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January, 21, 2008

Board of Directors
Republican River Water Conservation District
410 Main Street, Suite 8
Wray, CO 80758

Re: Republican River Compact Compliance Pipeline

Dear Board of Directors,

As most of you know, I represent the Pioneer Irrigation District and certain owners of the Laird Ditch, owners of senior water rights on the North Fork of the Republican River (collectively "Senior Surface Rights"). The principal concern of the Senior Surface Rights is that ground water pumping is drying up the North Fork and depleting the water available to the Senior Surface Rights. Although the Senior Surface Rights applaud efforts to help achieve Compact compliance, it must be done in a way that is consistent with the constitutional doctrine of prior appropriation.

The Senior Surface Rights have repeatedly raised concerns about well pumping in general and the ground water pipeline in particular. As currently proposed, even if the pipeline were temporarily effective in achieving Compact compliance, that compliance would be achieved in a way that allows injury to the Senior Surface Rights. In spite of these concerns, the Republican River Water Conservation District ("RRWCD") is pursuing the ground water pipeline instead of other alternatives that could help achieve Compact compliance while protecting Senior Surface Rights. Specifically, I understand the RRWCD recently rejected a proposal that would import 10,000 acre-feet of fully consumptive water from the South Platte River into the Republican River basin in favor of the proposed ground water pipeline.

The Senior Surface Rights contend the proposed ground water pipeline project is fatally flawed so the RRWCD should consider other alternatives. The following is a summary of some of the flaws:

1. The Ground Water Pipeline Is a Temporary Solution.

The ground water pipeline is premised upon mining the same ground water that the Special Master for the United States Supreme Court determined was hydrologically connected to the surface streams. Depletions caused by ground water pumping is why

Colorado is currently out of compliance with the Compact. A pipeline fed by ground water pumping will eventually deplete the river, rather than supplement it. Thus, at best, the pipeline is a temporary solution that will only make matters worse in the future. By contrast, the proposal to import 10,000 acre-feet of water would have added new water to the Republican River basin.

2. The Pending Ground Water Litigation Could Render the Pipeline Useless.

As you are well aware, the Senior Surface Rights initiated litigation on July 1, 2005, when it became apparent that the State was not willing to curtail ground water pumping that was drying up the North Fork. That litigation is set for a trial before the Ground Water Commission in June, 2008. One of the questions raised in that litigation is whether the boundaries of the Northern High Plains designated ground water basin ("NHP Basin") must be re-drawn to exclude wells impacting the river.

The legal basis for the claim is that the very same statute that empowers the creation of a designated ground water basin also requires the basin boundaries to be altered as future conditions require and factual data justify. C.R.S. § 37-90-106(1)(a). The Colorado Supreme Court has agreed with that plain reading of that statute. *See Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20 (Colo. 2006). The boundaries of the designated basin must be adjusted to exclude improperly designated ground water, which means the exclusion of all ground water that "has more than a de minimis impact on surface waters," and is causing injuring to surface water rights. *Gallegos*, 147 P.3d at 31-33. Once the boundaries of the basin are re-drawn, all wells that are no longer in the designated ground water basin must operate in priority. *Id.*

On an earlier appeal of this existing litigation, the District Court agreed that the Ground Water Commission is bound by the results of the Compact Litigation, including the Compact ground water model ("Model") approved by the United States Supreme Court. The Court further held that the "Model is a binding recognition of the extent to which groundwater pumping is depleting surface flows." That Model shows roughly 14,000 acre-feet of well pumping depletions to the North Fork alone. Further analysis of the Model in the ongoing litigation shows that the new boundary of the NHP Basin must be at least 15 miles away from the North Fork. The wells that the RRWCD proposes to use to fill the ground water pipeline appear to be about 10 miles from the North Fork.

In short, if the Senior Surface Rights are successful in the litigation, the pipeline wells could be limited to operating in priority or with an augmentation plan. That would render the pipeline useless. By contrast, the 10,000 acre-feet of imported water delivered to the North Fork upstream of the senior water rights would have helped satisfy Senior Surface Rights and 100% of that water would have been a credit under the Compact accounting.

3. The Ground Water Pipeline Violates Compact Law.

The law is clear that Compact compliance must be achieved, to the extent possible, within the existing framework of the prior appropriation doctrine. *Simpson v. Bijou Irrigation*, 69 P.3d 50, 69 (Colo. 2003); *see also Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1248 (Colo. 1996). Similarly, C.R.S. § 37-80-104 mandates that compacts which are deficient in provision for intrastate administration be implemented so as to restore lawful use conditions as they were before the effective date of the compact insofar as possible. *Alamosa-La Jara Water Users*, 674 P.2d 914, 923 (Colo. 1983).

The ground water pipeline contradicts the prior appropriation doctrine. The proposal entails pumping ground water under *junior* rights, and then piping that water *downstream* of the headgates of the Senior Surface Rights. Moreover, the stated purpose of the pipeline is to allow junior wells to continue pumping when they would otherwise be curtailed under the Compact because of their depletive effect to the North Fork. All the while, the North Fork is drying up and the Pioneer Ditch is critically water short under its 1890 water right. In order to use the ground water pipeline in a manner consistent with Colorado law, the pipeline must deliver water upstream of the Senior Surface Rights to help “restore lawful use conditions as they were before the effective date of the compact insofar as possible.” C.R.S. § 37-80-104. Without a plan to address the Senior Surface Rights, the proposed ground water pipeline effectively allocates all of Colorado’s water under the Compact to the junior wells.

4. The Proposed Pipeline Violates the Compact Itself.

The Pioneer Ditch is an inter-state ditch that provides water to users in both Colorado and Nebraska under an 1890 water right. The Pioneer Ditch and its water right are protected in the Compact. Specifically, Article V of the Compact states that the provisions of the United States Supreme Court decision regarding the Pioneer Ditch “are hereby *recognized as binding upon the states*; and Colorado, through its duly authorized officials shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal *in conformity with said judgment*.” (Emphasis added). That Article then recognizes that the 50 cfs water right in the Pioneer Ditch is “allocated for beneficial use in Colorado and Nebraska.”

The ground water pipeline violates this provision of the Compact by proposing to achieve Compact compliance by piping water around the Pioneer headgate so that well pumping may continue and further dry up the North Fork and the water available for diversion under the Pioneer Ditch.

In summary, the Senior Surface Rights believe the ground water pipeline is fatally flawed. Back in 1942 when Colorado entered into the Compact, it was utilizing only a fraction of its allocation of water. Now, Colorado is exceeding its Compact allocation. The principal difference between then and now is that wells are depleting the rivers as shown by the Compact Model. This root cause must be recognized by the RRWCD.

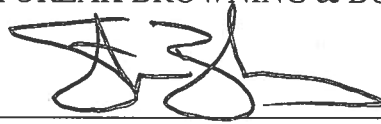
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While the Senior Surface Rights support efforts to achieve Compact compliance, it cannot be lawfully done at the cost of 1888 and 1890 water rights that pre-date the Compact. When all is said and done, Colorado is still a prior appropriation State.

The Senior Surface Rights remain willing to discuss all options with the RRWCD should the RRWCD be willing to address the concerns of the Senior Surface Rights in trying to achieve Compact compliance.

Sincerely,

PORZAK BROWNING & BUSHONG LLP

A handwritten signature in black ink, appearing to read 'S. Bushong', written over a horizontal line.

Steve Bushong

cc: Dick Wolf, State Engineer
Harris Sherman, Executive Director of DNR
Colorado Water Conservation Board
David Robbins, Esq.
Mike Adamson
Rex Buck
Rusty Heaton