

DISTRICT COURT, WATER DIV. NO. 2, COLORADO 501 N. Elizabeth, Room 116 Pueblo, CO 81003	
THE PEOPLE OF THE STATE OF COLORADO, ex rel. Kevin G. Rein, State Engineer and Steve J. Witte, Division Engineers for Water Div. No. 2 Plaintiffs v. 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 Defendants and Third-Party Plaintiffs v. PARK FOREST WATER DISTRICT, Third-Party Defendant.	
	Case No.: 2017CW3038
PARTIAL SUMMARY JUDGMENT IN FAVOR OF THIRD-PARTY DEFENDANT	

The Court, having considered the Third-Party Defendant's, Park Forest Water District's ("PFWD") Motion for Partial Summary Judgment, and being advised in the premises, hereby FINDS, CONCLUDES, AND ORDERS:

**A. Applicable Law and Standard of Review:**

1. The Court can interpret the Inclusion Agreement as a question of law, determining the meaning from the four corners of the document, considering the entire agreement as a whole and not specific phrases in isolation, reading together as a whole referenced documents that are part of the same transaction, and giving technical terms their technical meaning with reference to trade usage. *See Bledsoe Land Co. v. Forest Oil Corp.*, 277 P.3d 838, 842-46 (Colo. App. 2011). The parties' own extrinsic expressions of intent should not be considered. *Id.*, at 845. Extrinsic evidence should not be used to create an ambiguity. *Am. Fam. Ins. Co. v. Hansen*, 375 P.3d 115, 121 (Colo. 2016).

2. “A party against whom a claim...is asserted or a declaratory judgment is sought may, move with or without supporting affidavits for a summary judgment in the defending party’s favor as to all or any part thereof.” *C.R.C.P. 56 (b) (2018)*. A declaratory judgment interpreting an agreement “may be either affirmative or negative in form and effect...” *C.R.C.P. 56 (a) (2018)*. The court may issue summary judgment on a question of law “if there is no genuine issue of any material fact necessary for the determination of the question of law.” *C.R.C.P. 56 (h) (2018)*. “Summary judgment should be rendered forthwith “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *C.R.C.P. 56 (c) (2018)*. Evidence received by this Court at the July 5, 2018 preliminary injunction hearing that would have been admissible at trial on the merits is part of the record, *C.R.C.P. 65 (a)(2) (2018)*, and the transcript of that hearing effectively serves as evidence to support summary judgment. *See Governor’s Ranch Prof. Center v. Mercy of Colo., Inc.*, 793 P.2d 648, 651 (Colo. App. 1990).

3. Where a party moves for summary judgment concerning an issue for which he would not bear the ultimate burden of persuasion at trial, the initial burden of production may be satisfied by showing that there is an absence of evidence in the record to support the nonmoving party’s case. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). The purpose of summary judgment is to avoid the unnecessary expense of a trial by piercing through the factual allegations and reviewing if, based on the undisputed facts, the complainant is entitled to judgment as a matter of law. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992).

#### **B. Admitted or undisputed facts.**

The following facts are undisputed, have been established as a matter of record in this case, or have been admitted to by the parties:

1. This Court conducted a preliminary injunction hearing in this case on July 5, 2018.
2. The Complaint contains two claims for relief against PFWD. Defendants’ “First Claim” alleges that PFWD breached an Inclusion Agreement. Defendants’ “Second Claim” seeks in part a declaratory judgment of the rights and obligations of the parties under the Inclusion Agreement regarding “the extent to which PFWD is obligated under the Inclusion Agreement to provide water to fill the ponds on [Defendants’] property.
3. Defendants admit that the Inclusion Agreement is unambiguous. *Defendants’ Combined Response to Plaintiffs’ Motion for Preliminary Injunction and Hearing Brief on Motion for Preliminary Injunction*, June 27, 2018 (“Hearing Brief”), 8, line 3; *Defendants/Third Party Plaintiffs’ Cross-Motion for Summary Judgment (“Cross Motion”)*, 6, lines 8-9; *PI Hr’g. Tr.*, 9, lines 2-3.

4. Defendants' First Claim alleges PFWD breached the Inclusion Agreement by failing to "provide replacement/augmentation water sufficient to maintain the existing Ponds at a full stage..." More specifically, Defendants' allege that PFWD breached the Inclusion Agreement by failing to provide augmentation for or water to fill or refill Defendants' ponds after they were drained for construction, leading to the State's claims against Defendants' that the impoundment of such water was unlawful.

