District Court, Water Division 3, State of Colorado Court Address: 702 Fourth St., Alamosa, CO 81101 Phone Number: (719) 589-4996	
IN THE MATTER OF THE RIO GRANDE WATER CONSERVATION DISTRICT, IN ALAMOSA COUNTY, COLORADO, AND CONCERNING THE OFFICE OF THE STATE ENGINEER'S APPROVAL OF THE PLAN OF WATER MANAGEMENT FOR SPECIAL IMPROVEMENT DISTRICT NO. 1 OF THE RIO GRANDE WATER CONSERVATION DISTRICT	▲ **COURT USE ONLY** ▲ Case Number: 06CV64 and 07CW52 Div.: 1 Ctrm:

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING SUPPORTERS' MOTION TO DISMISS

THIS MATTER came before the Court on the motion of Supporters, State and Division Engineers, the Rio Grande Water Conservation District, the Rio Grande Water Users Association, the Conejos Water Conservancy District, Farming Technology Corporation and the Skyview Parties (Mountain Coast Enterprises, LLC, Wijaya Colorado, LLC, Ernest Myers and Virgina Myers, Skyview Cooling Company, Inc., and Sam Investment, Inc.)("Supporters") to dismiss challenges raised in the Objectors' Invocations of Retained Jurisdiction based on failure to state a claim, C.R.C.P. 12(b)(5). Objectors, San Antonio, Los Pinos and Conejos River Acequia Preservation Association, Save Our Senior Water Rights, LLC, Richard H. Ramstetter, and Peter D. Atkins, ("Objectors") filed a response to the motion and the Supporters filed a reply. The Court has considered these pleadings and all matters of record herein.

I. Background

This case comes before the Court under the provisions of C.R.S. § 37-92-501(4)(c) which provides that the water judge will retain jurisdiction over a water management plan "for the purpose of ensuring the plan is operated, and injury is prevented, in conformity with the terms of the court's decree approving the water management plan." On May 27, 2010, this Court issued its Decree approving Special Improvement District No. 1's Amended Plan of Water Management ("Amended Plan") with some additional conditions included in the Decree. The Colorado Supreme Court affirmed the Decree approving the Amended Plan in *San Antonio, Los Pinos and Conejos River Acequia Preservation Ass'n v. Special Improvement Dist. No. 1*, 270 P.3d 927 (Colo. 2011) ("*Subdistrict"*). As required in the Amended Plan, Special Improvement District No. 1 ("Subdistrict") prepared the 2012 Annual Replacement Plan ("2012 ARP"); the State Engineer approved the 2012 ARP on May 1, 2012, and the Objectors timely filed protests and invoked this Court's retained jurisdiction to review the 2012 ARP. The Court has set a trial to hear the Objectors' protests for five days beginning on October 29, 2012.

Pursuant to C.R.C.P. 12(b)(5), Supporters filed a motion to dismiss ten of the challenges raised in the Objectors' invocation of retained jurisdiction for failing to state a claim for relief under C.R.C.P. 12(b)(5). Specifically, Supporters allege that this Court and the Supreme Court have already decided these ten issues in the Decree approving the Amended Plan and the affirmance of the Decree and, therefore, the doctrine of issue preclusion bars re-litigation of these issues.

II. C.R.C.P. 12(b)(5)

C.R.C.P. 12(b)(5) provides that the court can dismiss a pleading or part of one, pre-trial, if the pleading fails to "state a claim upon which relief can be granted." This type of motion tests

the sufficiency of the pleading. In deciding the current motion, the court must accept the Objectors' allegations as true and view them in the light most favorable to the Objectors. *See Public Service Co. of Colorado v. Van Wyk,* 27 P.3d 377, 385-386 (Colo. 2001). A claim should be dismissed only if "it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief." *Id.* (*citing Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1100 (Colo. 1995)).

In reviewing a motion to dismiss under C.R.C.P. 12(b)(5), the rule requires the court consider only matters stated within the complaint. Appellate courts, however, have interpreted this provision to include not only consideration of the facts as alleged in the complaint, but also documents attached as exhibits or referenced in the complaint and matters of which the court may take judicial notice. *Yadon v.* Lowry, 126 P.3d 332, 336 (Colo. App. 2005); *Walker v. Van Laningham,* 148 P.3d 391, 397 (Colo. App. 2006). The "legal effect" of attached documents "is determined by their contents rather than by allegations in the complaint." *Stauffer v. Stegemann*, 165 P.3d 713, 719 (Colo. App. 2006). A trial court is not required to accept legal conclusions or factual claims at variance with the express terms of documents attached to or referenced in the complaint. *Id*. Similarly, the court is not required to accept legal conclusions or factual claims at variance to matters of which the court may take judicial notice.

III. Issue Preclusion and Law of the Case

Issue preclusion bars re-litigation of an issue a court has finally decided. *In re Tonko*, 154 P.3d 397, 405 (Colo. 2007); *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44, 47 (Colo. 2001). The doctrine of issue preclusion "serves to relieve parties of multiple lawsuits, conserve judicial resources, and promote reliance on the judicial system by preventing inconsistent decisions." *Sunny Acres*, 25 P.3d at 47.

Although Objectors do not dispute this explanation of issue preclusion, they argue that the Court should not apply the doctrine here because issue preclusion does not apply to prior rulings in the same case. *See e.g. S.O.V. v. People in Interest of M.C.*, 914 P.2d 355, 359 (Colo. 1996). Rather, Objectors claim the Court should apply the law-of-the-case doctrine which is a discretionary rule where a court generally adheres to previous rulings made in the same case. *See People v. Dunlap*, 975 P.2d 723, 758 (Colo. 1999).

The Court agrees with Objectors that it is the doctrine of law-of-the-case that applies to this decision since the Court is dealing with the same parties in the same case. *See Verzuh v. Rouse*, 660 P.2d 1301, 1303 (Colo. App. 1982). However, the Court does not agree with Objectors' explanation of the doctrine as it applies to this decision. Objectors claim that under the law-of-the-case doctrine, this Court is free to reconsider its prior rulings and may decline to apply the law of the case if prior rulings are no longer sound. *Response in Opposition to Supporters' Motion to Dismiss Challenges Raised on Objectors' Invocations of Retained Jurisdiction for Failure to State a Claim* ("Response") at 12. Although that is a correct recitation of the legal principles when applied to an on-going case that has never resulted in a final judgment or an appeal, or when the court reviewing the appellate judgment is a higher appellate court, *e.g. Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 243 (Colo. 2003), the rule is different when the trial court is considering law of the case established by a final judgment that has been appealed and affirmed, *e.g.*, *Kuhn v. State*, 897 P.2d 792, 795 (Colo. 1995). "The law of the case established by an appellate court must be followed on remand in subsequent proceedings before a trial court." *Id.* (*citing People v.* Roybal, 672 P.2d 1003, 1005 (Colo. 1983)). Accordingly, under the law-of-the-case, to the extent the Objectors' challenges have

been previously resolved by the Decree, which was affirmed on appeal, this Court is bound to follow the previously decided law of the case.

IV. The Ten Issues

The Court will refer to the page and paragraph of the *Invocation of Retained Jurisdiction* filed by San Antonio, Los Pinos and Conejos River Acequia Preservation Association and Save Our Senior Water Rights, LLC, ("Invocation") to identify each of the issues.

1. Page 15, ¶44:

Here the Objectors challenge the following statement in Section 2.0 of the 2012 Plan: "Therefore, the 2012 projected Subdistrict Well pumping is 308,761 acre-feet." The Objectors give three reasons for this challenge: 1) The 2012 Plan includes no support for its conclusion that 2012 well pumping will be approximately the same as 2011 well pumping; 2) The estimate of Subdistrict well pumping is flawed because there is no limit on the amount of water Subdistrict well owners may pump and, therefore, the Plan should estimate the pumping at the highest recorded level for each well and add a safety factor of at least fifteen percent of the maximum; 3) "The projection methodology also fails to provide any water for meeting the Rio Grande Compact" and the Subdistrict should be required "to include a volume of water proportional to the volume of water pumped to meet the demands of the compact calls."

Supporters ask the Court to dismiss this challenge because the Court has already approved the methodology set forth in the Amended Plan for calculation of projected Subdistrict well pumping as follows:

> "B. Quantification of Subdistrict Well Pumping:
>
> i. Estimate pumping by Subdistrict Wells based upon anticipated hydrologic conditions for the current Plan year using historical data from well meter records or other reasonable methods.

