DISTRICT COURT **ARCHULETA COUNTY, COLORADO** 109 Harman Park Drive, Pagosa Springs, CO 81147 (970) 264-8160	DATE FILED June 11, 2025 10:49 PM FILING ID: B7FD1C3DF3103 CASE NUMBER: 2024CV30069
Plaintiff and Counterclaim Defendant: PAGOSA AREA WATER AND SANITATION DISTRICT acting by and through its WATER ACTIVITY ENTERPRISE v. Defendant and Counterclaimant: SAN JUAN WATER CONSERVANCY DISTRICT	▲ COURT USE ONLY ▲
Submitting Attorney: Jeffrey M. Kane, Atty. Reg. No. 44075 SOUTHWEST WATER AND PROPERTY LAW LLC 679 E. 2nd Ave., Unit 10, Durango, CO 81301 (970) 422-5510; jkane@swpropertylaw.com	Case No. 2024CV30069 Div: Courtroom:
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FOR DECLARATORY RELIEF	

Counterclaimant San Juan Water Conservancy District ("SJWCD"), through undersigned counsel, hereby replies to the Response to Motion for Summary Judgment filed by Counterclaim Defendant Pagosa Area Water and Sanitation District ("PAWSD") on May 30, 2025 ("Response") to the motion for summary judgment for declaratory relief filed by SJWCD on May 1, 2025 ("Motion") as follows:

I. THERE IS NO GENUINE DISPUTE AS TO THE MATERIAL FACTS CONCERNING SJWCD'S REQUESTED DECLARATORY RELIEF

A. The material facts necessary to construe the Restructure Agreement as requested by SJWCD are undisputed.

1. SJWCD requested entry of the following declaratory relief:

A. The Restructure Agreement establishes a Project Planning Period of not less than 20 years that extends until at least October 27, 2035;

B. PAWSD does not have a right to sell the Running Iron Ranch during the Planning Period absent a showing that it has made every effort to retain the Running Iron Ranch but cannot do so;

C. PAWSD does not have a right to sell Running Iron Ranch at this time;

D. The parties agreed in the Restructure Agreement that PAWSD cannot abandon the Project during the Planning Period; and

E. PAWSD waived its equitable right to partition the Running Iron Ranch while the Restructure Agreement remains in force.

Motion at p. 18. Each prayer for relief asks the Court to construe the plain meaning of the words of the Restructure Agreement in light of the entire agreement and the intent and expectations of the parties evident within its four corners. The facts necessary to construe those aspects of the Restructure Agreement are not in dispute.

2. A fact is material only where it could affect the outcome of the case. See, e.g., *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). SJWCD has carried its burden to demonstrate that there is no genuine dispute as to the following facts:

a. That the Districts partnered to plan for and develop the Project. Compl., ¶5; Mot., ¶10 and Exh. 1 to Exh. A ("Restructure Agmt."), p. 1, Recitals 1 and 2.

b. That the Districts partnered to purchase Running Iron Ranch, and each of them obtained financing from CWCB to do so. Compl., ¶11; Mot., ¶¶11-12, Restructure Agmt., p. 1, Recital 3, and Exh. B.

c. That SJWCD and PAWSD own Running Iron Ranch as tenants in common. Compl. ¶12; Mot. ¶11.

d. That PAWSD's directors decided, after it purchased its interest in the Running Iron Ranch and prior to 2015, that it was no longer in PAWSD's best interests to pursue development of the Project or own Running Iron Ranch. Mot. ¶13, Restructure Agmt., p. 2, Recital 2.

e. That PAWSD, notwithstanding its directors' change of heart about the Project, negotiated and executed with SJWCD and CWCB the Restructure

Agreement, and that each of the parties has benefited or stand to benefit from the other parties' performance of its respective obligations. Mot. ¶14; Resp. at p. 12 (last partial ¶) and 13 (1st full ¶).

f. That PAWSD's directors determined that entering the Restructure Agreement was in the best interests of its constituents and executed the loan amendment pursuant to an irrepealable resolution adopted by the PAWSD Board of Directors in 2016. Mot., ¶15 and Exh. B.

g. That the parties agreed to a 20-year planning period for the Project. Resp. at p. 2 (2d full ¶).

h. That PAWSD desires to sell the Running Iron Ranch, but does not need to do so. Compl., ¶32; Resp. at p. 14 (last partial ¶).

i. That PAWSD has decided to sell Running Iron Ranch in the middle of the 20-year Planning Period established by the Restructure Agreement. Resp. at p. 16 (2d full ¶).