5. Paragraph 8 of the Inclusion Agreement states:

Augmentation of Evaporative Depletions. The Water District and Petitioner acknowledge that the Property includes three existing ponds with a maximum combined surface area of approximately 5 acres ("Existing Ponds"). The Water District shall add the Existing Ponds to its plan for augmentation as augmented structures, and shall provide replacement/augmentation water sufficient to maintain the Existing Ponds at a full stage, and to augment depletions resulting from surface evaporation, without additional charges or fees assessable upon [Defendants]. It is anticipated that the Water District will utilize excess available septic return flows from within the District for such augmentation purposes, but the Water District may use any such augmentation means available to it, in the Water District's sole and complete discretion. The Existing Ponds will be operated consistent with the terms and conditions of the augmentation plan amendment, which shall be consistent with this Paragraph 8, and no additional ponds may be constructed on the Property without the Water District's prior written consent. Excepting provision of augmentation water as provided in this Paragraph 8 and the obtaining of a decree from the Division 2 Water [sic] Court allowing the District to do the same, nothing in this Agreement shall require or otherwise obligate the Water District, at any time or for any other purpose, to provide fill or re-fill water to the Existing Ponds or any future ponds located on the Property, nor shall the Existing Wells be used to fill or supply water to any such pond, excepting return flows from the authorized uses of the Existing Wells, as described in Paragraph 7 of this Agreement, which may naturally accrue to the Existing Ponds.

6. The "plan for augmentation" referenced in paragraph 8 of the Inclusion Agreement refers to "the anticipated amendment to the augmentation plan to replace evaporative losses from the Ponds" which was approved by decree of the Water Court in Case No. 14CW3010 ("Augmentation Decree").

### **C. Ruling:**

1. PFWD is not obligated to augment depletions from Defendants' ponds beyond evaporative losses, and it did not breach the Inclusion Agreement. The contents of the Inclusion

Agreement are undisputed. Because, as Defendants have admitted, that portion of the Inclusion Agreement at issue in this case is unambiguous, the Court can, and has interpreted that agreement according to its plain meaning. The heading of paragraph 8, "Augmentation of Depletions", "defines the nature of the depletions that require replacement water." The term "augmentation/replacement water" used in paragraph 8 refers to water to be supplied pursuant to the Augmentation Decree, which was to be consistent with paragraph 8. The Augmentation Decree specifically authorizes PFWD to augment only evaporation losses, and not fill or refill depletions. PFWD's obligation pursuant to the Inclusion Agreement "to maintain [Defendants' ponds] at a full stage", a trade term or standard of the community, means the pond has "already been full or legally filled" and refers to replacement of evaporative losses only. Had the parties intended to include losses beyond evaporation, they had the opportunity to clarify that addition by further revision of paragraph 8, but they did not.

2. Based on this evidence, a plain reading of the Inclusion Agreement does not confer any obligation on PFWD to fill or refill Defendants' Ponds beyond filling to replace evaporative depletions. There are no genuine issues of fact material to the interpretation of the Inclusion Agreement in this respect. The Court, therefore, enters summary judgment in PFWD's favor on Defendants' Second Claim in PFWD's favor and declares that the Inclusion Agreement does not obligate PFWD to provide water for or to augment depletions from Defendants' Ponds other than to replace evaporative losses.

3. The Court also enters summary judgment in PFWD's favor on the Defendants' First Claim and rules that PFWD did not breach the Inclusion Agreement and is not responsible to Defendants for damages for the alleged breach, including without limitation any damages suffered by Defendants as a result of Plaintiffs' claims against Defendants in this case.

4. The Court need not reach PFWD's alternative claims that the First and Second Claims against PFWD should be dismissed based upon the statute of limitations, the doctrine of laches, or the doctrine of waiver, and those claims are hereby declared moot.

5. Pursuant to paragraph 26 of the Inclusion Agreement, PFWD is hereby awarded as against Defendants its costs and expenses, including without limitation reasonable attorneys' fees incurred in this litigation and all expenses incurred in enforcing or collecting this judgment, subject to submission by PFWD of a bill of costs and proof of attorneys' fees. This award does not prejudice PFWD's rights to rescind the Inclusion Agreement or to pursue its counterclaim to rescind the Inclusion Agreement.

6. The parties may proceed in this matter with PFWD's counterclaim against Defendants.

Dated: 2/15/13

By the Court:

