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| DISTRICT COURT, WATER DIVISION NO. 1, COLORADO 901 9 th AVENUE GREELEY, CO 80631 | DATE FILED: March 27, 2024 10:47 AM FILING ID: A798AEB047D79 CASE NUMBER: 2024CW3001 |
| CONCERNING THE APPLICATION FOR WATER RIGHTS OF ST. VRAIN & LEFT HAND WATER CONSERVANCY DISTRICT IN BOULDER COUNTY | ▲ COURT USE ONLY ▲ |
| Attorneys For Opposer: Wyatt Sassman (#51890) Kevin Lynch (#39873) Asha Brundage-Moore (#59014) Abigail Frische (Student Attorney) Jon Harley (Student Attorney) Mary Lobato (Student Attorney) Environmental Law Clinic University of Denver Sturm College of Law 2255 East Evans Avenue Denver, CO 80208 (303) 871-6140 wsassman@law.du.edu klynch@law.du.edu abrundage-moore@law.du.edu afrische24@law.du.edu jharley25@law.du.edu mlobato25@law.du.edu | Case No. 2024CW3001 |
| STATEMENT OF OPPOSITION | |

1. Name, mailing address, email address and telephone number of opposer:

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2. State Facts as to why the application should not be granted or why it should be granted in part or on certain conditions:

I. Save the Worlds Rivers holds Applicant to “strict proof” on its claims of reasonable diligence in developing the conditional rights for the Coffintop Reservoir. *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 747 (Colo. 1997). Applicant has failed to sufficiently demonstrate its diligence in developing these conditional rights for at least three reasons. First, Applicant has failed to show that the project can and will be completed within a reasonable time. Second, Applicant has failed to demonstrate the “steady application of effort” in developing these conditional rights as required by Colo. Rev. Stat. § 37-92-301(4)(b) to show reasonable diligence. Third, Applicant has failed to establish a non-speculative intent in holding the conditional water rights for Coffintop Reservoir.

A. First, Applicant has failed to show that “the waters ‘can and will’ be stored” and put to beneficial use, “and that the project ‘can and will’ be completed with diligence and within a reasonable time.” *Vermillion Ranch Ltd. P’ship v. Raftopoulos Bros.*, 307 P.3d 1056, 1067 (Colo. 2013). The “can and will” test is “a question of fact and law” that balances multiple factors to determine whether there is “a substantial probability” the project will be completed. *Id.* The ultimate question is whether “evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies.” *City of Aurora v. ACJ P’ship*, 209 P.3d 1076, 1085 (Colo. 2009) (quoting *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 45 (Colo. 1996)). A non-exhaustive list of factors includes: “[1] [T]he legal and physical availability of unappropriated water; [2] the technical feasibility of a project; [3] the applicant’s present right and prospective ability to access the property; [4] the applicant’s ability to obtain necessary permits for construction; and [5] the economic feasibility of a project.” *Vermillion Ranch*, 307 P.3d at 1067 (internal citations omitted).

Therefore, to show reasonable diligence in developing the conditional water rights for Coffintop Reservoir, “[A]pplicant must demonstrate not only ‘steady application of effort,’ as required by Colo. Rev. Stat. § 37-92-301(4)(b), but also that the waters ‘can and will’ be stored and beneficially used and that the project ‘can and will’ be completed with diligence and within a reasonable time as required by Colo. Rev. Stat. § 37-92-305(9)(b).” *Vermillion Ranch*, 307 P.3d at 1067.

1. Applicant has not shown that the South St. Vrain Creek has sufficient “legal and physical availability of unappropriated water” to support a substantial probability that Coffintop Reservoir can and will put water to beneficial use within a reasonable amount of time. *Id.*
 - i. In the last ten years, the water appropriated for Coffintop Reservoir has not been physically and legally available because of its junior priority date.

