no personal knowledge of whether the November 1st policy had been followed prior to 1972, when he became involved in water rights administration. Mr. Hall had not seen the letter prior to the last several years and the copy of the letter that Mr. Hall initially had in his office was unsigned and did not contain the ledger accounting form attached to the letter. However, Don Chapman, superintendent of Riverside, testified that Riverside had a copy of the 1936 letter in its files that appeared to have been placed there at or near the time the letter was issued.



Although the Hinderlider Letter was addressed to all division engineers and water commissioners, the evidence at trial did not indicate the state water officials relied on the letter. Ms. Cuning, water commissioner for District 1 from 1989 to 2002, did not know the basis for the November 1st water year. Mr. Stenzel, division engineer for Division No. 1 from 1992 to 2002, had not seen the letter prior to 2000, and did not know that the letter was purportedly the reason for the November 1st water year. Mr. Berryman, division engineer for Division No. 1 from 1985 to 1995, did not circulate the letter to water users and was uncertain if he possessed a copy of the letter during his time in office. Finally, a 1996 water commissioner manual makes no mention of either the letter or the November 1st water year.

*b. November 1st Policy*

The court received additional evidence regarding the existence of and administration pursuant to the Engineers' November 1st policy. Some of this evidence referred to the Hinderlider Letter as the basis for the November 1st policy while other evidence did not state its basis.

Two separate biennial reports of the state engineer to the governor reference the November 1st policy. The 28th Biennial Report of the State Engineer to the Governor, for the years 1935-1936, contains a discussion of the November 1st policy set forth in Hinderlider Letter. It states that, following the Court's decisions in *Windsor Reservoir* and *Park Reservoir*,

The Department was confronted with the necessity of establishing a date from which to reckon the year within which a reservoir might have the opportunity to obtain one filling. November 1st was arbitrarily adopted as the date from which to reckon storage in all reservoirs, which date seems to have met with universal approval.

The 29th Biennial Report of the State Engineer to the Governor, for the years 1937-1938, similarly discusses the November 1st policy following the Court's decision in *Park Reservoir*. This report states that "it was necessary to define a year, since a reservoir is entitled to only one filling in any one year as against a junior appropriator demanding the water. This was set as from November 1st of one year to October 31st of the following year, and in general has met with approval." This report also discusses the Division Engineer's ruling in the Trinchera case, discussed below.

A 1937 ruling of the Office of the Division Engineer in the matter of *Trinchera Ranch Company v. The Trinchera Irrigation District, in Irrigation Division No. 3* (the "Trinchera ruling") references the November 1st policy. This ruling explains the November 1st policy set forth in the Hinderlider Letter and applies it to that particular dispute.

Mr. Kroeker, a water rights engineer and expert witness in this case, testified that the November 1st water year is "common knowledge."

As discussed in greater detail below, some but not all of the Engineers' records reflect the use of a water year beginning on November 1st and ending on October 31st. These records include water commissioner field books from before 1936 until 1969, when they were discontinued. They also include forms used to record calls in Division No. 1. Similarly, several storage right decrees used by the Engineers to administer water rights, such as the re-fill decrees for Prewitt, Jackson Lake, Riverside Empire, and Bijou No. 2, expressly reference the November 1st water year.

A study prepared by the engineering firm Woodard-Clyde-Shepard & Associates, dated May 2, 1967, references the November 1st policy. This report cites Cecil Osborne, then-superintendent of Riverside and the city engineer of the Towns of Brush and Fort Morgan, who also did consulting work for Bijou and other irrigation systems. "He stated that the storage season usually begins on November 1st."

Several current and former state water administration officials testified that the November 1st water year is the presumptive water year used by the Engineers to administer irrigation storage rights in Water Division No. 1. These state water administration officials include Mr. Simpson, Mr. Stenzel, Mr. Berryman, Mr. Hall, Mr. Schantz, and Ms. Cunning. Some state water officials, such as Mr. Berryman, understood the November 1st policy to be based on the Hinderlider Letter, while others did not know its basis.

Finally, a letter, dated October 4, 1989, from Alex Michael, then-manager of North Sterling, and Mr. Berryman, then-division engineer, establishes that North Sterling was aware of the November 1st policy by at least 1989. Mr. Berryman testified that he had two or three conversations with Mr. Michael regarding the filling of North Sterling Reservoir during the month of October. This 1989 letter purports to summarize a conversation between these two men that occurred on October 3, 1989 regarding the November 1st policy. In the letter, Mr. Michael notes his disagreement with the Engineers' November 1st policy.

c. *Additional Historical and Factual Background Regarding  
Irrigation Reservoir Administration in Division No. 1*

Additional historical and factual background regarding the administration of irrigation reservoirs in Division No. 1 is relevant. In general, prior to the recent drought in 2002, administration of the South Platte River, especially during the non-irrigation season, has not been stringent.

The South Platte River was administered loosely prior to recent drought years, generally before the year 2002. This administration was particularly loose in the "non-irrigation" or "storage" season when senior ditches are no longer diverting and the senior water rights on the river are storage rights, such as major irrigation reservoirs. This loose administration was made possible in part due to relatively high river flows as compared to demand during the non-irrigation season. Water rights on the South Platte River and storage rights in particular were not administered strictly in accordance with the priority system.

There was also evidence that, during this historical period of loose administration, some water users and water officials made an effort to keep calls off the river during the non-irrigation season. This so-called “gentlemen’s agreement” allowed the irrigation reservoirs on the South Platte River below the Denver metro area to fill in a manner other than by strict priority and the use of recorded calls. The lack of a non-irrigation season call permitted relatively junior recharge water rights, often with priorities of 1972 or younger, to divert. Well owners were also not required to replace depletions during the winter when there was no recorded call.

