

DAVID W. ROBBINS
PETER J. AMPE
MATTHEW A. MONTGOMERY

HILL & ROBBINS, P.C.
ATTORNEYS AT LAW
3401 QUEBEC STREET, SUITE 3400
DENVER, COLORADO 80207

TELEPHONE
303 296-8100

FAX
303 296-2388

E-MAIL
peterampe@hillandrobbs.com

ROBERT F. HILL (Ret.)

March 16, 2023

Rebecca Mitchell
Director
Colorado Water Conservation Board
1313 Sherman Street, Room 718
Denver, CO 80203

Re: Special District No. 5 of the Rio Grande Water Conservation District Loan
Amendment No. 1 Approved January 24, 2023.

Dear Director Mitchell:

The Colorado General Assembly established the Rio Grande Water Conservation District (“RGWCD”) as an appropriate agency for the conservation, use, and development of the water resources of the Rio Grande and its tributaries. The legislation is codified at sections 37-48-101, et. seq., C.R.S. That same legislation provided the RGWCD the ability to create one or more special improvement districts to accomplish specific purposes within a portion of the RGWCD. See § 37-48-108, C.R.S. In response to the drafting and promulgation of the Colorado Division of Water Resources’ Rules Governing the Withdrawal of Groundwater in Water Division No. 3 (the Rio Grande Basin) and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for all Irrigation Water Rights (“Groundwater Use Rules”) the RGWCD and the water users within the District moved forward on creating six separate special improvement districts.

Based upon petitions filed by water users in the Saguache Creek area, the RGWCD filed a Petition with the District Court, in and for Saguache County, to establish Special Improvement District No. 5 (“Subdistrict No. 5”). The District Court subsequently granted that petition. *Order Establishing Special Improvement District No. 5 of the Rio Grande Water Conservation District*, Saguache Combined Court, Case No. 2017CV30015 (December 18, 2017). The Board

of Managers of Subdistrict No. 5 then drafted a Plan of Water Management, which included a groundwater management plan, as the official plan of the Subdistrict pursuant to section 37-48-126, C.R.S. ("POWM"). The RGWCD Board of Directors approved the POWM September 9, 2019. The Colorado State Engineer approved the POWM pursuant to sections 37-48-126(2) and 37-92-501(4)(c), C.R.S. on March 13, 2020. By Resolution dated September 24, 2020 and pursuant to Article 45.1 of Title 37 of the Colorado Revised Statutes, the Board of Managers of Subdistrict No. 5 established a Water Activity Enterprise.

The Water Court, in and for Water Division No. 3 upheld the Colorado State Engineer's proposed Groundwater Use Rules. *Findings of Fact, Conclusions of Law, Judgement and Decree*, Case No. 2015CW3024, District Court, Water Division 3 (March 15, 2019). In general, the Groundwater Use Rules require that, if a non-exempt well is to continue to withdraw groundwater from within Water Division No. 3, such a well must remedy any injurious depletions to senior surface water users, achieve and maintain sustainable aquifers, and not unreasonably interfere with the State's ability to fulfill its obligations under the Rio Grande Compact. The Subdistrict No. 5 POWM is designed and intended to assure that, through its operations, Subdistrict Wells will comply with the Groundwater Use Rules.

The vast majority of injurious depletions from Subdistrict Wells accrue to Saguache Creek. Remedying those depletions has presented numerous challenges for the Subdistrict. Many surface water rights on Saguache Creek are encumbered by a conservation easement that prohibits the water right owner from changing the use of the water. Also, the timing of depletions is such that the highest depletions accrue to the stream in April and October. If a surface water right was able to be acquired by the Subdistrict and changed to an augmentation or replacement use, the months with the lowest historical consumptive use are generally April and October, so the timing of injurious depletions and historical consumptive use available to remedy those depletions does not overlap. Storage in a reservoir would be the logical way to retime the historical consumptive use to address this timing issue, but there is no storage available on Saguache Creek. In the original Subdistrict No. 5 Saguache Pipeline Loan, the plan was to utilize the aquifer as a reservoir and pump water from existing wells to Saguache Creek. This plan would have required rights-of-way through county roadways and private property for the pipeline, which could take years to finalize, if it could even be done.