Those facts, about which there is no genuine, triable issue of fact, are the material findings needed to grant SJWCD its requested declaratory relief as a matter of law.

B. The factual matters disputed by PAWSD in the Response are immaterial to SJWCD's requested declaratory relief.

3. PAWSD and SJWCD do dispute several factual matters. Many of those matters are material to adjudicating SJWCD's breach of contract claim. But those disputed facts are not material to the narrow declaratory relief requested by SJWCD, and to which it is entitled as a matter of law: namely, to say what section 5.2 requires of the parties. The Court can resolve that limited issue of contract construction based on the text within the four corners of the Restructure Agreement and undisputed facts.

4. When the breach of contract claim is tried, some facts disputed by the Districts will be relevant. For example, PAWSD questions whether SJWCD has substantially performed its contractual obligations to lead Project planning, and SJWCD alleges

PAWSD's conduct toward SJWCD and the Project has impaired SJWCD's ability to educate constituents, develop potential partner relationships, and compete effectively for funding.[1] Those contested issues of fact will be material to the breach of contract claim, but they do not determine whether the Court is able to explicate the parties' contractual duties as a matter of law.

II. SJWCD IS ENTITLED TO DECLARATORY RELIEF CONCERNING SALE OF THE RUNNING IRON RANCH DURING THE PLANNING PERIOD

5. The Districts agree that standard principles of contract interpretation apply and that the Restructure Agreement is not ambiguous. Mot. ¶¶ 5-7; Resp. at 4 (1st partial ¶). The Districts also agree that the heart of the matter is the extent to which PAWSD's right to sell Running Iron Ranch during the Planning Period in Section 5.2.1 is restricted by the "make every effort" condition. Resp. at p. 4 (last full ¶). PAWSD's limited textual analysis hangs its hat on reading the sale right provision of Section 5.2.1 while asking the Court to ignore the immediately preceding clause, several related terms in the agreement, and the parties' expectations reflected in the Restructure Agreement as a whole. Resp. at p. 5 (1st full ¶). That intent clear, PAWSD asks the Court to refuse to give effect to PAWSD's "make every effort" obligation, an approach, as discussed

[1] In particular, SJWCD disputes that "very little has been done in terms of meaningful progress towards development of Dry Gulch Reservoir since the Restructure Agreement," Resp. at 14 (1st full ¶). Because detailing SJWCD's accomplishments and current activities to further Project planning is immaterial to SJWCD's requested relief, SJWCD looks forward to presenting evidence at the proper time concerning all is has been accomplished and that is underway despite PAWSD's intransigence and lack of cooperation.

Section III below, unsupported by principles of contract interpretation and performance or other law.

A. The date the planning period terminates is not settled, and SJWCD is entitled to declaratory relief on this issue.

6. SJWCD requests a declaration that the Restructure Agreement establishes a Project Planning Period of 20 years that ends not sooner than October 27, 2035. PAWSD argues that there is no controversy that the parties agreed to a Planning Period of 20 years, but PAWSD does not respond concerning when precisely the Planning Period began and when it ends. Because the Restructure Agreement is not clear about the commencement of the Planning Period, there is a controversy concerning its precise ending date, and that date has legal significance. This is precisely the sort of controversy entitling SJWCD to declaratory relief. C.R.S. § 13-51-102; *Zab, Inc. v. Berenergy Corp*., 136 P.3d 252, 260 (Colo. 2006). Therefore, SJWCD is entitled to the requested relief concerning the duration of the Planning Period as a matter of law.