§3(B)(i) Appendix 1 to Amended Plan. In response, Objectors argue that the Court's approval of the Amended Plan that included §3(B)(i) of Appendix 1 did not settle the actual methodology to be used to estimate pumping by Subdistrict wells because this provision allowed for the use of other reasonable methods of estimating pumping. In addition, Objectors argue that the 2012 ARP contains no support for the assumption that 2012 Subdistrict well pumping volumes will be the same as in 2011. In their reply, Supporters agree that Objectors may challenge the 2012 ARP's calculation of projected Subdistrict well pumping and may challenge whether the method used to calculate the volume of water pumped is reasonable. But they contest the ability of Objectors to raise, at this stage in the proceedings, a new method of calculation of estimated pumping based on the maximum observed pumping on a well-by-well basis and then adding a 15% safety factor or a new method of calculation that includes consideration of Rio Grande Compact deliveries.

The Court agrees with the Supporters and finds that when this Court approved the Amended Plan including Appendix 1, the Court approved a method of calculating the estimated Subdistrict well pumping using historical well data and anticipated hydrologic conditions for each plan year or other reasonable methods. This is the law of the case. Thus, the question before the Court is no longer "what method should the Subdistrict use" for this calculation, but rather "does the method the Subdistrict used in the 2012 ARP comport with the requirements of the Amended Plan?" And, if the Subdistrict proposes a method other than the specific method set forth in Appendix 1, is that method "reasonable." Accordingly, the Court dismisses the portions of Objectors' challenge to the 2012 ARP that seek to require the Subdistrict to estimate pumping at the highest recorded level for each well with an added safety factor of at least

fifteen percent of the maximum and that seeks to require the Subdistrict "to include a volume of water proportional to the volume of water pumped to meet the demands of the compact calls."

2. Pages 16-17, ¶45:

This objection challenges the Subdistrict's calculation and use of the recharge credit from four recharge decrees, W-3979, W-3980, 96CW45 and 96CW46, as an input in the RGDSS model. The Objectors state the following three specific challenges: 1) That the recharge credits are not determined according to the methodology of their decrees but only by a means that "honors" the decrees; 2) That the Subdistrict "should be required to specifically identify the recharge credits claimed by the Subdistrict and the associated owner of the recharge credit. Otherwise the Subdistrict will be using the recharge credits of Objectors and other water users without authorization . . ."; and 3) That there are additional reasons set forth in the Objectors' *Motion for Determination of Question of Law Regarding the Subdistrict's Claim of Authority to use Water Associated with "Recharge Decrees."*

Supporters argue that the Court has previously decided these issues. The Court agrees. To the extent the Objectors are challenging the methodology of the recharge credit calculation that "honors" the decrees, as approved by this Court in the Decree at ¶136, the Court has already decided this issue and will not revisit that question. Similarly, to the extent the Objectors want the Court to revisit the arguments set forth in the motion for a determination of law concerning the Subdistrict's use of the water from the recharge decrees, the Court has already decided the constitutional question and the Colorado Supreme Court has specifically approved that decision. *Subdistrict,* 270 P.3d at 949-50. Accordingly, the Court dismisses the portion of the Objectors' challenges to the 2012 ARP that ask the Court to find that the method of calculation of the recharge credit, as set out in the Amended Plan and the Decree, should be reconsidered and the

portion that asks the Court to re-visit the question whether the Subdistrict is violating the constitutional rights of the owners of the recharge credits by using the water made available from the four specified recharge decrees in the calculations of the amount of stream depletion being caused by Subdistrict well pumping.

On the other hand, the Objectors' challenge to the recharge credit water owners' compliance with the requirement to install measuring devices, *Invocation of Retained Jurisdiction Raising Challenges to the 2012 Annual Replacement Plan* filed by Ramstetter and Atkins ("Ramstetter Invocation") at ¶7, and the Objectors' challenge to the Subdistrict's use of a method to calculate the amount of recharge credit that is allegedly different from the method approved in the Amended Plan and the Decree, Ramstetter Invocation at ¶8, are appropriate issues for the Court to consider in determining whether the 2012 ARP complies with the requirements of the Amended Plan and the Decree[1]. Finally, although the Court agrees with Supporters that this Court, and the Supreme Court, have decided that the inclusion in the calculation of the Subdistrict wells' net consumptive use of groundwater of the fully consumable imported water made available to Subdistrict water users under the recharge decrees is constitutional, that does not answer the question whether the Subdistrict is properly calculating the amount of credit. It would seem necessary to identify the owners and specific amounts of recharge credits to allow the Objectors an opportunity to review the accuracy of the credit calculation in the 2012 ARP. The Court, therefore, finds that the challenge to the 2012 ARP's failure to specifically identify the owners and specific amounts of recharge credits cannot be dismissed as having been previously decided.