In recent years, however, the situation permitting loose administration has changed. First, between the mid 1900s and the 1970s, several trans-basin importation projects were implemented to import water from other river basins. The imported water that was not consumed was discharged to the South Platte River and added to the available in-basin water supplies. However, municipalities that import water have increased efforts to recapture and reuse legally fully-consumable water, thereby reducing available water supplies. Second, numerous wells were drilled in the South Platte basin from the 1950s to the present that diverted water from the alluvium of the South Platte River. Consequently, demand on the river increased. Third, recharge rights have also increased demand on the river as tributary groundwater wells have been incorporated into the priority system. Some wells began to replace their well-pumping depletions pursuant to judicially-approved plans for augmentation under the Water Right Determination and Administration Act of 1969, §§ 37-92-101 to -602, C.R.S. (the “1969 Act”). However, over 4,000 wells were operated under substitute supply plans approved by the State Engineer until the Colorado Supreme Court’s decision in *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139 (Colo. 2001). *See also Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003). These wells have since been required to operate under augmentation plans or substitute water supply plans. § 37-92-308, -308(b)(III), C.R.S. Recharge water rights have gained popularity as they are often used to replace well depletions. Recharge water rights also frequently divert in September and October of each year.

In summary, the relative excess supply and low demand in the non-irrigation season that permitted loose administration and the gentlemen’s agreement are no longer present in the South Platte River basin. Consequently, the administration of the South Platte River has become more stringent especially following the recent drought.

The Engineers have not promulgated rules or regulations regarding either the Hinderlider Letter or the November 1st policy under the 1969 Act, previous water law statutes, or other legal authority.

2. Administration of Storage Rights in Water Division No. 1, Including North Sterling’s Storage Rights

The court received evidence regarding the administration of reservoirs and water storage rights in Division No. 1. In general, this evidence reflected the historically loose administration of the South Platte River. The court received the records of state water officials used in the

recording and administration of storage rights. In addition to evidence regarding the administration of North Sterling's storage rights, the parties also presented evidence regarding the administration of other reservoirs in Division No. 1.

*a. Records of the Engineers and Water Commissioners*

The records of state water officials are frequently inconsistent from year to year but nevertheless provide some relevant information regarding the administration of North Sterling's storage rights. Further, these records are generally not consistent with the requirements of the Hinderlider Letter.

Water commissioners maintain records of storage water right operations in the form of water commissioner field books. Records pertaining to storage water rights are also maintained by the State Engineer.

Both the format of the water commissioner field books and State Engineer's records, and the information reported therein has varied from year to year. Early records from before 1925 generally contain only a November 1st and a May 1st storage amount for each reservoir and first date run/last date run information. After 1925, readings of storage contents were generally taken on a single day each month. However, the start date for these records was inconsistent. In some instances, the period of record began on the first of the month, in other cases, at the end of the month, and in some cases on the 16th of the month. The months in which these records began and ended also varied. Certain of these records pertain to periods longer or shorter than a calendar year. Certain of these records are also missing beginning of month storage contents for one or more months. Prior to 2002, the water commissioners' field book and State Engineer records pertaining to the North Sterling's storage rights contain no information regarding the acre-feet of water diverted to storage in North Sterling Reservoir or the acre-feet of water released from North Sterling Reservoir. After 2002, this storage and release information is provided only on a monthly basis. The water commissioner field book and State Engineer records alone do not establish how a particular water right has been historically operated or administered, but rather, are summaries of water use on more or less standardized forms.

Records kept by state water officials are also frequently not in accordance with the requirements of the Hinderlider Letter. As discussed above, water commissioner field book and State Engineer records have generally recorded reservoir storage contents for a single day each month. As of 2002, these records also contain records of deliveries to storage and releases from storage on a monthly basis. However, the Hinderlider Letter requires that records of any and all diversions to storage and releases from storage be recorded so that it can be determined when a storage water right decree has filled. These records comprised of a single storage content reading each month and, after 2002, deliveries to storage and releases from storage on a monthly basis, do not allow the record-keeper to determine whether, or on what date a storage water right decree had received its one fill, and such record-keeping is not in accordance with the record-keeping described in the Hinderlider Letter. These records alone do not provide the information required to determine the date when a decree has filled or a reservoir has reached its maximum

contents. To determine whether a storage water right has fulfilled its decrees, detailed records of all of the amounts of water delivered to storage and releases from storage must be maintained. For example, Mr. Simpson testified that it was not possible to determine from these records the dates that reservoirs began filling, completed filling, or stopped storing water. Similarly, Mr. Hall testified that he could not determine from state records whether certain reservoirs had filled in particular years. Thus, these records are not in accordance with the strict requirements of the Hinderlider Letter.

*b. Administration of North Sterling's Storage Rights*

Evidence presented at trial established that the Engineers' believed that they were administering North Sterling's storage rights pursuant to the November 1st policy and not low-point or any other form of administration. Several current and former state water officials, including Mr. Simpson, Mr. Stenzel, Mr. Berryman, Mr. Hall, Mr. Schantz, and Ms. Cuning, uniformly testified that North Sterling's storage rights are and have been administered pursuant to the November 1st policy. Further, although state records are somewhat inconsistent as discussed above, the records generally reflect the use of the November 1st water year. For example, water commissioner field books from before 1936 until 1969, when they were discontinued, and forms used to record calls in Division No. 1 reflect the November 1st water year.

*c. Operation of Certain South Platte Reservoirs Below the Confluence with the Cache la Poudre River*

The court also received evidence regarding the operation of several other major reservoirs that divert from the South Platte River below the confluence with the Cache la Poudre River near Greeley, Colorado.

*i. Relevant Reservoirs Diverting From the South Platte*

Empire Reservoir has a water storage right for 37,709 acre-feet with an appropriation date of May 5, 1905 and an adjudication date of January 13, 1936. Empire Reservoir also has a junior storage water right in the amount of 37,709 acre-feet with an appropriation date of May 5, 1905, and an adjudication date of January 13, 1936. Both of the 1905 priorities are senior to the North Sterling's water rights. Empire Reservoir also has a refill water right in the amount for 37,709 acre-feet with an appropriation date of December 31, 1929 and an adjudication date of June 8, 1965.

Jackson Lake Reservoir has a water storage right for 30,992 acre-feet with an appropriation date of May 18, 1901 and an adjudication date of January 15, 1914. Jackson Lake Reservoir has an additional water storage right for 4,637 acre-feet with an appropriation date of May 18, 1901 and an adjudication date of May 11, 1915. Both of these storage rights are senior to the North Sterling's water rights. Jackson Lake also has a refill water right for 8,269 acre-feet with an appropriation date of December 31, 1929 and an adjudication date of June 8, 1965.