B. There is no genuine issue of material fact that PAWSD does not need to sell Running Iron Ranch, and SJWCD is entitled to judgment as a matter of law that PAWSD's desire and efforts to sell the Running Iron Ranch are at odds with its obligation to "make every effort" to retain Running Iron Ranch during the Planning Period.

7. While PAWSD asserts it has made every effort (or, at least, sufficient effort) to retain Running Iron Ranch, for purposes of declaring the parties' duties under the Restructure Agreement, there is no genuine issue of material fact concerning whether PAWSD has actually made the required effort. Since September 2024, PAWSD has actively sought to sell the Ranch over the objections of SJWCD and without providing a justification that could possibly meet its "every effort" duty. PAWSD does not assert

that it cannot retain Running Iron Ranch. Instead PAWSD admits that its current Directors want to sell Running Iron Ranch because they have made a decision based on "numerous changed circumstances" that, as a policy matter, spending additional money on the Project is not warranted, the Project should be abandoned, and Running Iron Ranch should be sold. Resp. at pp. 12-14. It is logically impossible to conclude that PAWSD is making any effort to retain the Running Iron Ranch when PAWSD is, in fact, trying to sell it.

C. The Restructure Agreement, interpreted a whole, cannot be construed to mean that PAWSD may sell Running Iron Ranch during the Planning Period "in its sole discretion."

8. Contrary to the rules of contract interpretation, PAWSD asks the Court to ignore the "make every effort" promise in the Restructure Agreement so that PAWSD can sell its interest in Running Iron Ranch "in its sole discretion." Resp. at 4 (2d full ¶). PAWSD's desired interpretation is not supported by the plain language of Section 5.2, and is contrary to the parties' purpose in entering the agreement and their reasonable expectations evident throughout the Restructure Agreement.

9. The Restructure Agreement must be interpreted to give meaning to each of its provisions. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984). The only way to reconcile and give meaning to each provision of Section 5.2 is to construe PAWSD's performance of its "make every effort" obligation as a condition precedent to its right to sell Running Iron Ranch during the Planning Period "in its sole discretion." Only if PAWSD has made every effort to retain Running Iron Ranch but cannot, does it have a right to sell. If that condition precedent is satisfied, then PAWSD can determine

the manner of selling Running Iron Ranch "in its sole discretion but after consultation with" SJWCD and CWCB. The "make every effort" condition is a perfectly sensible approach to binding PAWSD to its commitment to develop the Project with SJWCD while accounting for the possibility that circumstances might make it impossible for PAWSD to continue to own its interest in Running Iron Ranch. There is no dispute that PAWSD has not alleged the sort of circumstances (e.g., insolvency) that could give it the right to sell its interest in Running Iron Ranch during the Planning Period.

D. There is no genuine dispute of material fact that the parties agreed that PAWSD can only abandon the Project after the expiration of the Planning Period, not before.

10. The right to abandon the Project after the Planning Period expressly authorizes PAWSD to exercise discretion in deciding ***after*** the Planning Period whether to continue to pursue the Project or to abandon it. PAWSD does not have a similar express right to abandon the Project during the Planning Period. The parties' omission of the right to abandon the Project during the Planning Period reinforces the plain meaning of Section 5.2.1 that PAWSD may not sell the Running Iron Ranch during the Planning Period unless it has made every effort to retain Running Iron Ranch (but is unable to do so). The Restructure Agreement, construed as a whole, does not permit PAWSD to abandon the Project during the Planning Period, and SJWCD is entitled to its requested relief on this issue.