Specifically, from January 1, 2014, through January 1, 2024, the conditional right for Coffintop Reservoir (Admin Number 4781.45489) was out of priority 70.19% of the time.¹

- ii. The likely unavailability of water for Coffintop Reservoir increases the risk of potential injury to downstream water users that would stall or end the project. Being out of priority for extended periods of time leaves Coffintop Reservoir at risk of creating a dead pool of water belonging to senior downstream water users. Applicant has failed to provide any details on its plan for mitigating the risk of injury to senior downstream water users stemming from the likely unavailability of water for Coffintop Reservoir and resulting heightened risk of creating a dead pool.
 - iii. For these reasons, Applicant has failed to show that the South St. Vrain Creek has enough legally and physically available water to support finding a substantial probability that Coffintop Reservoir can and will put water to beneficial use within a reasonable amount of time.
2. Applicant has also failed to show an ability “to obtain necessary permits for construction” to support a substantial probability of Coffintop Reservoir being completed with diligence and within a reasonable amount of time. *Vermillion Ranch*, 307 P.3d at 1067.
- i. Due to the wide-ranging impacts of dams and reservoirs on the environment and surrounding community, Coffintop Reservoir will likely require multiple federal, state, and local permits and authorizations before the project can begin construction. Based on the application and proposed project’s likely impacts, these permits and authorizations would likely include (but would not be limited to) a 1041 Permit from Boulder County,² a permit from the Federal Energy Regulatory Commission if the project includes hydropower generation,³ permits and authorizations required under the federal Clean Water Act,⁴ and permits and authorizations under the federal Endangered

¹ Colorado’s Decision Support Systems CWCB/DWR, *Administrative Calls – Structure Call Analysis*, COLORADO DEPARTMENT OF NATURAL RESOURCES, <https://dwr.state.co.us/Tools/AdministrativeCalls/StructureCalls?submitButton=Submit&SelectedGeoValue=waterDivisionDiv&SelectedWaterDivisionId=1&StartDate=01%2F01%2F2014&EndDate=01%2F01%2F2024&SelectedAdminNo=47481.45489&SelectedWDID=0504315&SelectedAdditionalValue=WDIDSearch&WDIDSearch.wdidFrom=0504315&WDIDSearch.includeAssociatedWaterRights=False&WDIDSearch.Operator=1>.

² See Boulder County Land Use Code – Oct. 12, 2023, Article 8 §§ 308, 501 (2023).

³ FEDERAL ENERGY REGULATORY COMMISSION, HYDROELECTRIC PROJECT HANDBOOK FOR FILINGS OTHER THAN LICENSES AND EXEMPTIONS § 1.2 (2001).

⁴ See, e.g. 33 U.S.C. § 1344 (2024).

Species Act.⁵ Federal permits and authorizations would also trigger lengthy and detailed environmental impact assessment processes required by the federal National Environmental Policy Act.⁶

- ii. “Dams profoundly affect river hydrology, primarily through changes in the timing, magnitude, and frequency of high and low flows” which “differ significantly from the . . . natural flow regime.” Francis J. Magilligan & Keith H. Nislow, *Changes in Hydrologic Regime by Dams*, 71 GEOMORPHOLOGY 61, 62 (2005). “The hydrologic regime of a watershed . . . provides the link between rivers and the riparian zone, ultimately maintaining the diversity and function of these increasingly threatened habitats.” *Id.*
- iii. A dam that creates a reservoir “may obstruct fish migration... [as well as] change natural water temperatures, water chemistry, river flow characteristics, and silt loads.”⁷
- iv. Dams are known to stop the downstream movement of sediment, changing the characteristics of the river downstream. Aregai Tecele, *Downstream Effects of Damming the Colorado River*, 10 INT. J. OF LAKES & RIVERS 7, 23 (2017); See also Francis Lajole, et al., *Impacts of Dams on Monthly Flow Characteristics. The Influence of Watershed Size and Seasons*, 334 J. OF HYDROLOGY 423, 426 (2007). The lack of sediment deprives natural vegetation of vital nutrients, altering the ecosystem of the downstream area. Tecele, *Downstream Effects of Damming the Colorado River* at 23. The natural distribution of sediment is also responsible for the creation of beach-like areas. *Id.*
- v. Reduced flow rates from reservoirs cause the build-up of trace minerals in rivers. *Id.* at 26. While these trace minerals may be harmless in their naturally occurring quantities, their accumulation can poison an ecosystem and make it uninhabitable for native species, allowing for the introduction of invasive species better suited for the new ecosystem. *Id.*; Thomas W. FitzHugh & Richard M. Vogel, *The Impact of Dams on Flood Flows in the United States*, 27 RIVER RESEARCH AND APPLICATIONS, 1192 (2011).
- vi. The installation of a dam not only damages the ecosystem of a river, but it also reduces the scenic qualities of the area surrounding a reservoir as natural vegetation dies off and any beach-like areas reduce in size due to a lack of sediment.

⁵ See, e.g. 16 U.S.C. § 1536 (2024).

⁶ See, e.g. 42 U.S.C. § 4332 (2024).

⁷ U.S. Energy Information Administration, *Hydropower Explained: Hydropower and the Environment*, EIA, <https://www.eia.gov/energyexplained/hydropower/hydropower-and-the-environment.php> (last visited March 26, 2024).

- vii. In addition to displacing human and non-human communities, reservoirs may also impact areas of cultural and practical significance, such as “important natural areas [and] agricultural land,” as well as archaeological sites known or unknown at the time of the reservoir’s construction. *Id.*
 - viii. Applicant makes no mention of permits in their Application for Finding of Reasonable Diligence despite the very high likelihood that developing these rights will require completing several complex and uncertain permitting processes. 24CW3001, Application for Finding of Reasonable Diligence, ¶ 4.
 - ix. Applicant’s failure to make progress on securing any permits, or even begin applying for permits, required for the construction of Coffintop Reservoir in fifty years demonstrates that Applicant has failed to show there is a substantial probability of Coffintop Reservoir being completed with diligence and within a reasonable amount of time.
3. Applicant has also failed to show a “present right and prospective ability to access the property” to support a substantial probability of Coffintop Reservoir being completed with diligence and within a reasonable amount of time. *Vermillion Ranch*, 307 P.3d at 1067.
- i. Applicant has only listed the names and addresses of owners of the land where the project will be constructed, which does not demonstrate either a present right or prospective ability to access that property. 24CW3001, Application for Finding of Reasonable Diligence, ¶ 6.
 - ii. Applicant has provided no facts as to whether Applicant has a present right or prospective ability to access property. *Id.* at ¶ 4.
 - iii. Despite holding the conditional rights for Coffintop Reservoir for fifty years, Applicant has failed to acquire property for Coffintop Reservoir during that time.
 - iv. Applicant’s failure to make progress on securing any property interest required for the construction of Coffintop Reservoir in fifty years demonstrates that Applicant has failed to show there is a substantial probability of Coffintop Reservoir being completed with diligence and within a reasonable amount of time.

4. Like in *Vermillion Ranch*, Applicant here has “presented no evidence regarding a timeline for construction, the costs of construction and land acquisition, the ability to finance those costs, the status of necessary permits or government approvals, or the technical feasibility, design, or construction” of the reservoir. *Vermillion Ranch*, 307 P.3d at 1072.
 5. Thus, Applicant has “failed to meet its burden to prove by a preponderance of the evidence . . . that there is a substantial probability that the [dam and its] reservoir necessary to effect the appropriation ‘can and will’ be completed with diligence within a reasonable time.” *Id.* (citing *Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265, 1277 (Colo. 2006)).
- B. Second, Applicant has failed to steadily apply effort to develop the water rights involved in the Coffintop Reservoir in a reasonably expedient and efficient manner as required by Colo. Rev. Stat. § 37-92-301(4)(b).
1. The General Assembly requires water courts to review the development of conditional rights for reasonable diligence in order “to prevent the accumulation of undeveloped and unproductive conditional water rights to the detriment of those seeking to apply the state’s water beneficially.” *Trans-County Water, Inc. v. Cent. Colo. Water Conservancy Dist.*, 727 P.2d 60, 65 (Colo. 1986).
 2. “To allow [Applicant] to maintain its conditional appropriation indefinitely and without progress would frustrate that fundamental policy.” *Id.*
 3. With priority dates of 1969 and 1974, Applicant has seemingly made no measurable progress towards developing Coffintop Reservoir for over fifty years.
 4. Applicant relies on monetary expenses to support its application and fails to articulate, with any specificity, the amount spent directly on the development of Coffintop Reservoir. Applicant is also unclear regarding which expenses relate to the Coffintop Reservoir broadly. Applicant does not assert that any money has been spent towards developing the Coffintop Reservoir specifically. 24CW3001, Application for Finding of Reasonable Diligence, ¶ 4.
 5. Applicant instead relies on the assertion that Coffintop Reservoir is a component of the Applicant’s integrated system of water and structures under Colo. Rev. Stat. § 37-92-301(4)(b), and argues that work done on components of the District’s integrated system support diligence for Coffintop Reservoir. 24CW3001, Application for Finding of Reasonable Diligence, ¶ 4. These arguments are insufficient to show reasonable diligence for three reasons.

- i. First, Applicant has not adequately demonstrated that Coffintop Reservoir is an “integral component” of an integrated system for purposes of Section 301(4)(b). 24CW3001, Application for Finding of Reasonable Diligence, ¶ 4(E). Although Applicant claims that Coffintop Reservoir is an “integral component” of the District’s Augmentation Plan, Applicant has made no concrete progress towards developing Coffintop Reservoir and does not explain how its Augmentation Plan has been functioning for decades without meaningful progress on such an “integral component.” *Id.* Moreover, Applicant states elsewhere in its application that Coffintop Reservoir is an “asset[] that *can* be used to effectuate the [Stream Management Plan’s] stream management goals,” confirming that Coffintop Reservoir is not currently a meaningful element of the Stream Management Plan (“SMP”) (which includes the Augmentation Plan). *Id.* at ¶ 4(B) (emphasis added). For these reasons, all the facts and circumstances here show that the Coffintop Reservoir is not a component of an integrated system for purposes of Section 301(4)(b).
 - ii. Second, even if Coffintop Reservoir is part of an integrated system, work to repair preexisting components of an integrated system is not sufficient to demonstrate steady effort to develop other parts of the system under Section 301(4)(b). Repairing parts of a system maintains the status quo, while Section 301(4)(b) requires demonstrated progress in developing the overall system relevant to the conditional rights under review. For this reason, Applicant’s reliance on the remedial work for Rock’n WP Ranch Lake No. 4 is not sufficient under all the facts and circumstances here to demonstrate the Applicant’s steady application of effort to develop Coffintop Reservoir. *Id.* at ¶ 4(F).
 - iii. Third, Applicant’s monetary expenses categorized as “plan administration, operational, and maintenance” do not demonstrate steady effort to develop Coffintop Reservoir. *Id.* at ¶ 4(E). Without greater specificity, these expenses appear to represent the necessary administrative costs of running a water conservancy district while Section 301(4)(b) requires steady effort to complete the conditional appropriation.
6. All told, Applicant has failed to show “an intention to use the water” identified in these conditional rights or any “concrete action amounting to diligent efforts to finalize the intended appropriation.” *Orchard Mesa Irr. Dist. v. City and County of Denver*, 511 P.2d 25, 28 (Colo. 1973). “A record which shows only a hope someday to use the water, but with admitted prior years of inaction, will not support” reasonable diligence. *Id.*

C. Third, Applicant has failed to demonstrate non-speculative intent for holding the conditional rights underlying the Coffintop Reservoir as required to appropriate water in Colorado. *See* Colo. Rev. Stat § 37-92-103(3)(a).

1. “The anti-speculation doctrine, which has existed in Colorado prior appropriation water law since its inception in Territorial and early-Statehood days, prevents unlawful enlargements, as well as curbs the appropriation of water not needed for actual beneficial use.” *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 661 (Colo. 2011), as modified on denial of reh'g (June 20, 2011).

To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would as a practical matter discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains.

Colo. River Water Conservancy Dist. v. Vidler Tunnel Water Co., 594 P.2d 566, 568 (Colo. 1979).

2. The Colorado Legislature codified the anti-speculation doctrine, which provides guidance on when an appropriation is speculative. Colo. Rev. Stat § 37-92-103(3)(a). Speculative intent exists when an “appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.” *Id.* at § 103(3)(a)(II).
3. The anti-speculation doctrine applies to reasonable diligence applications “because a conditional right, or some portion of that right, may become speculative over time.” *Mun. Subdistrict, N. Colorado Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 709 (Colo. 1999).
4. Since conditionally appropriating this water over five decades ago, Applicant has since publicly disclosed it no longer has a specific plan or intent to build Coffintop Reservoir or knows the specific amount of water needed, rendering these conditional rights speculative.
 - i. Since at least 2014, Applicant has publicly discussed that it was reassessing the “purpose and needs” of its “storage and reservoir projects,” and specifically considering “[t]ransferring [the] Coffintop right to another location.” ST. VRAIN & LEFT HAND WATER CONSERVANCY DIST., Board Retreat Draft Meeting Summary 4 (2014). Among other options, Applicant was considering “[c]reating the string of pearls” as an alternative. *Id.*

- ii. More recently in 2020, Applicant explained in its Stream Management Plan that “the reservoir’s final design and location are likely going to be vastly different from the original design and location.” ST. VRAIN & LEFT HAND WATER CONSERVANCY DIST., St. Vrain & Left Hand Stream Management Plan Phase 1 Final Report 57 (2020). Again Applicant discussed moving “the Coffintop Decrees to a series of alternative off-channel storage sites, which are sometimes referred to as a ‘string of pearls’,” which Applicant acknowledged “would require a water court process.” *Id.*
5. Because Applicant no longer intends to construct Coffintop Reservoir and use the conditional water rights as described in the application, these rights have become speculative. *See OXY*, 990 P.2d at 709.
6. Although there is an exception to the anti-speculation doctrine “where a government agency is seeking to appropriate water on behalf of end users with whom it has a governmental agency relationship,” this exception does not apply here for two reasons. *United Water & Sanitation Dist. v. Burlington Ditch Reservoir & Land Co.*, 476 P.3d 341, 349 (Colo. 2020).
 - i. First, Applicant has failed to demonstrate that Coffintop Reservoir will “serve end users with whom it has a government agency relationship, and thus [Applicant] does not qualify for the governmental planning exception to the anti-speculation doctrine.” *Id.* at 351.
 - ii. Second, Applicant has also failed to show the elements necessary to take advantage of this exception available to governmental water supply agencies. A governmental agency must establish a non-speculative intent prior to gaining the right to appropriate water in Colorado. *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 314 (Colo. 2007). To establish a non-speculative intent, “a governmental water supply agency has the burden” to satisfy all three elements of the governmental anti-speculation test. *Id.* at 309-10. To avoid running afoul of the anti-speculation doctrine, the governmental water supply agency must provide evidence regarding:
 - 1) what is a reasonable water supply planning period;
 - 2) what are the substantiated population projections based on a normal rate of growth for that period; and
 - 3) what amount of available unappropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply.

Id. Applicant has failed to demonstrate any element here. *See* 24CW3001, Application for Finding of Reasonable Diligence, ¶ 4. For example, evidence of the second element would require population projections that would include, but are not limited to, future water demand, expert testimony, planning documents and studies, historical growth patterns, economic development plans, contractual agreements, and policy. *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 40-41 (Colo. 1996). Applicant has not carried that burden here.

7. Applicant continues to pursue reasonable diligence for Coffintop Reservoir as an 84,000 acre-feet reservoir when there is not an established reasonable planning period, substantiated population projections, or current supply deficits that support this appropriation as non-speculative. *Pagosa*, 170 P.3d at 309-10.
 8. Moreover, Applicant's own admissions regarding the uncertainty that surrounds the final project design, purpose, and need of Coffintop Reservoir has rendered these rights speculative. *See OXY*, 990 P.2d at 709.
 9. Because Applicant failed to establish a non-speculative intent for the Coffintop Reservoir conditional rights, the Application for Finding of Reasonable Diligence should not be granted.
- D. Save the Worlds Rivers holds Applicant to strict proof on its claims of reasonable diligence for Coffintop Reservoir. For the reasons explained above, the Applicant has failed to demonstrate reasonable diligence. The Application for Finding of Reasonable Diligence should therefore not be granted.
- II. This Statement of Opposition is ongoing and shall apply to any subsequent amended applications that may be filed.

Respectfully submitted on March 27, 2024.

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Counsel for Opposer Save the Worlds Rivers

VERIFICATION

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed on the 25 day of March, 2024, at Fort Collins, CO 80501
(date) (month) (year) (city or other location, and state OR country)

Jennifer Sunderland
Printed Name

[Signature]
Signature

The person signing this verification is: Opposer Engineer Other (describe) _____

Verifications of other persons having knowledge of the facts may be attached to this Statement of Opposition.

NOTE TO SELF REPRESENTED PARTIES: Parties who are not represented by an attorney shall file with the water clerk a single copy of this document in original paper format. Parties who are not represented by an attorney shall also serve a copy of this document on all parties to this case. Such service may be accomplished by sending a copy by first class mail, postage prepaid, by personal service, or by other means authorized under Rule 5 of the Colorado Rules of Civil Procedure.

The foregoing instrument was acknowledged before me in the County of Lincoln, State of Colorado, this 25th day of March, 2024, by the person whose signature appears above.

My Commission Expires: 06.20.27



[Signature]
Notary Public/Deputy Clerk

The person signing this verification is: Save the Worlds Rivers Coordinator

CERTIFICATE OF SERVICE

I certify that on March 27, 2024, a true and correct copy of the forgoing Statement of Opposition was electronically filed with the clerk of the District Court, Water Division 1, and served on each of the following via electronic service:

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