Riverside Reservoir has a water storage right for 16,070 acre-feet with an appropriation date of April 1, 1901 and an adjudication date of January 15, 1914. Riverside Reservoir, First Enlargement, has a storage right in the amount of 41,437 acre-feet with an appropriation date of August 1, 1907 and an adjudication date of January 15, 1914. Both of these rights are senior to the North Sterling water rights. Riverside Reservoir, Second Enlargement, has a storage water right for 4,089 acre-feet with an appropriation date of October 25, 1910 and an adjudication date of January 15, 1914. Riverside Reservoir also has a refill water right for 56,325 acre-feet with an appropriation date of December 31, 1929 and an adjudication date of June 8, 1965.

Prewitt Reservoir has a water storage right for 32,320 acre-feet with an appropriation date of May 25, 1910 and an adjudication date of January 15, 1914. Prewitt Reservoir also has a refill water right for 34,960 acre-feet with an appropriation date of December 31, 1929 and an adjudication date of June 8, 1965. The Prewitt Reservoir water rights divert water at a location downstream of the North Sterling Inlet Ditch. Prewitt's 1910 priority is generally unable to divert water other than a small amount of inflows between the North Sterling Inlet Ditch and the Prewitt Inlet Canal until North Sterling's senior 1908 priority is satisfied.

Julesburg Reservoir has a storage water right for 28,178 acre-feet with an appropriation date of February 12, 1904 and an adjudication date of December 8, 1908. The point of diversion for the Julesburg Reservoir is located downstream of the North Sterling Inlet Ditch. The Julesburg Reservoir water right is senior to North Sterling's.

## ii. Non-Irrigation Season Operation of Certain Reservoirs

Each year, Empire Reservoir, Jackson Lake Reservoir and Riverside Reservoir operate their storage water rights so as to fill their respective reservoirs to a "winter fill" level. This level is less than the full reservoir capacity. The winter fill level is designed to minimize icing and wind damage to the reservoir structures associated with winter winds and storms. It is selected by each reservoir operator and is not established by state water officials.

Water seeps away from storage during the winter and, in the spring, each reservoir operator determines when it will again begin diverting water to storage. State water officials do not generally assess losses for seepage and evaporation that occur during times when storage water rights are unable to divert water to storage in priority. In addition, Empire, Jackson Lake and Riverside Reservoirs typically lose significant amounts of water due to seepage if such reservoirs fill too far in advance of the irrigation season. Consequently, the operators of these reservoirs have little incentive to divert significant amounts of water to storage early in the non-irrigation season.

Diversions to storage after the reservoirs reach their winter fill level are generally deferred until the spring of each year in order to maximize the amount of water in storage at the start of the irrigation season and to minimize repair and maintenance costs and seepage losses.

*d. Administration and Operation of Boulder's Reservoirs*

Boulder presented evidence regarding the operation of its ten on-stream reservoirs that it uses for municipal water supply purposes and several other reservoirs in Boulder County. Although evidence regarding the operation of these reservoirs is tangentially related to general issues of low-point administration and the universality of the Engineers' November 1st policy, this evidence is not persuasive on administration of North Sterling's storage rights, which is the issue before the court.

Boulder's reservoirs are located in the Boulder Creek basin, upstream of North Sterling Reservoir and the other reservoirs discussed above. Some of the water storage rights for Boulder's reservoirs are senior and others are junior to North Sterling and the other reservoirs discussed above. Although there are few upstream water rights that can be called out by Boulder's storage rights, water can be called past or through Boulder's reservoirs to satisfy the downstream senior reservoir water rights. With limited exceptions, Boulder's water storage rights for its reservoirs are senior to the recharge water rights on the South Platte River. Boulder asserts that it operates eight of its ten reservoirs pursuant to low-point administration.

Boulder's other two reservoirs, Barker and Silver Lake Reservoirs, are operated pursuant to fixed water years. Boulder asserts that these two reservoirs were operated based on low-point administration until fixed start dates were selected in Case No. 90CW193. In the decree in that case and with the approval of state water officials, Boulder selected a May 1st start date for Silver Lake Reservoir and a May 20th start date for Barker Reservoir, based on a review of dates when the low-point for each reservoir had been reached historically. However, ten years after Boulder had selected a May 1st start date for Silver Lake Reservoir and a May 20th start date for Barker Reservoir, water commissioner field book and State Engineer records for these two reservoirs continue to summarize water storage using forms that run from November 1 to October 31 and record end-of-month storage contents for both reservoirs based on a November 1st to October 31st format, rather than based on the start date selected by Boulder.

Boulder also owns Mesa Reservoir, which fills in October or November of each year. Boulder also has a thirteen percent interest in Baseline Reservoir, which is operated on an October 1st to September 30th "storage year." Sixmile Reservoir is an irrigation storage reservoir in Division No. 1 that begins filling in October of each year.

The evidence regarding Boulder's reservoirs is not given great weight on the issue of the administration of North Sterling's storage rights. First, while the evidence discussed above tends to establish that Boulder operates most of its reservoirs based on each reservoir's annual low-point, there was no evidence that state water officials have administered these reservoirs based on low-point administration. Second, Boulder's reservoirs are not analogous to North Sterling Reservoir. Unlike North Sterling Reservoir, which sits relatively downstream on the South Platte main stem and can call out numerous junior water rights, Boulder's reservoirs sit near the top of the watershed and generally do not place calls for water that could potentially affect junior water rights. Third, the operation of Boulder's reservoirs is not directly related to the

administration of North Sterling's storage rights. Although, to a certain extent, the operation of Boulder's reservoirs weighs on the universality of the Engineers' November 1st policy, it has little to do with the Engineers' historical administration of North Sterling's storage rights.

*e. Administration of Municipal Reservoirs*

Mr. Simpson, former state engineer, testified that municipal storage water rights are generally not subject to administration based on the November 1st policy. Rather, he testified that, in some cases, municipal storage water right holders are allowed to select a "storage year" by agreement with state water officials. Municipal storage water right holders are allowed to select a start date based on actual operation of the reservoir.