III. PAWSD'S REQUEST THAT THE COURT INVALIDATE ITS PROMISE TO MAKE EVERY EFFORT TO RETAIN RUNNING IRON RANCH DURING THE PLANNING PERIOD IS NOT SUPPORTED BY PRECEDENT OR SOUND LEGAL OR POLICY REASONING

11. Taking a different tack to avoid its obligation to make every effort to retain the Running Iron Ranch during the Planning Period, PAWSD argues that it should not be required to perform that promise because doing so would violate the fiduciary duties of its directors. Even if PAWSD could prove changed circumstances have caused the breach of fiduciary duty it alleges, which SJWCD disputes,[2] PAWSD's argument fails as a matter of law because the precedent PAWSD cites was decided on different, narrow grounds not applicable here. Further, PAWSD is asking the Court to adopt an exception to contract performance that would swallow well-settled rules of contract enforcement with no discernable legal or policy reasoning that could support such as drastic holding.[3]

12. The case PAWSD relies on as support for its "right to breach" argument involved a far different transaction and contractual duty. *Great Western Producers Co-op. v. Great Western United Corp.*, 613 P.2d 873 (Colo. 1980). *Great Western* concerned a contract for the purchase and sale of stock in a publicly traded Delaware corporation. *Id*. at 875, fn.

[2] PAWSD's financial obligation under the Restructure Agreement – the key fact underpinning its fiduciary duty argument – has not changed since PAWSD approved and executed that contract.

[3] PAWSD also cites two court opinions discussing the availability of specific performance as a contractual remedy against a government entity who has not waived sovereign immunity to it, another direction PAWSD could tack when SJWCD's breach of contract claim is adjudicated. Resp. at 9, citing *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII*, 176 P.3d. 737 (Colo. 2007); *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and Sanitation District*, 240 P.3d 554 (Colo. Ct. App. 2010). The parties expressly agreed in the Restructure Agreement, however, that the remedy of specific performance is available, thereby waiving any defense of sovereign immunity to specific performance that PAWSD might assert. Exh. A at p. 21, §8.14 (2016 amendment).

2. The stock purchase agreement required the selling company's board of directors to "use its best efforts to obtain the approval" of the sale from its shareholders and debt holders (collectively, "security holders"). Without the security holders approving the sale, the sale could not proceed, meaning the parties agreed there was a contingency that had to be satisfied pursuant to the discretion of third parties to complete the transaction. *Id*. During the process of obtaining security holder approval, the price of sugar (a commodity relevant to the stock value) increased so much that the terms of the sale became objectively bad for the security holders, and the directors ceased recommending that the security holders approve the sale. *Id*. at 876. When the security holders declined to approve the sale, the sale did not close by the termination date agreed to in the contract, so it terminated in the manner expressly agreed to by the parties. *Id*. at 877.

13. The "well defined and narrow" question for the trial and appellate courts in *Great Western*, *id*., after the stock sale contract terminated and a lawsuit was commenced, was whether the seller's "best efforts" obligation prohibited its board of directors from reversing its recommendation to the security holders. Dispositive to the analysis of that question was that the seller's directors had a legal duty under Delaware law to advise the security holders of the changed circumstances and exercise independent judgment in determining whether the sale was in the best interest of the corporation at the time it sought security holder approval. *Id*. at 877-78. The Court held that the "best efforts" obligation was not breached where the seller took the approval question to the security holders with information and a recommendation it was legally

required to offer. *Id*. In those circumstances, the seller had exercised its "best lawful efforts" to obtain the security holder consent because the board's parallel statutory duty to exercise independent judgment, regardless of its contractual duty, "lie[d] at the heart" of their corporate management duties. *Id*. at 878. It was also vital that the directors objectively could not recommend approval based on dollars and cents and that they did not have to make, and the jury courts did not have to evaluate, a subjective determination about the best interests of the security holders.

