

<p><b>DISTRICT COURT, WATER DIVISION 2, STATE OF COLORADO</b> 501 N. Elizabeth, Room 116 Pueblo, Colorado 81003</p>	<p>DATE FILED: July 21, 2017 11:15 PM FILING ID: 36EBD42F36C85 CASE NUMBER: 2017CW3038</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Plaintiffs: THE PEOPLE OF THE STATE OF COLORADO, <i>ex rel.</i> KEVIN G. REIN, State Engineer, and STEVEN J. WITTE, Division Engineer for Water Division 2</b></p> <p>v.</p> <p><b>Defendants: STEVEN J. JACOBS JR., in his individual capacity, CASAS LIMITED PARTNERSHIP #4, a Colorado limited partnership, and IQ INVESTORS, LLC, a Colorado limited liability company</b></p>	<p>Case No. 17CW_____</p>
<p><b>Attorneys for State and Division Engineers:</b> CYNTHIA H. COFFMAN, Attorney General PAUL L. BENINGTON, First Assistant Attorney General* Attorney Reg. #33079* CHRISTOPHER R. STORK, Assistant Attorney General* Attorney Reg. # 47555* Water Resources Unit Natural Resources &amp; Environment Section Colorado Department of Law 1300 Broadway, 7<sup>th</sup> Floor Denver, CO 80203 Telephone: (720) 508-6309 (Benington); (720) 508-6311 (Stork) Email: paul.benington@coag.gov; christopher.stork@coag.gov *Counsel of Record</p>	<p style="text-align: center;"><b>VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, PENALTIES, AND COSTS</b></p>

Plaintiffs, the People of the State of Colorado, *ex rel.* Kevin G. Rein, State Engineer, and Steven J. Witte, Division Engineer for Water Division 2 (collectively

“Engineers”), by and through the Attorney General and undersigned Assistant Attorneys General, hereby bring this action for injunctive and other relief to enforce a lawful order of the Division Engineer under section 37-92-503, C.R.S. (2016).<sup>1</sup> As grounds therefore, the Engineers allege as follows:

### **PARTIES**

1. Kevin G. Rein is State Engineer for the State of Colorado.
2. Steven J. Witte is the Division Engineer for Water Division 2.
3. Doug Hollister is the Water Commissioner for District 10 in Water Division 2.
4. Defendant Steven J. Jacobs Jr. is an individual and, based on information and belief, is a resident of El Paso County, Colorado.
5. Upon information and belief, Defendant Jacobs’ mailing address is P.O. Box 2076, Colorado Springs, Colorado 80901.
6. Upon information and belief, Defendant Jacobs is the President and Manager of Defendant Casas Limited Partnership #4.
7. Defendant Casas Limited Partnership #4 is a Colorado limited partnership.
8. Upon information and belief, Defendant Casas Limited Partnership #4 is the owner of the property addressed as 10195 Kurie Road, Colorado Springs, Colorado 80908.
9. Upon information and belief, Defendant Jacobs is the President and Manager of IQ Investors, LLC.
10. Defendant IQ Investors, LLC is a Colorado limited liability corporation.
11. Upon information and belief, Defendant IQ Investors, LLC is the owner of the property addressed as 7495 Eagle Wing Dr., Colorado Springs, Colorado 80908,
12. Ashley A. Wiechmann is an individual and, based on information and belief, is a resident of El Paso County, Colorado.

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<sup>1</sup> All statutory cites are to the Colorado Revised Statutes of 2016 unless otherwise indicated.

13. Upon information and belief, Ms. Wiechmann is the registered agent for Defendant Casas Limited Partnership #4 with the following address 5390 North Academy Blvd., Suite 300, Colorado Springs, Colorado 80918.
14. Upon information and belief, Ms. Wiechmann is the registered agent for Defendant IQ Investors, LLC with the following address 5390 North Academy Blvd., Suite 300, Colorado Springs, Colorado 80918.
15. Defendant Jacobs, Defendant Casas Limited Partnership #4 and Defendant IQ Investors LLC are hereinafter referred to collectively as “Defendants.”
16. Upon information and belief, Defendants are the owners of two on-channel, undecreed reservoirs known as Eagle Rising Pond No.1 (hereinafter “North Pond”) located at 10195 Kurie Road, Colorado Springs, Colorado 80908 and Eagle Rising Pond No. 2 (hereinafter “South Pond”) located at 7495 Eagle Wing Dr., Colorado Springs, Colorado 80908 (collectively “Ponds”).

### **JURISDICTION AND VENUE**

17. This complaint involves enforcement of a lawful order of the Division Engineer, which is a water matter within the exclusive jurisdiction of this Court under sections 37-92-203 and 37-92-503, C.R.S.
18. This Court has personal jurisdiction over Defendants and in rem jurisdiction over the Ponds. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 38 (Colo. 1997) (“When the proceeding involves a matter assigned by statute to the water court, jurisdiction is thereby conferred over persons and property affected by the [action].”).
19. Venue is proper because the violations of the Division Engineer’s order discussed herein occurred within Water Division 2 and the Ponds are located within Water Division 2.

### **ALLEGATIONS**

#### **State and Division Engineers’ statutory authority**

20. The Water Right Determination and Administration Act, sections 37-92-101 to 37-92-602, C.R.S., requires the Engineers to administer, distribute, and regulate the waters of the State of Colorado.

21. “Waters of the state” include all surface and tributary groundwater, except that water found in designated basins. § 37-92-103(13), C.R.S.; *Three Bells Ranch Associates v. Cache La Poudre Water Users Assn.*, 758 P.2d 164, 172 (Colo. 1988).
22. Under section 37-92-301(1), C.R.S., the State Engineer is responsible for the administration and distribution of the waters of the state, and, in each division, this administration and distribution is accomplished through the offices of the division engineers.
23. Section 37-80-102(2), C.R.S., authorizes the State Engineer to delegate to any other person the obligations to discharge on or more portions of the duties imposed upon him. Under section 37-92-202, C.R.S., the State Engineer will appoint division engineers and may also employ assistants and staff members to enable each division engineer in carrying out his duties. Each division engineer may, in turn, establish one or more field offices and may appoint as a member of his staff a water commissioner for each office to assist in carrying out these statutory duties.
24. The Engineers have the authority and duty to issue orders as are necessary for the administration of the waters of the state. §§ 37-92-501 – 502, C.R.S.
25. Under section 37-92-502(3), C.R.S., the Division Engineer will order the release from storage of any water that he finds to have been illegally or improperly stored and will issue orders as are necessary to ensure that the released waters are delivered to the owners or users of water rights who are entitled to that water and to ensure that the release of the subject water will not cause damage.
26. Under section 37-92-502(7), C.R.S., the State Engineer, Division Engineer, and their duly authorized assistants have the power and duty to issue orders so that the streams of the state may be kept clear of unnecessary dams or other obstructions which may restrict or impede the flow of water to the water users of the state.
27. The order in question involves waters of the State of Colorado, which are subject to administration by the Engineers under sections 37-92-301, 37-92-501, and 37-92-502, C.R.S.

### Defendants' Ponds

28. Upon information and belief, Defendants are the owners of the Ponds located in the NW $\frac{1}{4}$  of the SE $\frac{1}{4}$  and the SW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 29, Township 12 South, Range 65 West of the Sixth Prime Meridian in El Paso County, Colorado. The UTM Coordinates of the Ponds' dams are as follows:

North Pond: X/Easting: 527066, Y/Northing: 4314353 Zone 13S, NAD83.

South Pond: X/Easting: 526984, Y/Northing: 4313820 Zone 13S, NAD83.

29. The Ponds are on-channel reservoirs on Cottonwood Creek, tributary to Monument Creek, tributary to Fountain Creek, which is ultimately tributary to the Arkansas River.
30. Upon information and belief, neither of the Ponds have any decreed storage water rights attributable to the structures.
31. The Park Forest Water District's amended plan for augmentation decreed in Case No. 14CW3010 covers replacement of evaporative losses from the Ponds.
32. Case No. 14CW3010 did not, however, decree water rights or otherwise provide a legal means for the initial fill of the Ponds after their reconstruction.
33. The decree in Case No. 14CW3010 specifically stated: "The District does not seek new water storage rights for the pond structures in this case, and the District is simply replacing the evaporative loss from each pond."
34. Upon information and belief, the Ponds were drained and construction work was completed on the structures in the winter of 2014-2015
35. On April 22, 2015, Mr. Hollister observed that the Ponds were filled and spilling.
36. In a letter dated April 29, 2015, Mr. Hollister requested information on the status of the source of the fill for the Ponds after he observed both structures to be full and spilling after reconstruction of both. *See* letter attached as **Exhibit A**.
37. According to the letter, Mr. Hollister was under the impression that Defendant Jacobs was working with Park Forest Water District to provide a legal source of water for the initial fill of the Ponds after their reconstruction.

38. The April 29, 2015 letter gave Defendant Jacobs until May 15, 2015, to take action to confirm the status of the initial fill of the Ponds after their reconstruction.
39. Upon information and belief, Defendant Jacobs did not provide confirmation of the status of the initial fill water for the Ponds after their reconstruction by the May 15, 2015, deadline.
40. On February 11, 2016, Park Forest Water District sent Defendant Jacobs a letter demanding final payment for the initial fill of the Ponds after their reconstruction. *See* letter attached as **Exhibit B**.
41. In a letter dated February 19, 2016, Park Forest Water District informed Mr. Hollister that initial fill of the Ponds after their reconstruction had not been paid for, the Water Agreement to provide the water was rescinded, and new negotiations would be required to provide this water. *See* letter attached as **Exhibit C**.
42. Based on Park Forest Water District's letter dated February 19, 2016, Park Forest Water District would not release a legal source of water to replace the water stored out-of-priority due to lack of payment by Defendant Jacobs.
43. Additional communications with Defendant Jacobs indicated that he would provide documentation of the agreement with Park Forest Water District regarding replacement obligations for the initial fill of the Ponds by the week of November 28, 2016. *See* email correspondence attached as **Exhibit D**.
44. To date, a legal source to fill the Ponds has not been identified and the structures remain illegally filled.

#### **The Division Engineer's Order**

45. On December 23, 2016, the Division Engineer issued an Order to Defendant Jacobs as Manager of both Defendant Casas Limited Partnership #4 and Defendant IQ Investors LLC under section 37-92-502, C.R.S. A true and correct copy of this document is attached as **Exhibit E**.
46. This Order was mailed to Defendant Jacobs by certified mail at his mailing address: P.O. Box 2076, Colorado Springs, Colorado 80901.

47. The Order required the following actions by Defendant Jacobs within 30 days of receipt of the Order:
  - a. To permanently cease and desist from the storage of state waters in the above described pond; and
  - b. To prepare a plan for the manner in which the pond is to be drained by April 1, 2017 and maintained drained and submit it to this office prior to implementation of said plan; or
  - c. Provide for legally obtained return flow credits from Park Forest Water District pursuant to 00CW18; or
  - d. Apply to the Division 2 Engineers Office for a Substitute Water Supply Plan for any other legally obtained water source capable of delivering water to Cotton Wood Creek drainage upstream of the subject ponds
48. United States Postal Service records and the recipient information show that Defendant Jacobs received the Order on December 29, 2016. This document is attached as **Exhibit F**.
49. Upon information and belief, Defendants did not comply with the Order within 30 days of receipt because Defendants unlawfully retained stored water in the Ponds and failed to submit a plan to drain the structures by April 1, 2017 or pursue the other options described in the Order.
50. Upon information and belief, the Ponds have remained filled since April 1, 2017.
51. On April 11, 2017, Mr. Hollister visited the Defendants' property and observed that the Ponds remained filled without compliance with and, thus, in violation of the Order.
52. On July 7, 2017, Mr. Hollister along with Griff Rainford, Deputy Water Commissioner for District 10 in Water Division 2, visited the property and again observed the Ponds were full in violation of the Order. Photographs from this site visit are attached as **Exhibit G**.

### **Injury to other water users**

53. Upon information and belief, Defendants initial fill of the Ponds after their reconstruction from Cottonwood Creek has caused injury to downstream decreed water rights.
54. Upon information and belief, Defendants have diverted and stored and continue to store out-of-priority waters of Cottonwood Creek, which is ultimately tributary to the Arkansas River.
55. The Arkansas River is an overappropriated river system in Water Division 2. *A-B Cattle Co. v. U.S.*, 196 Colo. 539, 544, 589 P.2d 57, 61 (1978) (“The Arkansas River is overappropriated; water is scarce; and conservation of water and prevention of waste is the order of the day.”).
56. Upon information and belief, the Ponds impede the flow of water to persons with decreed water rights and thereby cause injury to the vested rights of others.
57. The out-of-priority diversion of water referenced herein has caused and continues to cause material injury to those persons entitled to use water under decreed and senior water rights.

### **FIRST CLAIM FOR RELIEF (Injunctive Relief)**

58. All above paragraphs are incorporated as though fully set forth herein.
59. The Engineers seek a permanent and mandatory injunction requiring Defendants to comply with the Order, enjoining Defendants from further violations of the Order and requiring any other measures that the Division Engineer may determine to be necessary to prevent the out-of-priority storage of water in the Ponds.
60. Under section 37-92-503(1)(a)-(b), C.R.S., “In the event an order of a division engineer or the state engineer issued under section 37-92-502 is not complied with, the state engineer and the particular division engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division for an injunction enjoining the person to whom such order was directed from continuing to violate the same. In such a proceeding, if the court upholds the order of the state engineer, the



person against whom such order was issued shall pay the costs of the proceeding, including the allowance of reasonable attorney fees.”

61. Under section 37-92-502(3), C.R.S., “Each division engineer shall order the release from storage of any water he finds to have been illegally or improperly stored and shall make such orders as are necessary to insure that such released waters are delivered to those owners or users of water rights who are entitled to the same and to insure that the release will not cause damage.”
62. In the event any person commits a violation under section 37-92-502(3), “The state engineer and the particular division engineer in the name of the people of the state of Colorado, through the attorney general, shall apply to the water judge of the particular division to recover the civil penalties specified in paragraph[] (a) . . . of this subsection (6) or for a temporary restraining order, preliminary injunction, or permanent injunction, as appropriate, enjoining further violations of this subsection (6). If the state engineer and the division engineer prevail, the court shall also award the costs of the proceedings including the allowance of reasonable attorney fees.”
63. "Person" means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States, or any other legal entity, public or private. § 37-92-103(8), C.R.S.
64. Defendants’ violations of the Order have caused, and any further violations will continue to cause, injury to vested water rights.
65. Defendants’ violations of the Order subjects Defendants to a permanent and mandatory injunction, under section 37-92-503(1)(a) and 37-92-503(6)(e), C.R.S., requiring Defendants to comply with the Division Engineer’s Order enjoining Defendants from further violations of the Order, and requiring any other measures that the Division Engineer may determine to be necessary to prevent the out-of-priority storage of water in the Ponds.

**SECOND CLAIM FOR RELIEF  
(Penalties)**

66. All above paragraphs are incorporated as though fully set forth herein.
67. Defendants have violated sections 37-92-502(3) and 37-92-503(6)(a)(II), C.R.S.

68. These violations subject Defendants to civil penalties under section 37-92-503(6)(a)(II), C.R.S., of up to five hundred dollars for each day that the violation continues.
69. Under section 37-92-503(6)(a)(II), C.R.S., the Engineers hereby request a penalty against Defendants of up to five hundred dollars for each day that a water was illegally and improperly stored in the Ponds in violation of the Order, in an amount to be determined at trial.

**THIRD CLAIM FOR RELIEF  
(Costs, including Attorney Fees)**

70. All above paragraphs are incorporated as though fully set forth herein.
71. As the result of Defendants' violations of the Division Engineer's Order, under section 37-92-502, C.R.S., the Engineers have incurred and will continue to incur costs, including attorney fees, which the State of Colorado is entitled to recover from Defendants under sections 37-92-503(1)(b) and 37-92-503(6)(e), C.R.S.
72. The Engineers hereby request recovery of these costs, including attorney fees, as permitted by statute, in an amount to be determined by the Court.

**PRAYER FOR RELIEF**

WHEREFORE, the Engineers pray for judgment against Defendants and for the following relief:

- A. Enjoin Defendants from further violations of the Order and order Defendants to immediately comply with the Order and implement any other measures that the Division Engineer may determine to be necessary to prevent the out-of-priority storage of water in the Ponds;
- B. Order Defendants to pay a civil penalty of up to five hundred dollars per day for each day that the Order was violated, under section 37-92-503(2) and 37-92-503(6)(a)(II), C.R.S., in an amount to be determined at trial;
- C. Order Defendants to pay to the State of Colorado the Engineers' costs of bringing this proceeding, including reasonable attorney fees, under section 37-92-503(6)(a)(II), C.R.S., in an amount to be determined by the Court; and
- D. Grant such other and further relief as the Court deems just and proper.


DATED this 21<sup>st</sup> day of July, 2017.

CYNTHIA H. COFFMAN

Attorney General

*Filed under C.R.C.P. Rule 121 § 1-26.*

*A duly signed original is on file with the Office of the Attorney General  
for the State of Colorado.*



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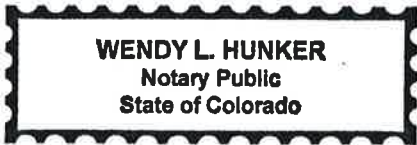
**VERIFICATION**

STATE OF COLORADO            )  
  ) ss  
COUNTY OF Pueblo            )

I, Steven J. Witte, Division Engineer for Water Division 2, of the Colorado Division of Water Resources, being duly sworn, hereby state that I have read the foregoing VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, PENALTIES, and COSTS, and that the contents are true to the best of my knowledge and belief.

  
\_\_\_\_\_  
Steven J. Witte  
Division Engineer for Water Division 2  
Colorado Division of Water Resources

Subscribed and sworn to before me this 26th day of July, 2017.



  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: 2/8/2019