[1] The Court notes that the motion to dismiss did not actually seek to dismiss these challenges, but, since Objectors argued these claims in their response to the motion to dismiss, the Court has chosen to address them.

3. Pages 17-18, ¶47:

Here Objectors challenge the portion of Section 3.0 of the 2012 ARP which uses the USDA NRCS National Water & Climate Center forecast that the "Rio Grande flow gauged near Del Norte would be 71% of average" to estimate the predicted annual Rio Grande flow at the Del Norte gauge. According to the Objectors, weather predictions are unreliable to forecast the availability of water and, therefore, the ARP should use the most conservative projection which would be the actual flow from 2002, a very low (if not the lowest recorded) flow year on the Rio Grande.

Supporters argue that this Court has already decided, and the Colorado Supreme Court has approved, using actual annual forecasts of stream-flow rather than relying on a set, conservative stream-flow each year. *See Subdistrict*, 270 P.3d at 943; *Decree* at 17, ¶ 208. In their response, Objectors state that their real objection is that the Division Engineer and the Subdistrict have information available to them suggesting that reliance on the April 1 forecast, alone, will result in inaccurate results during this year—and, therefore, is not reasonable. This is a different objection, contained in the Ramstetter Invocation but not in the Invocation. The Supporters have not sought to dismiss this objection from the Ramstetter Invocation. The Court agrees with the Supporters that this Court has finally decided and the Colorado Supreme Court has approved that annual estimated pumping should be based on the anticipated hydrologic conditions for the current Plan Year and not on a conservative estimate of Rio Grande River flows from 2002. Accordingly, the challenge contained in ¶ 47 of the Invocation is dismissed.

4. Pages 18-19, ¶ 48:

The Court agrees with Supporters' arguments as set forth in the motion and the response. Accordingly, the challenge contained in ¶48 is dismissed to the extent it is asking the Court to

reconsider either the method of calculating estimated annual recharge credit, which the Court already determined in the Decree, or to require the Subdistrict to project estimated pumping based on the actual streamflow in the Rio Grande as it occurred in 2002. The Court also agrees with Supporters and Objectors that the question of "whether the use of linear regression analysis to estimate recharge" is a reasonable method to make such an estimation has not been previously decided by the court.

5. Pages 19-20, ¶ 49:

Here the Objectors challenge a different part of the 2012 ARP's method for determining recharge credit from the four recharge decrees discussed above in Section IV(2). Specifically, Objectors object to the use of the actual projected recharge to determine the recharge credits available to the Subdistrict rather than using the projected recharge reduced by twenty percent. Objectors argue that only by making the calculation using a reduced recharge credit will the Subdistrict have any "hope of restoring the Unconfined Aquifer."

The Supporters argue that the Court has already considered the question of how the Subdistrict will obtain sustainability of the Unconfined Aquifer and has approved the Subdistrict's plan which calls for accurately calculating and replacing actual injurious depletions caused by Subdistrict well-pumping and fallowing irrigated lands to reduce Subdistrict well-pumping—but does not call for changing the method by which recharge credits are calculated. In response, Objectors argue that the Amended Plan and the Decree did not address the current dire condition of the Unconfined Aquifer and the fact, as shown by Section 13.2 and Figure 13.1 in the 2012 ARP, that the Unconfined Aquifer lost an additional 225,000 acre feet of stored water during the last year.

The Court can hardly disagree with Objectors' concerns about the state of the Unconfined Aquifer, but that does not change the fact that the Amended Plan and the Decree approve the Subdistrict's method for calculation of the recharge credits using current hydrologic conditions and do not contain a twenty percent reduction to help recover the Unconfined Aquifer. In fact, this Court declined "to hold that the Subdistrict is responsible for an immediate recovery of aquifer levels . . . ," decree at ¶ 308, and this Court approved the two-pronged approach stated above—replacement of injurious depletions and reduction in Subdistrict well pumping—as the means to promote the sustainability of the Unconfined Aquifer. Decree at ¶371. Therefore, although the Court will certainly hear objections to the accuracy of the recharge credit calculations, or the reasonableness of the means of making those calculations, the Court dismisses the part of ¶ 49 of the Invocation that calls for the Court to impose a twenty percent reduction in the accurately calculated recharge credit to help restore the Unconfined Aquifer.

6. Pages 24-25, ¶ 56 and Ramstetter Invocation page 5, ¶ 14:

The Supporters ask the Court to dismiss the portion of the cited challenges that object to the 2012 ARP commencing to replace injurious depletions on May 1, 2012, rather than on January 1, 2012. The Supporters note that this Court and the Colorado Supreme Court approved the plan year for annual replacement plans to run from May1 to April 30, rather than from January 1 to December 31. Although Objectors agree that this is the court-approved plan year for the annual replacement plans, the Objectors point to paragraph 1 of the terms and conditions of approval of the Amended Plan which states:

> 1. DUTY TO REPLACE ALL INJURIOUS DEPLETIONS: Beginning in the year 2012, the Subdistrict shall replace all injurious depletions exceeding 50 acre-feet per year in time, location and amount, including ongoing injurious depletions resulting from past pumping.

Objectors argue that this term of the Decree required the Subdistrict to begin replacing injurious depletions on January 1, 2012, and that this Court plainly could not have meant for the replacements to have begun with the May 1, 2012, commencement of the operation of the annual replacement plan, or this Court would have said that instead.

Undersigned judge does not find herself in a position to resolve this apparent conflict in the provisions of the Decree and the Amended Plan without further assistance from the parties. Accordingly, the Court denies the motion to dismiss the cited portions of the Invocation and the Ramstetter Invocation.

7. Page 27, ¶ 58:

Here the Objectors challenge the 2012 ARP's use of the April 3, 2012 USDA NRCS National Water & Climate Center forecast that has a 50% chance of exceedance as the forecast for stream flows from April - September at the Rio Grande gauge at Del Norte. As the Supporters explain it, the National Water and Climate Center makes five forecasts of each stream-flow each month and the forecast with the 50 percent exceedance probability is "the middle of the range of forecasts with 50 percent chance that actual volumes will be above or below the predicted volume." *Reply to Objectors' Response to Supporters' Motion to Dismiss Challenges Raised in Objectors' Invocations of Retained Jurisdiction for Failure to State a Claim* ("Reply") at 12, *quoting* the April NRCS forecast web-site. This explanation suggests to the Court that the choice of the 50% forecast is reasonable, but the Court cannot find that the Court has already ruled on this detail of the 2012 ARP. Accordingly, the Court denies the motion to dismiss the cited portion of the Invocation.

8. Page 28, ¶ 59:

Here the Objectors challenge "the use of weather forecasts in determining replacement obligations." Invocation at 28. The Supporters argue that the Court has already decided that weather forecasts are appropriate data upon which the Subdistrict can rely in projecting stream-flow. The Court agrees.

In their response, Objectors claim that they are objecting to the use of the Division Engineer's "Rio Grande Compact Ten Day Report" to add 90,000 acre feet to the NRCS forecast to project the annual flow of the Rio Grande at the Del Norte gauge. This is a different issue than what was listed in the Invocation. The Court understands this objection to go to whether the Subdistrict has used a reasonable method to estimate the annual flow of the Rio Grande at Del Norte in the 2012 ARP. Thus, the Court dismisses the portion of the cited objection that generally challenges the use of weather forecasts to help predict stream-flow, but the Court leaves the issue of whether the use of the Division Engineer's Ten Day Report to add 90,000 acre feet to the NRCS forecast of the annual flow of the Rio Grande at the Del Norte gauge is reasonable.

9. Pages 28-29, ¶ 60:

This challenge is identical to the challenge discussed at IV (7) and (8) except this challenge concerns the 2012 ARP's estimate of the annual flow of the Conejos, Los Pinos and San Antonio Rivers. For the same reasons as discussed in IV(7) and (8), the Court dismisses the portion of the cited objection that generally challenges the use of weather forecasts to help predict stream-flow, but the Court leaves the issue of whether it is reasonable to use the 50% exceedance forecast or to use the Division Engineer's Ten Day Report to add 31,200 acre feet to the NRCS forecast of the annual flow of these streams.

10. Page 37-39, ¶ 65:

Paragraph 65 of the Invocation concerns sections 13.1 and 13.2 of the 2012 ARP which discuss the groundwater levels and change in groundwater levels in the Unconfined Aquifer. Objectors challenge this portion of the 2012 ARP because they claim

> the assumptions that have been made by the Subdistrict with respect to the 2012 Plan are contemplated to maximize well pumping, which will only have the effect of depleting the Unconfined Aquifer further and undermining the sustainability of the Unconfined Aquifer.