14. Unlike the seller in *Great Western*, PAWSD does not allege it has made "best lawful efforts" to comply with the condition that it "make every effort to retain" the Running Iron Ranch during the Planning Period. Instead, PAWSD asks this Court to hold that PAWSD should be excused from its "make every effort" duty because this PAWSD Board of Directors is of the opinion that continuing to own and pay for Running Iron Ranch is no longer in the best interests of PAWSD's constituents. Resp. at 21 (1st full ¶) ("Under *Great Western*, PAWSD is not required to take any further actions towards compliance with the 'efforts' requirement of the Restructure Agreement, and PAWSD is therefore free to sell the Running Iron Ranch."). In other words, this PAWSD Board of Directors has made a highly subjective and discretionary determination, under the nebulous framework of fiduciary duties, which was far different than the circumstances that required the about-face of the directors in Great Western.

15. The facts and holding in *Great Western* in no way justify a party selectively repudiating, and a court deleting, a material term of an agreement that remains in force. Failing to enforce the "make every effort" promise would fundamentally alter the terms

of the agreement, the benefit of the bargain to the other parties, and the clear expectations of all parties. Indeed, that outcome would excuse PAWSD to breach its material promise even though PAWSD has and continues to benefit from the Restructure Agreement. *See, e.g.*, Resp. at 12 (declining per capita water demands due to conservation practices and spending mandated by the Restructure Agreement) and 13 (Running Iron Ranch has "appreciated substantially in value"). And unlike *Great Western*, where circumstances entirely independent of the parties fundamentally altered the bargain made in a contract before performance of the duty was even attempted, PAWSD would still receive the benefit of its bargain while SJWCD would not.[4]

16. Extending *Great Western* to apply to these circumstances would undermine essential principles of contracting contrary to public policy. Under PAWSD's reading of *Great Western*, any business or governmental entity could selectively and unilaterally abrogate an obligation it no longer wants to perform regardless of the detriment doing so causes other parties to the contract as long as its directors conclude that its owners or constituents would be better off with different terms or no contract at all.

17. The world is replete with long-term agreements in which one party eventually wishes to terminate before the other party receives the full benefit of their bargain. the fact that in the 45 years since *Great Western* was decided, no court has expanded on the

[4] The Restructure Agreement is also very distinct from a purchase and sale agreement that provides for a period of due diligence and satisfying certain contingencies before the heart of the deal is performed and the transaction closes. Indeed, in contrast to the express termination date agreed to the stock sale in *Great Western*, the Restructure Agreement provides that it "may not be terminated" but "may be amended by written agreement of the Parties." Motion, Exh. A, §7.1.

nature of the promises and transactions to which it applies demonstrates the narrowness of its holding.[5] PAWSD asks the Court to fashion an inherently subjective and nebulous standard for a party to avoid a contractual duty while denying any say or recourse to the aggrieved party. In short, no precedent or sound legal or policy principle justified the Court preemptively voiding a contractual duty to benefit one party to the detriment of the other parties while a contract remains in force.

18. PAWSD also notes that in *Great Western*, the Colorado Supreme Court construed the "best efforts" provision "as only requiring the board to 'make a reasonable, diligent, and good faith effort to accomplish a given objective' " and argues that "[t]here would seem no reason to regard every effort as having a meaning different from best efforts; the case law construing every effort suggests as much." Resp. at 8 (2d full ¶; quoting commentary [internal quotation marks omitted}). This Court can readily construe the plain meaning of "every effort" to determine the parties' intent in choosing the language they did. Mot. at ¶¶23-24. There is no reason the Court need resort to wording in other contracts made for other purposes by other parties. Even if the construction of "best efforts" in *Great Western* could inform the interpretation of "make every effort," were PAWSD willing to "make a reasonable, diligent, and good faith effort" to retain

[5] Indeed, the Colorado Supreme Court was asked to extend *Great Western* in a case arguing that fiduciary duties excused a different sort of contractual obligation, but it declined to do so. *Colorado Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 172-74 (Colo. 1993). In the *Friedman* case, the bank cited *Great Western* to argue that its breach of contract was excused by its fiduciary duty to certain beneficiaries. The Court disagreed, rejecting the bank's argument that it was obligated to obtain the highest price for a property interest when its pre-existing contractual obligations required a different result. *Id.* at 174 (holding that the bank's fiduciary duty "neither extinguishes the Bank's obligations under [the contract], nor shields the Bank from liability for breach of contract"). *Id.* at 174.