Similar to the evidence regarding Boulder's reservoirs, great weight is not given to the evidence concerning municipal water storage rights on the issue of the administration of North Sterling's storage rights. Although the water stored in North Sterling Reservoir has several decreed beneficial uses, its primary use is irrigation and the basis of its annual operations is the irrigation season. Thus, municipal storage reservoirs are operated and administered in a different factual context. Furthermore, the court is not determining the administration of reservoirs or water storage rights other than those of North Sterling in this matter.

*E. Laches*

Defendants argue that the doctrine of laches bars North Sterling's claim for declaratory judgment. "Laches is a form of estoppel and contemplates an unconscionable delay in asserting one's rights which works to the defendant's prejudice or injury in relation to the subject matter of the litigation." *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 73 (Colo. 1996) (citation omitted). "The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another." *Id.* (citations omitted). Laches is inapplicable "to a party who has no duty to act." *Id.* at 74. Further, laches must "meet a high standard in the water right context." *Central Colo. Water Conservancy Dist. v. City of Greeley*, 147 P.3d 9, 17 (Colo. 2006).

North Sterling's cause of action is not barred by laches. As discussed above, the South Platte River has not been strictly administered, especially during the non-irrigation season, until the recent drought in 2002. In 2001, state water officials refused North Sterling's call. North Sterling then initiated a series of meetings and written and telephonic correspondence with the Engineers in an attempt to resolve the situation. When such attempts proved unsuccessful, North Sterling filed its complaint in this matter. It is doubtful that North Sterling had a full knowledge of the facts until recently. Moreover, North Sterling's actions in this matter do not constitute unreasonable delay. Thus, laches does not apply.



F. *North Sterling's Storage Rights Have Been and Are Legally Administered Pursuant to the November 1st Water Year*

This court previously determined in its order dated May 2, 2007 that where a storage decree is silent on the issue, such as the decrees confirming North Sterling's storage rights, the Engineers must be able to account for and, if necessary, curtail diversions subject to the one-fill rule in order to fulfill the administrative role that the General Assembly has assigned to them.

The court further determined in that order that North Sterling's storage right decrees were ambiguous regarding the application of the one-fill rule. *See Hinderlider v. Canon Heights Irrigation & Reservoir Co.*, 117 Colo. 183, 185 P.2d 325 (1947) (interpretation of decrees is a question of law for the court). The ambiguities included the historical administration of North Sterling's storage rights, the application of the Engineers' policies and decisions to North Sterling's storage rights, and issues of injury. The court was thus unable to make determinations in the May 2, 2007 order regarding these factual issues.

These ambiguities require the court to interpret North Sterling's storage right decrees. "[W]hen construction of a decree is necessary, it must first be construed in the light of its underlying record." *South Adams Water & Sanitation Dist. v. Broe Land Co.*, 812 P.2d 1161, 1168 (Colo. 1991) (citing *Orchard City Irrigation Dist. v. Whitten*, 146 Colo. 127, 361 P.2d 130 (1961)). However, where "the meaning of a decree is ambiguous, and the court cannot determine its meaning from the underlying record, the court may look to the administrative interpretation of the decree by officials charged with the administration of that decree." *Id.* (citations omitted). "Court deference to policy determinations in rule-making proceedings does not extend to questions of law such as the extent to which rules and regulations are supported by statutory authority." *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 929 (Colo. 1983). Finally, ambiguities are "generally an issue of fact to be determined in the same manner as other disputed factual issues." *Union Rural Elec. Ass'n, Inc. v. Public Utils. Comm'n*, 661 P.2d 247, 251 n.5 (Colo. 1983).

The court has reviewed the evidence and determines that the Engineers' November 1st water year is the method by which North Sterling's storage rights have been and are administered pursuant to the one-fill rule. First, the November 1st water year is the presumptive water year for the administration of North Sterling's storage rights. Second, Plaintiffs did not overcome this presumption. Third, low-point administration is not applicable to North Sterling's storage rights. And fourth, injury to the water rights of Defendants would result from the low-point administration of North Sterling's storage rights.

1. Fixed Water Year Beginning November 1st Water Year is the Presumptive Water Year for North Sterling's Water Storage Rights

The November 1st water year, a fixed, 365-day (or 366-day during a leap year) water year beginning on November 1st and ending on October 31st, is the presumptive water year for North Sterling's storage rights. *See Hassler v. Fountain Mut. Irrigation Co.*, 93 Colo. 246, 248,

26 P.2d 102, 102 (1933) (“considerable importance attaches to the practical interpretation or construction placed upon the decrees by those officials charged under the statutes with the duty of giving effect thereto and of distributing the water thereunder.”).

The preponderance of the evidence presented at trial, described in detail above, established the presumption that the Engineers’ November 1st water year applies to North Sterling’s storage rights. First, there was evidence that the Hinderlider Letter was distributed to at least some water users, such as Riverside, near the time that it was written. There was additional evidence that the letter attained wider dissemination among state water officials, including the Trinchera ruling, reports to the governor, and the testimony of certain former and present state water officials. Second, with or without the Hinderlider Letter, the Engineers’ November 1st policy was well established and known in Division No. 1 with respect to North Sterling’s storage rights. This includes North Sterling’s awareness of the policy by 1989. Third, state water officials uniformly testified that the November 1st policy applied to North Sterling’s storage rights. Although much of the testimony concerned a historical period of loose administration of the South Platte River and the gentlemen’s agreement to keep calls off the river during the non-irrigation season, state water officials testified that, to the extent North Sterling’s storage rights were administered, they applied the November 1st policy. And fourth, the decrees confirming North Sterling’s storage decrees are silent concerning the water year and the Engineers have decided to apply a November 1st water year to North Sterling’s storage rights.

As discussed below, the court does not agree with Plaintiffs’ arguments that the Engineers’ presumptive November 1st policy does not apply to North Sterling’s storage rights.

Plaintiffs contend that the Hinderlider Letter provides no basis for administration because, even if the letter had been disseminated to all water users, the letter is not binding because its policies were not adopted as enforceable rules or regulations. However, Plaintiffs rely on statutory provisions regarding the Engineers’ adoption of rules and regulations under § 37-92-501 and -304, even though the letter predates the 1969 Act by thirty years. Moreover, to the extent that the 1969 Act is relevant, under § 37-92-501(1), C.R.S., the “state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of” his duties. As discussed in this court’s order dated May 2, 2007, such duties include the administration of the one-fill rule. Further, other evidence, apart from the Hinderlider Letter, supports the Engineer’s administration under the November 1st water year.

Plaintiffs similarly argue that the Trinchera ruling and the state engineer’s reports to the governor were not disseminated to water users and did not provide notice of the November 1st policy. However, the evidence at trial established that notice of the November 1st policy was well-known by water users in Division No. 1. For example, North Sterling was on notice of the November 1st policy by 1989.

Plaintiffs contend that the November 1st water year does not apply because there has been little or no historical administration of storage rights on the South Platte, pursuant to the November 1st water year or otherwise. Historical custom cannot be the basis for administration

of water rights. *See Comstock*, 58 Colo. at 202, 145 P. at 705. However, the Engineers' application of the November 1st policy is not a "custom" or in conflict with law, but rather the administration of the one-fill rule and the fulfillment of the administrative role that the General Assembly has given the Engineers. Further, although there was been little historical administration of North Sterling's storage rights until recently, to the extent that they have been administered, they have been consistently administered pursuant to a November 1st water year. *See South Adams*, 812 P.2d at 1168.

Finally, the court does not agree with Plaintiffs' suggestion that the Engineers "imposed" the November 1st water year solely for the benefit of junior recharge water rights. Such a contention was not supported at trial by the documentary evidence or testimony of current and former state water officials. Rather, the November 1st water year prevents North Sterling from calling out any junior water rights if North Sterling's storage rights have been satisfied during that water year.

## 2. Plaintiffs Have Not Overcome the Presumptive November 1st Water Year

The court determines that Plaintiffs have not overcome the presumptive November 1st water year for North Sterling's storage rights. The evidence presented at trial established that North Sterling and the Engineers have historically maintained two parallel accounting systems for North Sterling's storage rights: North Sterling's accounting system for reservoir operations based on the irrigation season, and the Engineers' accounting system for administration based on the November 1st water year. The evidence did not establish that North Sterling's storage rights have been administered pursuant to low-point administration or that the Engineers have acquiesced to such administration.

### a. *Parallel Accounting Systems of North Sterling and the Engineers*

North Sterling has maintained detailed internal records of its water rights, as discussed above, including its storage rights in North Sterling Reservoir. The records indicate that North Sterling diverted water to storage, released water from storage, and operated its reservoir based generally on the irrigation season and the needs of members that use the water as the primary means to irrigate lands within the district. Such operations necessarily create a low-point in the reservoir following the end of the irrigation season at which time North Sterling logically begins to fill the reservoir anew.

The Engineers and water commissioners have also maintained records of North Sterling's water rights. As discussed above, these records are less precise than those of North Sterling and not entirely consistent from year to year or with the Hinderlider Letter. The condition of these records generally corresponds to the historically loose administration of the South Platte River, especially regarding the filling of reservoirs during the non-irrigation season. Nevertheless, these records and testimony concerning these records are consistent with a November 1st water year.

North Sterling's and state water officials' records establish that the parties were, in essence, operating two parallel accounting systems. North Sterling's accounting system concerned internal operations and annually pivoted on the end of the irrigation season and the corresponding low-point in the reservoir. The Engineers' accounting system, by contrast, applied a November 1st water year for administrative purposes. Of course, as discussed above, the records of state water officials were used infrequently for actual administration due to loose administration, a relatively greater supply of water due to less demand, and agreements to avoid official, recorded calls. Nonetheless, neither set of records alters the application of the presumptive November 1st water year.

*b. Appropriation of and Making North Sterling's Storage Rights Absolute*

The court does not agree with Plaintiffs' argument that North Sterling's storage rights were appropriated based on low-point administration, and therefore, the Engineers must administer North Sterling's storage rights pursuant to low-point administration. North Sterling's appropriation and use of its storage rights pursuant to internal operations revolving around the irrigation season and annual low point in the reservoir are distinct from the administration of those storage rights by state water officials. Further, as discussed above and in the order dated May 2, 2007, North Sterling's storage decrees are silent on the application of the one-fill rule and the Engineers have exercised their statutory duty by administering these storage rights pursuant to the November 1st water year. Consequently, the Engineers' administration of North Sterling Reservoir has not altered or amended North Sterling's decreed water rights. *See Orchard City Irrigation Dist.*, 146 Colo. at 137, 361 P.2d at 135. *See also Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 58 (Colo. 1999) (comparing the roles of the water court and the Engineers).

Nor does the court agree that, because North Sterling's storage rights were made absolute based on the reservoir's low point, North Sterling is entitled to low-point administration. Colorado courts have repeatedly held that the underlying record and previous decrees making North Sterling's storage rights absolute are relevant to the construction of decrees. *See, e.g., Central Colo. Water Conservancy Dist.*, 147 P.3d at 16-17. However, as discussed above, even in light of the underlying record, such as Case No. 3156, North Sterling's storage right decrees are ambiguous. Further, the court is limited to the extent that it can take judicial notice of facts that the parties are litigating. *See Mun. Subdistrict, Northern Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999). Even if the court were to take judicial notice of the underlying record, it has little to offer on the issue of the administration of North Sterling's storage rights pursuant to the one-fill rule. Most importantly, as discussed previously in this court's order dated October 15, 2007, the issue of making conditional storage rights absolute is distinct from how those rights are administered under the one-fill rule.



c. *North Sterling's Historical Diversions Made Before November 1st*

There is no dispute that North Sterling has historically diverted significant amounts of water prior to November 1st during most years. Rather, the parties dispute the legal significance of North Sterling's diversions in September and October. Historical call and diversion records do not establish that North Sterling called or diverted water under an administrative regime other than the Engineers' presumptive November 1st water year.

Central's expert, Mr. Armbruster, testified regarding his decree accounting and analysis of North Sterling's historical diversions. In his analysis, he assumed a November 1st water year to determine whether the historical records fit with such administration. Mr. Armbruster also assumed that water diverted under free river conditions in September and October is subsequently charged against North Sterling's senior 1908 priority following November 1st, which is his understanding of how carry-over water is accounted for in Division No. 1. Free river conditions were determined by examining historical call records to determine if there were call conditions that would have prevented North Sterling from diverting. He opined that historical diversion records of North Sterling's storage rights correspond with administration under a November 1st water year. The only exception in Mr. Armbruster's opinion is that, in 1978, the Engineers' recorded a 1908 call before November 1st when the 1908 priority was already satisfied but the 1915 priority was not. He thus opined that a 1915 call should have been recorded in 1978 instead. Mr. Hall similarly testified that the 1908 call in 1978 could have been a mistake.

Mr. Kroeker, testified as an expert for Bijou, Riverside, Jackson Lake, and Fort Morgan, regarding his decree accounting and analysis of North Sterling's historical diversions. Similar to Mr. Armbruster, Mr. Kroeker testified that North Sterling's diversions during September and October occurred during free river conditions and that historical administration of North Sterling's storage rights has been consistent with a November 1st water year. Again similar to Central's expert, Mr. Kroeker opined that the 1908 call in 1978 was an anomaly because the 1908 priority reached its one annual fill on April 7, 1978.

Boulder's expert, Mr. Rozaklis, testified regarding his decree accounting and analysis of North Sterling's historical diversions. The purpose of his analysis was to determine whether an assumed October 1st through September 30th ("October 1st water year") water fit with the historical operations of North Sterling Reservoir as well or better than the November 1st water year assumed by Mr. Armbruster and Mr. Kroeker. Mr. Rozaklis opined that North Sterling's variable year operation was consistent with an assumed October 1st water year. He further opined that, by using an October 1st water year, North Sterling adhered to the one-fill rule every year and that, when North Sterling stored more than the 81,400 acre-feet decreed to North Sterling's storage rights, such additional storage occurred under free river conditions.

North Sterling has called for water before November 1st. Such years are particularly relevant to the decree accounting and analysis of North Sterling's historical diversions. However, these years do not demonstrate that North Sterling's storage rights have been

administered pursuant to administration other than the November 1st water year. Rather, North Sterling's historical calls made before November 1st are consistent with the November 1st water year because North Sterling received water under its unsatisfied 1915 priority or North Sterling diverted under free river conditions.

In 1976, Mr. Michael, then-manager of North Sterling, wrote a letter, dated October 7, 1976, to Mr. Samples, then-water commissioner for District 1, to confirm a call for water under its 1908 priority in late September and early October of 1976. North Sterling's 1908 right had been satisfied but its 1915 right had not. The Engineers recorded the call under the 1915 priority. Mr. Kroeker testified that a 1915 call was the proper call. A call under North Sterling's 1915 priority is consistent with a November 1st water year because that priority was not yet satisfied.

In 1978, Mr. Michael made a similar request by letter, dated October 4, 1978, to place a call under North Sterling's 1908 priority. North Sterling's 1908 priority had been satisfied in April of that year but its 1915 priority had not. The Engineers honored North Sterling's demand for water and recorded it as a 1908 call. However, Mr. Hall, current division engineer for Division No. 1, testified that recording the call under the 1908, as opposed to a 1915 priority, may have been a mistake. Experts for Opposers similarly testified that the call should have been recorded under North Sterling's 1915 priority. Based on the evidence, the Engineers' administration in 1978 was consistent with the November 1st water year because, even though the call was recorded under the 1908 priority, the 1915 priority was unsatisfied. Thus, North Sterling did not actually begin a new fill prior to November 1st in 1978.

In 1989, Mr. Michael sent a letter, dated October 4, 1989, to then-division engineer Mr. Berryman requesting a call on North Sterling's 1908 priority. This is the same letter by which, as discussed above, Mr. Michael disagreed with the November 1st policy. Mr. Yahn testified that North Sterling diverted water and charged it against the 1908 priority. Later that October, flows in the South Platte River increased for an unknown reason from some 450 cubic feet per second ("cfs") to 850 or 900 cfs. Mr. Berryman did not respond to this letter and no call was honored or recorded. Opposers experts contended that these diversions were made during free river conditions. The year 1989 provides no basis to undermine the Engineers' presumptive November 1st water year because the Engineers did not honor or record a call, the Engineers disagreed with North Sterling's position, and flows increased in the river permitting diversions without a call.

North Sterling also called and received water in October of 2002 and 2004. Similar to the situation in 1976, these calls were made under North Sterling's unsatisfied 1915 priority. Consequently, these calls are also consistent with administration under the Engineers' November 1st water year.

The historical administration of North Sterling's storage rights thus theoretically corresponds to both the November 1st water year and the October 1st water year. However, there is no evidence demonstrating the operation or administration of North Sterling's storage

rights pursuant to an October 1st water year. Further, the issue of the administration of North Sterling pursuant to an October 1st water year is not before the court because North Sterling and Plaintiffs have not provided notice, pleaded, or requested administration under an October 1st or other fixed water year. Rather, Plaintiffs maintain that North Sterling is entitled to low-point administration and the court limits its consideration to such arguments and evidence.

The evidence regarding North Sterling's historical diversions in September and October thus does not support Plaintiffs' assertions that North Sterling's storage rights have been historically administered under an administrative regime other than the Engineers' presumptive November 1st water year. Rather, the evidence supported Defendants' position that North Sterling's historical diversions, including those in September and October, are consistent with the November 1st water year. Although North Sterling may have maintained its internal records of diversions pursuant to the low point of North Sterling Reservoir, there is no evidence its diversions were legally made pursuant to low-point administration.

*d. Engineers' Lack of Acquiescence to Low-Point Administration*

The evidence does not establish that the Engineers have acquiesced to low-point administration of North Sterling's storage rights. Current and former state water officials uniformly testified that they applied the November 1st water year to North Sterling's storage rights. Although loose administration and the gentlemen's agreement affected much of the historical period in question, there is no evidence that the Engineers ceded their administrative role to permit Plaintiffs to determine how the one-fill rule is to be administered. For example, it is not reasonable to conclude that the Engineers acquiesced or actually administered North Sterling's storage rights under low-point administration because they recorded North Sterling's call in 1978 under the 1908 priority. Such a conclusion would be especially unreasonable in light of the fact that the 1915 priority was unsatisfied. Similarly, North Sterling's call in 1989 provides no evidence that the Engineers acquiesced to low-point administration. Rather, the exchange between Mr. Michael and Mr. Berryman in 1989 tends to show that, despite loose administration and the lack of recorded calls, the Engineers were prepared to more strictly adhere to the November 1st policy. Finally, the court is not persuaded by the administration of Boulder's reservoirs or other municipal reservoirs for the reasons discussed above. There is no evidence that the Engineers have applied or acquiesced to low-point administration.

3. Low-Point Administration Not Applicable to North Sterling Reservoir

The court notes specific concerns with North Sterling's request for low-point administration. First, the court is not persuaded by case law concerning low-point administration. Second, the evidence established that low-point administration of North Sterling's storage rights is problematic.

Plaintiffs rely on the case of *Board of County Commissioners of the County of Arapahoe v. Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840 (Colo. 1992) ("*Upper Gunnison*"), which discusses low-point administration. In that case, certain parties disputed the

determination of the Water Court for Division No. 4 that adopted an accounting system that utilizes an administration date of November 1st instead of low-point administration. *Id.* at 851. In a footnote, the Colorado Supreme Court described low-point administration as follows:

Adoption of a low point administration date requires selection each year of the date upon which the least amount of water is in place in the reservoir as the point at which to begin calculations of available storage space. Such an administration date will by necessity vary year to year and can result in administration years consisting of more or less than 12 months.

*Id.* at 851 n.13. The Court held that the water court did not abuse its discretion in selecting the November 1st administration date for the subject reservoir. Based on the evidence at trial, the water court determined that the variable water year used by low-point administration would not adequately protect junior downstream water users from potential expansions of the reservoir's right to one fill. *Id.*

In this matter, the court does not find *Upper Gunnison* persuasive of Plaintiffs' position. First, the reservoirs at issue in *Upper Gunnison* are factually distinct from North Sterling Reservoir in that, unlike North Sterling Reservoir, the reservoirs at issue in *Upper Gunnison* are on-channel, multi-purpose reservoirs, that do not call out junior water rights and make releases to satisfy downstream water users. Second, the Court's definition of low-point administration in that case cannot be reasonably read as a holding that controls the outcome of this matter. Third, the Water Court for Division No. 4 found, and the Colorado Supreme Court upheld, the determination that a water year beginning on November 1st, and not low-point administration, was the proper method of administration, in part to avoid injury to junior downstream water users.

The evidence presented at trial established that the application of low-point administration to North Sterling's storage rights is highly problematic. First, it is unclear how low-point administration of North Sterling's storage rights would function vis-à-vis other water users. Although the evidence established that North Sterling operates its storage rights based on the low-point reached following the irrigation season, the evidence also established that North Sterling has not called for and received water based on such low-point operations. There is also no evidence of North Sterling providing notice to the Engineers that it had reached its annual low point. Similarly, current and former state water officials were unfamiliar with low-point administration and how such administration would function or how storage rights would be accounted for under such administration. Second, it is unclear whether low-point administration of North Sterling's storage rights is administrable. The evidence established that North Sterling Reservoir's low point varies greatly from year to year. Under low-point administration, North Sterling would, in essence, be permitted to determine its own fluctuating water year annually based on its own considerations. The Engineers would thus be left to administer all other water rights on the South Platte River contingent upon North Sterling's own determination of its water year. Moreover, there is no history of low-point administration of North Sterling Reservoir or an analogous reservoir to provide guidance. Finally, as discussed in greater detail below, low-point



administration of North Sterling's storage rights could injure other water users. Compare *Upper Gunnison*, 838 P.2d at 852 (discussing potential expansion of use). Further, under low-point administration, there would be no certainty or predictability concerning the length of North Sterling's actual annual water year. *Farmers Reservoir and Irrigation Co. v. City of Golden*, 44 P.3d 241, 245 (Colo. 2002) ("We have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation."). In short, the court cannot conclude that low-point administration is applicable to North Sterling's storage rights.

4. Injury Would Result From Low-Point Administration of North Sterling Reservoir

The court determines that North Sterling's claim for low-point administration would not result in injury to Plaintiffs but would result in injury to the water rights of Defendants.

a. *Injury to Plaintiffs*

Administration of North Sterling's storage rights under a November 1st water year will not injure North Sterling. As discussed in this court's order dated Mon-fall May 2, 2007, North Sterling's storage rights are limited to one annual fill. Further, as discussed above, Plaintiffs have not established that the presumptive November 1st water year has not and does not apply to North Sterling's storage rights. The November 1st water year does not preclude North Sterling from exercising its water rights, calling for water under its decreed priorities, and/or diverting water during free river conditions. Rather, the November 1st water year merely prevents North Sterling from calling for water in excess of its decreed storage rights.

The court does not agree with Plaintiffs' argument that North Sterling is injured if it cannot call for water prior to November 1st. First, although North Sterling Reservoir takes a long time to fill, North Sterling may call for water prior to November 1st if it does so under priorities that have not been previously satisfied during the current water year. Such a call would preclude all junior water rights, including junior recharge water rights, from diverting, if necessary. Second, as discussed above, North Sterling has not established that it is entitled to low-point administration. Finally, the court does not agree with North Sterling's assertion that, because North Sterling uses water for irrigation in the spring and summer, it is no consolation if North Sterling diverts the balance of its decreed storage rights in the subsequent fall. Water diverted to storage in the fall can be released to irrigate lands within North Sterling during the following year. This is especially true considering North Sterling Reservoir's low seepage rate.

Administration of North Sterling's storage rights under a November 1st water year will also not injure Plaintiff-Intervenors Boulder, Centennial, and Pawnee. These parties argue that the administration of North Sterling's storage rights pursuant to the November 1st water year injure them by limiting their own storage and recharge opportunities. However, these claims are insufficient in this matter. This case concerns the administration of North Sterling's water rights.

Consequently, any claims of injury to Plaintiff-Intervenors are indirect and, in essence, contingent upon the validity of North Sterling's claims. As discussed above, North Sterling is not entitled to low-point administration of its storage rights and the November 1st water year applies to North Sterling's storage rights. Consequently, the water rights of Plaintiff-Intervenors will not be legally injured by North Sterling's exercise of its priorities and the continued administration of North Sterling's storage rights under the November 1st water year.

*b. Injury to Other Water Users*

Low-point administration of North Sterling's storage rights would injure the water rights of Defendants by altering the historical stream conditions under which the junior rights were appropriated. A junior water rights holder is "entitled to the maintenance of stream conditions existing at the time of its respective appropriation." *Colo. Water Conservation Bd. v. City of Central*, 125 P.3d 424, 434 (Colo. 2005) (listing cases). Mr. Kroeker testified that, if North Sterling is allowed to have a variable water year and begin its annual fill before November 1st under low-point administration, the result would be a change in the historic streams conditions and injury to the junior refill and recharge water rights of Bijou, Riverside, and Fort Morgan. Mr. Armbruster, Central's expert, provided a similar analysis regarding Central junior storage and recharge rights. The court also notes that Aurora owns junior water rights in the South Platte basin. Therefore, low-point administration of North Sterling's storage rights would cause injury by altering the historical stream conditions the junior appropriators have relied upon.

Low-point administration of North Sterling's storage rights could also cause injury through the enlargement of North Sterling's storage rights beyond its one fill in a given year. *See, e.g., City of Grand Junction v. City & County of Denver*, 960 P.2d 675, 683 n.6 (Colo. 1998) (stating one-fill rule). Because the annual administrative period necessarily varies under low-point administration, North Sterling could call for and divert in excess of its one-fill in a twelve-month period. *See Upper Gunnison*, 838 P.2d at 852. Consequently, junior water rights holders would be injured. *See Farmers' Reservoir and Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001) ("A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority."); *City of Aurora v. State Engineer*, 105 P.3d 595, 607 (Colo. 2005) (injury presumed in over-appropriated South Platte basin).

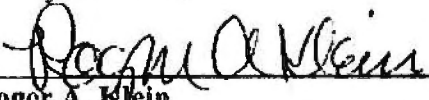
In summary, the court determines that North Sterling's storage rights have not been administered under low-point administration and that North Sterling lacks the right to low-point administration. Consequently, injury would result from the imposition of such administration. *See City of Sterling*, 125 P.3d at 434. Therefore, the court need not reach Plaintiffs' argument that Defendants are not injured because Defendants have no right to the maintenance of historical call conditions.

**V. Order and Judgment**

Based on the foregoing, the court hereby finds, determines and orders that judgment is entered against Plaintiff, North Sterling Irrigation District, and in favor of Defendants, the State and Division Engineers, and the court denies Plaintiff's First Claim for Relief.

Dated: December 11, 2007.

By the court:

  
\_\_\_\_\_  
**Roger A. Klein**  
**Water Judge**  
**Water Division No. 1**

*This document was filed pursuant to C.R.C.P. 121, § 1-26. A printable version of the electronically signed order is available in the Court's electronic file.*

May 11, 1936

TO ALL DIVISION ENGINEERS AND WATER COMMISSIONERS

Under the construction placed upon the statute providing for the storage of water in reservoirs in this state, the water officials have in the past considered that a decree for direct use of water was superior to one for storage purposes, which interpretation was upheld in a former decision of the Supreme Court. The recent opinion of the Supreme Court in the case of the Park Reservoir Company v. M. C. Hinderlider, State Engineer, et al, reversed its former decision. Therefore, in the future, you are to administer all decrees, whether for direct use or for storage purposes, strictly in their relative orders of priority.

In this connection, the Supreme Court has heretofore ruled that a reservoir is entitled to only one filling in any one year, as against a junior right which may be demanding the water. (Windsor R. & C. Co. v. Lake S. D. CO., 44 Colorado, P. 214). One filling of the reservoir does not necessarily mean that the reservoir must be actually filled to decreed capacity, but does mean that the sum total of the quantities of water, stored from time to time therein during any one year, is equivalent to the total quantity of water decreed to that particular reservoir.

The aforementioned decision does not define the word "year". In the absence of such definition, it might reasonably be assumed to mean a "calendar" year. For the purpose of greater convenience and efficiency, however, the Legislature has established a "fiscal" year, and this Department for years has used a "seasonal" year in the tabulation of stream flow records, and for other purposes.

As a result of climatic, crop, and other conditions affecting the supply and use of water in the state, it is considered desirable to adopt what might be termed a "seasonal " year, which it is thought will permit of a more practicable and efficient administration of the aforementioned ruling of the Court limiting a reservoir to one filling in any one year. The arbitrary establishment of a "seasonal" year will not conflict with a former decision of the Court, that there is no such thing as an irrigation season, nor will it affect the right of a ditch or reservoir to call for water at any time, since such calls will be recognized only in order of priority. Until further notice, it will, therefore, be assumed that the "seasonal" year will cover the period from November 1st to October 31st.

While the recent ruling of the Supreme Court may seem to greatly increase difficulties of administration, <sup>N</sup>many of the perplexities will disappear if a reservoir is considered to be a ditch. The only distinction to be kept in mind is the fact that the Court limits a reservoir to one filling a year until all junior rights have been filled, which filling is usually measured

in cubic or acre feet, while the right of a ditch to divert water is not limited in quantity, measured in cubic or acre feet or in time during the year, but is limited by the "rate" of diversion mentioned in its decree.

A proper administration of a reservoir will, therefore, require the maintenance of a correct record of the reading of the gage rod in the reservoir on November 1st, and of the beginning and ending of each period of storage during the seasonal year, and of the beginning and ending of releases from the reservoir during the seasonal year, together with the dates of all such gage rod readings. In other words, it is necessary that a debit and credit account on each reservoir be maintained at all times, which account would charge the reservoir with storage therein, and credit the reservoir with releases therefrom. Water carried over in reservoirs after October 31st shall be charged to the new seasonal year's filling privileges, which will have the effect of decreasing the effective storage capacity of the reservoir during the new seasonal year.

For keeping such records, we suggest the use of a "Reservoir Ledger Book" substantially in conformity with the attached form.

Very truly yours,

M. C. Hinderlider, State Engineer