In addition, in the Invocation, Objectors argue that the Subdistrict's calculation of a five-year running average of the amount of Unconfined Aquifer storage is "irrelevant with respect to the sustainability of the Unconfined Aquifer and prevention of injury to senior water rights."

In their motion to dismiss this portion of the Invocation, Supporters note that the Amended Plan requires the Subdistrict to calculate and include the five-year running average of Unconfined Aquifer storage. In the reply, Objectors concede this point. Accordingly, to the extent this objection is based on the calculation and inclusion of a five-year running average, the Court dismisses the objection.

Supporters also argue that the remainder of this challenge should be dismissed because it is an objection to the choice of how to achieve and maintain a sustainable supply of water in the Unconfined Aquifer which this Court has already approved in the Decree. Objectors respond that the issue of whether the efforts of the Subdistrict under the terms of the Amended Plan are successful in reestablishing appropriate water levels in the Unconfined Aquifer is an issue the Court must consider under its retained jurisdiction over the operation of the Amended Plan. The Court agrees with Supporters to the extent Objectors are asking the Court to consider imposing requirements not contained in the Amended Plan but the Court agrees with the Objectors, that

whether the operation of the approved plan is having the projected effect on the storage levels in the Unconfined Aquifer will be an issue the Court must continually review.

V. Conclusion

As set forth above, the Court finds that some of the objections included in the Objectors' Invocation of this Court's retained jurisdiction should be dismissed because they fail to state a claim upon which relief can be granted. They fail to state a claim because they concern issues that have already been decided by this Court in the Decree this Court issued on May 27, 2010, which was affirmed by Colorado Supreme Court.

IT IS THEREFORE ORDERED that the Supporters' Motion to Dismiss is granted in part and denied in part as more particularly set forth in the discussion above.

DONE this 10th day of August 2012.

BY THE COURT:

Digitally signed by Pattie P. Swift
DN: cn=Pattie P. Swift, o=12th Judicial District, ou=Chief Judge, email=pattie.swift@judicial.state.co.us, c=US
Date: 2012.08.09 17:51:47 -06'00'

Pattie P. Swift
Water Judge
Water Division 3

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of the signature, service of the foregoing Order was made via LexisNexis File & Serve, or by U.S. Mail, first class postage prepaid, addressed as follows:

Jim Bailey
Bailey & Peterson, P.C.
1660 Lincoln St.
Suite 3175
Denver 80264

William A. Hillhouse II
Andrew H. Teske
Hoskin Farina & Kampf, P.C.
200 Grand Avenue, #400
P.O. Box 40
Grand Junction, CO 81502

David W. Robbins
Peter J. Ampe
Jennifer H. Hunt
Hill & Robbins, P.C.
1441 18th Street, Suite 100
Denver, CO 80202-1256

Perry Alspaugh
40351 C.R. E
Del Norte, CO 81132

Timothy R. Buchanan
Buchanan and Sperling, P.C.
7703 Ralston Road
Arvada, CO 80002

Erich Schwiesow
P.O. Box 1270
Alamosa, CO 81101

Stephane W. Atencio
SW Atencio & Associates, P.C.
601 Third Street
Alamosa, CO 81101

William A. Paddock
Karl D. Ohlsen
Carlson, Hammond & Paddock, LLC
1700 Lincoln St., Suite 3900
Denver, CO 80203

Martin Shellabarger
61935 CR U 60
Moffat, CO 81143

John McClure
McClure & Eggleston, P.C.
1401 17th St., Suite 660
Denver, CO 80202

David Bradley
7519 N Road 2 E
Monte Vista, CO 81144-9456

Kelly Sowards
P.O. Box 65
Manassa, CO 81141

Richard J. Mehren
Patricia M. DeChristopher
Moses, Wittemyer, Harrison &
Woodruff, P.C.
P. O. Box 1440
Boulder, CO 80306-1440

Dianne Woodard
1939 Centennial Drive
Louisville, CO 80027

JOHN W. SUTHERS, Attorney General
MARI DEMINSKI* #34582
PRESTON V. HARTMAN* #41466
Assistant Attorneys General
1525 Sherman Street, 7th Floor
Denver, CO 80203

Nicolas Sarmiento
cn=Nicolas Sarmiento, o, ou=12th Judicial District, email=nicolas.sarmiento@judicial.state.co.us, c=US
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Legal Res. Atty/Div. Clerk