Running Iron Ranch, it would not have filed this lawsuit or be asserting that it can sell Running Iron Ranch in its sole discretion during the Planning Period.

19. At the same time PAWSD insists circumstances have changed such that it should be relieved of performing an obligation it agreed to, it argues that "SJWCD has no right to take unilateral action with respect to any portion of the subject property during the term of the initial Planning Period." Resp. at 20 (last full ¶). PAWSD also admits that it has benefitted from the bargain it struck in the Restructure Agreement by saving money on interest payments and investing those savings in water conservation maintenance and improvements to its system. Resp. at 12 (last partial ¶). In short, PAWSD wants to have its cake and eat it, too by accepting the benefits of the Restructure Agreement but avoiding the commitments PAWSD made to get them. No precedent, principle contract performance, or sound policy interest supports PAWSD's desired outcome.

IV. SJWCD IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT PAWSD WAIVED ITS RIGHT TO PARTITION OWNERSHIP OF RUNNING IRON RANCH WHILE THE RESTRUCTURE AGREEMENT CONTROLS THE CIRCUMSTANCES OF SALE.

20. Colorado law does not require an express waiver of the right to partition; courts will readily infer one. *McIntire v. Midwest Theatres Co.*, 298 P. 959, 959 (Colo. 1931); *Twin Lakes Reservoir & Canal Co. v. Bond*, 401 P.2d 586, 590 (Colo. 1965). Despite PAWSD's attempts to minimize the premises of the Restructure Agreement recited by the parties, Resp. at 19 (2d full ¶), the fact that the parties expressly contemplated the right to partition and how it would negatively impact their interests in the Agreement, including those of lender CWCB, demonstrates that one of their purposes was to reach an agreement and avoid partition. Even without that, all the law requires to infer a

waiver of the right to partition is that granting partition would enable one party to avoid an otherwise enforceable contractual duty. It does not matter whether the duty being avoided is paying rent, a lien, a right to sell property, or continuing to finance the purchase of land needed for a water project on favorable terms. Colorado courts have unerringly concluded that the equitable right to partition must give way to the enforcement of bargained-for legal rights, including in the precise scenario here, where performance takes twenty years and circumstances allegedly have changed.

21. PAWSD's response recites the facts of Colorado cases establishing that a party cannot avoid its contractual obligations by bringing a partition claim, but does not provide any legal argument that those holdings do not and should not apply to this case. Resp. at pp. 19-20. If PAWSD is permitted to partition Running Iron Ranch despite its clear, bargained-for obligations under the Restructure Agreement, PAWSD would be using that equitable claim to avoid its legal duties to SJWCD and CWCB.

22. PAWSD also argues that entering summary judgment concerning its right to partition would be premature because it was pled in the alternative "if it is unsuccessful in its declaratory judgment claim." Resp. at pp. 20-21. PAWSD does not explain why, but the parties do not dispute that they are bound by the Restructure Agreement, at least to all terms except Section 5.2.1. So there is no material fact in dispute that would preclude entering declaratory relief concerning whether PAWSD and SJWCD waived their equitable right to partition by entering the Restructure Agreement. Accordingly, SJWCD is entitled to summary judgment against PAWSD on its partition claim as a matter of law.

RESPECTFULLY SUBMITTED this 11th day of June, 2025.

SOUTHWEST WATER AND PROPERTY LAW LLC

/s/ Jeffrey M. Kane
Jeffrey M. Kane

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of June, 2025, I served a copy of the foregoing Reply in Support of Motion for Summary Judgment for Declaratory Relief via ICCES to all parties of record.

/s/Adrienne Gomez
Adrienne Gomez

In accordance with C.R.C.P. 121 § 1-26(7), a printable copy of the foregoing document with original or electronic signatures is maintained at the office of Southwest Water and Property Law LLC.