For these and other reasons, the Subdistrict No. 5 Board of Managers chose to proceed with a plan to acquire senior surface water rights, several existing wells with adequate historical consumptive use, change the use of those water rights from irrigation to augmentation and replacement, and dry-up the previously irrigated acres. The water from the surface water rights will be used as a direct source of remedy for injurious stream depletions. At times the surface water rights are insufficient to remedy injurious stream depletions, the groundwater would then be exchanged from the existing wells to new points of diversion near Saguache Creek in a manner that would enable them to remedy injurious depletions in time, location, and amount. In order to fund the acquisition of the surface water rights, the existing groundwater rights and build the necessary infrastructure that will provide a long-term solution to remedy injurious depletions to Saguache Creek and allow the Subdistrict Wells to continue to operate, the RGWCD, for and on behalf of the Subdistrict No. 5 Water Activity Enterprise, applied for an amended loan from the Colorado Water Conservation Board in the amount of six-million, eighty-thousand, two-hundred dollars (\$6,080,200.00) loan. The loan will be repaid of a 30-year term at a blended interest rate of 1.20% per annum.

The loan will be repaid from revenues derived from the fees levied and collected by the Subdistrict. Attached to this letter is a budget projection from the Subdistrict showing that the Subdistrict can maintain its current activities and complete the repayment of the four million, eight hundred and forty-four thousand dollar water acquisition and infrastructure loan sought by the Subdistrict.

Pursuant to its POWM, the Subdistrict is entitled to raise funds by assessment of reasonable Annual Service and User Fees to carry out the goals and overall objective set forth in this Plan. *POWM* ¶ 4.1. The Subdistrict charges an Administrative Fee per Subdistrict Well to fund its general administrative operations. The Subdistrict also charges a Groundwater Withdrawal Fee based on the annual amount of Net Groundwater Withdrawals of a given Farm Unit, assessed one-year in arrears. There is no maximum limit on the Groundwater Withdrawal Fee. Instead, the Fee is set as part of the Subdistrict and District annual budget process and is set at the level necessary to fund the necessary programs and other expenses in the Subdistrict's budget. The revenues collected from the Groundwater Withdrawal Fee may be used to fund the remedy of injurious stream depletions caused by the withdrawal of groundwater from Subdistrict

Wells. The current Groundwater Withdrawal Fee is based on the type of use: wells used for sprinkler application are assessed \$27.82 for every acre-foot of groundwater withdrawn; wells used for flood application are assessed \$20.11; wells that are used for commercial, industrial, municipal and fish applications were assessed a variable Groundwater Withdrawal Fee based upon the RGDSS Groundwater Model consumptive use. The POWM also provides that, should Subdistrict Wells not be allowed to continue to withdraw groundwater because Subdistrict objectives and goals are not being met, the Subdistrict and RGWCD may continue to assess fees until all Post-Plan Injurious Stream Depletions caused by past groundwater withdrawals from Subdistrict Wells have been remedied.

The RGWCD, on behalf of the Subdistrict, has the legal authority to acquire real property, which includes water rights. § 37-48-105(l)(b), C.R.S. The RGWCD is authorized to borrow money on behalf of the Subdistrict., § 37-48-105(1)(c), C.R.S.

This letter of opinion is based upon the understanding that the State Engineer will work with the RGWCD and Subdistrict No. 5 and the agricultural producers within the Subdistrict boundaries to ensure that irrigated agriculture continues to be viable during the term of the loan and is not impaired or restricted while the Subdistrict Wells are in compliance with the Groundwater Use Rules.

Very truly yours,



Peter Ampe

cc: Jessica Halvorsen, Program Assistant, CWCB
Cole Bedford, Project Manager, CWCB
Cleave Simpson, General Manager RGWCD
Greg Higel, President RGWCD
Chris Ivers, Program Manager, Subdistrict No. 5
David Schmittell, President Subdistrict No. 5