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SUPREME COURT, COLORADO 2 E. 14th Ave., 4th floor, Denver, CO 80203 Appeal from the District Court for Water Division 5 109 8th St., Suite 104 Glenwood Springs, CO 81601	FILED IN THE SUPREME COURT JAN 06 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲ **COURT USE ONLY** ▲
JOYCE C. McNICHOLS, KENNETH J. McNICHOLS, MARGUERITE SERGENT, JOSEPH SERGENT, and GERALD LEWIS, Appellants, v. **ELK DANCE COLORADO, LLC., d/b/a SHADOW CREEK RANCH,** and **ALAN MARTELLARO, Division Engineer for Water Division 5, and HAROLD SIMPSON, Colorado State Engineer,** Appellees.	
ATTORNEY FOR APPELLANTS: Alison Maynard, #16561 P.O. Box 22135 Denver, CO 80222 tel: (303) 758-7038; fax: (303) 758-5001 e-mail: amaynard_1@juno.com	Case No.: 04 SA 328 District Court, Water Division 5 Case Nos. 00 CW 99 and 00 CW 302

APPELLANTS' REPLY BRIEF

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II. SUMMARY OF ARGUMENT

Neither the Court of Appeals nor the Summit County district court has decided the issue of whether there are jurisdictional defects in the judgment in 99 CV 277. In particular, the issue of the district court's jurisdiction to change the plan for augmentation decreed in 80 CW 504 was never presented to either court. Appellants are not collaterally estopped from raising these issues, therefore.

The four-part test for collateral estoppel is not met. There was no identity of issues: the issue of whether there are jurisdictional defects in the judgment has never been litigated. In addition, the "partition of water rights" issue decided by the Summit County District Court is not part of Homeowners' case. Also, the McNicholses and Sergents have had no "full and fair opportunity to litigate" any of the issues affecting their property rights. That they had notice of the trial does not substitute for service of process of a complaint which gave them notice that their water supply, and other rights granted to them under the PUD, would be impaired.

Under some circumstances, the failure to join an indispensable party may not render a judgment void, but that is not the case where the has manifestly abused its authority, as it did here. It interpreted the Spring Creek Ranch plan for augmentation in a fashion inconsistent with its plain terms, thus modifying it. In doing so it

infringed on the authority of *two* tribunals to which such a determination was exclusively committed, the water court and the board of county commissioners.

Elk Dance's claim for attorney fees must rejected, since it filed no appeal of the order denying those fees, and Homeowners' claims are not frivolous.

III. ARGUMENT

A. No Court Having Decided Whether the Court Had Jurisdiction to Enter the Judgment in 99 CV 277, Appellants are not Collaterally Estopped from Attacking It.

1. The Court of Appeals did not decide the jurisdictional issues raised in this appeal, nor were those issues before it.

In Sec. IV.B of its argument, Elk Dance argues that Homeowners' collateral attacks on the Summit Court judgment have already been "raised and rejected" by the Colorado Court of Appeals in case no. 03 CA 1718. This is incorrect.

Attached are pertinent pleadings from case 03 CA 1718. The notice of appeal, Exhibit A, shows that what was appealed was the Summit County district court's denial, in case 99 CV 277, of a Rule 60(b) motion to set aside the second "Rule 70" order it had entered in that case to execute on the judgment (a year after the judgment itself was issued). This Rule 70 order directed the clerk of the court to sign Homeowners' names to new covenants for their subdivision, since they had refused

to do so.[1] The basis for the Rule 60(b) motion was that the signature of Astrid Gifford on the resolution of the "board of directors" adopting the new covenants was a forgery. The court's denial of the 60(b) motion is all that was appealed in 03 CA 1718.

Once on appeal, the undersigned attempted to raise, in her brief, the jurisdictional issue she has now raised in this Court having to do with two of her clients' having defaulted early in the case, so that they could not be held liable for the impacts of the judgment on their property interests, which exceeded the relief prayed for in the complaint. This brief is attached as Exhibit B to Homeowners' "Reply on Motion to Strike, and for Extension" dated Dec. 12, 2005. However, the Court of Appeals did not decide the issue. It stated:

> [D]efendants have included in their briefs on appeal a challenge to the January 2002 judgment, again contending that the trial court lacked subject matter jurisdiction. ***We do not address the merits of this contention.***

Applicant's Exhibit A (attached to its answer brief), at 2. The Court then went on to opine, "Contrary to [Protesters'] contention, a judgment does *not* remain perpetually vulnerable to attack on jurisdictional grounds...[,]" reciting law to that effect. This

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[1]In fact, the judgment in 99 CV 277 says nothing about the defendants being required to sign off on new covenants, so the "Rule 70 motion to enforce the judgment" was not a Rule 70 motion. It was, nevertheless, granted.

opinion is dicta, since the Court *did not address the merits of the contention* that the district court lacked subject matter jurisdiction. Compare Bear Valley Drive-In Theatre Corp. v. Board of County Comm'rs, 173 Colo. 57, 476 P.2d 48 (1970) (court determined that the board's action was null and void by reason of improper notice and hearing; thus, its finding concerning conformity to the master plan was pure dicta).

In addition, only the one defect in subject matter jurisdiction was raised in the opening brief in 03 CA 1718–that of the invalidity of the judgment, as to the defaulting defendants--not the additional three defects which are before this Court. In particular, none of the issues pertaining to the district court's modifications of the plan for augmentation decreed in 80 CW 504 were raised in 03 CA 1718.

Finally, the ground the Court of Appeals gave, in 03 CA 1718, for not considering the jurisdictional issue in the brief was that the undersigned had earlier moved to amend the notice of appeal to add that issue, and the motion was denied. That explains its use of the word "again" in the blocked quotation, above: it said it was not its practice to "revisit earlier rulings of a motions division of this court." In fact, the motion, attached as Exhibit C, sought leave to amend in order to appeal the Rule 70 order directly, rather than simply appealing the denial of a Rule 60(b) motion to set the Rule 70 order aside, since the undersigned had realized that the district

court had never mailed the Rule 70 order to her clients and, thus, the time to appeal it had never begun to run. Thus, there had been *no* prior attempt to raise the jurisdictional issue. The undersigned filed a petition for rehearing on this basis, but that was denied.

In a nutshell, the Court of Appeals did not decide whether there were defects in subject matter jurisdiction in the Summit County district court's ruling in 99 CV 277, nor were any of those issues even before it.

2. No preclusive effect may be granted to dicta in an order of the Summit County district court dismissing contempt citations.

Elk Dance also argues, in part C of its brief, at 19, that Homeowners had a "full and fair opportunity to litigate the issue of subject matter jurisdiction" in the district court, attaching Exhibit B, which is an order of the Summit County district court entered in 99 CV 277 on March 18, 2004, two years after the judgment. This order is also immaterial. The district court was ruling on the undersigned's motion to discharge contempt citations against her clients for their refusal to sign new covenants and a stipulated ruling of the referee in 93 CW 213. The motion was predicated on two alternate grounds, first on the fact that two Rule 70 orders had entered, pursuant to which the clerk of court had already signed Homeowners' names

to the covenants and stipulation, so that the plaintiffs had their remedy and were not also entitled to contempt; and second on the judgment's not binding the McNicholses and Sergents, because of their early default. The court granted the motion to dismiss on the first basis. That it went on to express an opinion about the second basis was thus dicta, as the court itself acknowledged ("[A]lthough it may not be necessary to the ultimate conclusion which has been reached by the court on this issue ...[,]" Exhibit B to Elk Dance's answer brief, at 4. Elk Dance has left this line out of its quotation, see p. 25.) Compare Bear Valley, supra.

Elk Dance has not provided any authority for according preclusive effect to dicta in an order dismissing contempt citations long after the judgment entered. Obviously, there was no "full and fair opportunity to litigate" the issue, nor–because the order dismissed the contempt citations, the relief they requested–could Homeowners have appealed it.

3. That the McNicholses and Sergents were served with notice of the date of trial, the TMO, and even the judgment itself, does not mean they are bound by the judgment.

Elk Dance also argues, at 25 (following the district court order just discussed), that, because the McNicholses and Sergents were served with notice of the date of trial in 99 CV 277, as well as the trial management order and the judgment itself, they

had notice of the issues to be tried, as well as an opportunity to appeal, so that they are bound.

This proposition, too, is wrong: all rules and cases on the subject establish that, to be bound, they must have been served with a complaint which gave them notice of the nature and extent of relief which was sought against *them*. See authority discussed in the Opening Brief, at Sections A and B. In this case, both the complaint and amended complaint sought no relief other than a declaratory judgment that Swenson et al. were the "duly elected board of directors of the SCRA." Attached hereto as Exhibit D, in addition, are the answer and counterclaims made by Homeowners' co-defendants Lewis and Wade, referred to in the judgment in 99 CV 277, and the supposed source of the court's exercise of authority over the issues of ownership of the plan for augmentation, the 1989 Settlement Agreement, the validity of the bylaws, and other matters. The certificate of service shows that this pleading was never even mailed to the McNicholses and Sergents. Even if it had been, they still would not have been on notice that *they* would suffer liability. These were *counterclaims* pled against the *plaintiffs*.

Sunshine v. Robinson, 451 P.2d 757 (Colo. 1969), which held that a trial conducted in the absence of certain defendants who did not appear was a trial on the

merits of all claims presented, is inapposite, since the defendants there did not default. They were served with a complaint which gave them notice of the claims against them, and they filed an answer. The McNicholses and Sergents, in contrast, were served with a complaint which gave them no notice of the relief ultimately entered against them, and did not file an answer. The court *held* that they had defaulted. C.R.C.P. 54(c), treatises construing that rule, and this Court's abundant precedent firmly establish that they *cannot be held liable* for relief going further than that prayed for in the complaint with which they were served. See the opening brief at Sec. A.

B. The Test for Collateral Estoppel Is Not Met.

Elk Dance has argued at length that the four-part test for collateral estoppel is met, so that Homeowners are barred from challenging the jurisdiction of the Summit County District Court. The test is not met, because there is no "identity of issues," nor was there a "full and fair opportunity to litigate."

1. There was no identity of issues.

Elk Dance states:

> In order for an issue to be litigated, the issue must have been raised by the parties in the prior action. [Pomeroy v. Waitkus, 517 P.2d 396, 399 (1973).] No issue is legally raised between parties unless one of them, by appropriate

> pleading, asserts a claim or cause of action against the other. ... In addition to the issue having to be properly raised, the issue must be submitted for determination and then actually determined by the adjudicatory body.

Answer brief, at 13-14. Homeowners agree fully. The problem is that Elk Dance has misidentified the issue Homeowners seek to litigate, which is not the ownership of 80 CW 504, but whether the district court *had jurisdiction* to determine the ownership of 80 CW 504 (and, in doing so, to change the plain terms of the decree). That issue has never been decided by any court.

Even as to the ownership issue as described by Elk Dance, there is no identity of issues. The counterclaim of Lewis and Wade in 99 CV 277 asked that the water rights be partitioned among the lot owners. Elk Dance, several times in its brief, inaccurately says that Homeowners' petition to set aside the decrees in the water cases below are, similarly, "based on the assertion that Homeowners ... own the plan for augmentation and associated water rights," and that they claim these rights for themselves "individually"--in order to make it appear the claim is identical. It is not identical: Homeowners filed their petitions for the benefit of the Spring Creek Ranchers' Association, not themselves as individuals. They have continually asserted that the *SCRA* is the exclusive owner of the plan for augmentation and water rights, doing so both as members of the corporation, pursuant to the Uniform Nonprofit

Corporations Act, as well as lot owners in the PUD, pursuant to the Planned Unit Development Act of 1972. See their petitions to set aside the decrees in 00 CW 99 and 00 CW 302, Vol. I at 15, par. 8; Vol. VI, at 728, introductory paragraph and par. 7; and motion for summary judgment in 00 CW 99, Vol. II at 216 et seq.

For this reason, as well as that the jurisdictional defects of the district court were never litigated, there is no identity of issues, and no collateral estoppel.

2. There was no "full and fair opportunity to litigate."

Obviously, the McNicholses and Sergents had no "full and fair opportunity to litigate" the issue of ownership of the augmentation plan, since they defaulted long before that issue was injected into the case. They were entitled to rely on the complaint with which they were served, which gave no notice that they might be personally affected by these proceedings; and had no incentive to litigate vigorously (such as by challenging the jurisdiction of the court).

C. No "Implied Finding of Subject Matter Jurisdiction" Can Save a Void Judgment.

In response to Homeowners' argument that Elk Dance was required, as an indispensable party, to be joined in 99 CV 277, and that the judgment is void for its nonjoinder, Elk Dance argues, at Sec. C of its brief, that the district court's "implied

determination" that it had jurisdiction constitutes a bar to the present collateral attack. It relies on People in the Interest of E.E.A., 854 P.2d 1346 (Colo. App. 1992), where, although statute mandated joining the affected child in a paternity proceeding, the court proceeded without the child, and the resulting judgment was held not void, and not subject to collateral attack.

E.E.A. is distinguished on several bases. First, the court there determined that the child was not an indispensable party; here, the court in 99 CV 277 determined that Elk Dance *was* an indispensable party. Second, the finding by the court that it had jurisdiction, in E.E.A., was held not to be a manifest abuse of its authority, given that the statute had "inherently contradictory language"; the harmed party–the child–was not the person arguing that the judgment was invalid; and the father did not dispute that the juvenile court was the proper forum. Here, there is an unambiguous rule and case law requiring the joinder of indispensable parties; the harmed parties *are* the ones arguing that the judgment is invalid; and Homeowners *do* dispute that the district court was the proper forum.

As to what constitutes a "manifest abuse of authority," I Restatement (Second) of Judgments §12 (1980), which the Court of Appeals relied on, states:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe upon the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

All three apply here; as to (2) specifically, the authority of *two* different tribunals was infringed upon by the district court when it determined that 80 CW 504 was not the augmentation plan for Spring Creek Ranch: the water court, as well as the Board of County Commissioners for Summit County. See Sections D(2) and (3) of the Opening Brief, and Town of Breckenridge v. City and County of Denver, 620 P.2d 1048 (Colo. 1980) (complaint filed "in equity" with the water court, asking it to modify a decree without giving resume notice, dismissed as an unlawful attempt to change a water right).

Elk Dance does not appear to argue that the "implied finding of jurisdiction which is not directly appealed" bars the collateral attack under any circumstances other than the failure to join an indispensable party. Whether or not its argument is

so limited, a holding that it does would conflict with this Court's decisions in many other cases which have held that rulings made by district courts lacking either personal or subject matter jurisdiction, particularly in the area of water rights, *are* subject to collateral attack. Stonewall Estates v. C.F.&I Steel Corp., 197 Colo. 255, 592 P.2d 1318 (Colo. 1979), for example, involved a collateral attack on a water decree made in a diligence proceeding, and West End Irrig. Co. v. Garvey, 117 Colo. 109, 184 P.2d 476 (1947), on a decree entered 19 years earlier determining the priority of ditches which diverted in Utah. Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (Colo. 1963), overruled in part (on an unrelated issue) in Chatfield East Well Co. v. Chatfield East Property Owners Ass'n, 956 P.2d 1260 (1998), involved a collateral attack made in 1963 on water rights decrees entered for tributary wells in 1948. In all three cases (two of which were in personam suits for injunction), the earlier, unappealed court decisions were held void "for want of jurisdiction over the subject matter and for a lack of power to adjudicate such rights. ... A void judgment may be attacked directly or collaterally." Id. at 140 (citing seven cases). The earlier court's "implied determination" of its own jurisdiction was no barrier to these collateral attacks.

D. The Plan for Augmentation in 80 CW 504 Is a Covenant Running with the Land in Phase I.

Elk Dance says, given that the application for 80 CW 504 had not even been filed when the PUD for Spring Creek Ranch was approved, there is "no conceivable argument that a PUD could create a covenant that runs with the land for something that does not even exist when the alleged covenant was created." Answer Brief, at 21. The hornbook principle of "condition subsequent" is the complete answer to that question. The language in both the resolution approving the PUD and the PUD agreement, quoted at p. 6 of the opening brief, makes clear that the approval of the rezoning was conditioned on the later preparation of a "Water Augmentation Plan ... for each phase." Compare Purgatoire River Water Cons. Dist. v. Highland Irrig. Co., 574 P.2d 83 (Colo. 1978), holding that the decree at issue there was "a final decree at the time of its entry, to become operative upon the occurrence of a condition subsequent," 574 P.2d at 87, which was construction of a reservoir. Similarly, the PUD approval here was not operative, and construction of none of the features of the housing development could commence, until the condition subsequent of a decreed plan for augmentation was satisfied.

As to Elk Dance's contention that there is no evidence that the decree in 80 CW 504 was ever recorded in the Summit County property records, that issue was never raised in the trial court, so should not be considered by this Court. In any event, the PUD itself was recorded and 80 CW 504 was one of the appurtenances of the PUD. Moreover, this Court has held that a PUD is enforceable even if it is *not* recorded. South Creek Associates v. Bixby, 753 P.2d 785 (Colo. App. 1987), aff'd 781 P.2d 1027 (Colo. 1989). Elk Dance is estopped from arguing that 80 CW 504 is not the augmentation plan for Spring Creek Ranch, since its acquisition of the bulk of the original Spring Creek Ranch property is the very basis for its asserting to the water court and other officials that it is the "owner" of 80 CW 504.

That the Covenants (Vol. II at 301) state, at par. 10.1, that each parcel "shall be entitled to such water and water rights as set forth in the deed of conveyance of such parcel from the Developer and to no other water rights," is also immaterial. Par. 10.2, "Wells," provides that one well in the subdivision may serve several adjacent parcels, which will be operated by the Association. That is the situation which exists. In addition, the covenants say that, if there is any conflict between the covenants and the PUD Agreement, the PUD Agreement shall control. Vol. II at 313, par. 12. The PUD Agreement provides, at par. III.A, "Water System":

> Domestic water will be furnished either by individual wells, *by a central water system (including the adoption of a Plan for Augmentation as needed)*, or by the "Pure Cycle" system ... *The Developer agrees to develop said water systems in such manner so as to not materially interfere with or injure the water rights now owned by other water users in the vicinity of the Property ....*

Vol. II at 280.

Elk Dance's contention that "the majority of the PUD for Phase I was ... vacated in 1989 pursuant to the request of the Spring Creek Ranch Association" is also wrong. The BOCC resolution at Vol. II, p. 316, vacates only certain lot lines in the plat. It does not remove the PUD from Phase I.

There are several problems with Elk Dance's contention that the 1989 Settlement Agreement constitutes a conveyance to it of SCRA's water supply. First, that agreement is not a deed, so conveyed nothing, in and of itself. Sec. 38-30-102, C.R.S., requires water rights to be conveyed pursuant to the same formalities which attend the conveyance of any other real estate, which means by deed. At best, the 1989 Settlement Agreement is an agreement to convey. Because it *did* result in *some* deeds, which were executed immediately–the deed from Met Life to the Lanes of the Lane property, which included irrigation rights (but not 80 CW 504), and the deed from Met Life to Spring Creek Ranchers' Association of commonly owned property such as the well site, storage tank site, refuse site, and so forth–but not in a deed to

the plan for augmentation, the Settlement Agreement cannot reasonably now be interpreted as even constituting an *agreement* to convey 80 CW 504.

Homeowners' battle over 99 CV 277 springs in large part because they never had notice that the 1989 Settlement Agreement was being litigated in 99 CV 277–and, of course, it could *not* be litigated, since Elk Dance, as the successor in interest to the Lanes, was not a party. Homeowners, who did not receive copies of the 1989 Settlement Agreement when it was signed, believe that certain pages were substituted before it was mailed to them. They have never had the ability to contest the authenticity of this document which SCRA submitted to the court as "the 1989 Settlement Agreement" in 99 CV 277. Par. 16, in particular, is ambiguous, since, in subpart (a) it requires Lane to assign to the lot owners an interest in "any" plan for augmentation for the in-house use of up to 14 single family homes, which implies that a new plan would be sought for homes in excess of the seven already in Phase I; and in subpart (b) assigns the responsibility for prosecuting any amendments to "the plan for augmentation" to the members of Spring Creek Ranchers' Association. All which can be concluded from this paragraph is that Lane and Met Life both knew that Spring Creek Ranch was entitled to be augmented. To the extent it can be deemed consent by SCRA to give its water supply, including its right to be augmented under

its decreed plan for augmentation, to Elk Dance, however, par. 16 is against public policy, so unenforceable. It is also unenforceable because the board of county commissioners has never passed a resolution removing 80 CW 504 from the PUD for Phase I, as would be required.[2]

Elk Dance's characterization as "dicta" of the holding in Cache la Poudre Water Users Ass'n v. Glacier View Meadows, 550 P.2d 288 (Colo. 1976), that the plan for augmentation was a covenant running with the land for the benefit of the subdivision, is inaccurate, since it was critical to the outcome. Its argument that, even so, that case had "nothing to do with transferring title to the water rights to the homeowners' association or the lot owners," and that "it is this conveyance from the developer to the homeowners' association that conveys title, not recording of the augmentation plan," at 24, is opaque, and the undersigned does not understand it. Suffice it to say that the developer (Spring Creek Development Company) owned certain property and water rights; it obtained approval of a PUD for that property, Spring Creek Ranch, conditioned on preparation of a plan for augmentation; and it

[2]Again, as with the deeds, because two other BOCC resolutions resulted from the 1989 Settlement Agreement–a removal of the PUD from the Lane property, and a vacation of lot lines in Phase I–yet there was no BOCC resolution removing the plan for augmentation from Phase I, that Agreement cannot now be interpreted to have accomplished that removal.

obtained a decree for a plan for augmentation expressly for Spring Creek Ranch. Nothing more is necessary to show that Spring Creek Ranch is entitled to be augmented pursuant to this plan.

E. The Plan for Augmentation Does Not Cover the Area to be Augmented, and Is Not Appurtenant to Elk Dance's Property.

Elk Dance has told the Court that its property description is "consistent" with the property covered by the decree in 80 CW 504. Answer Brief, at 28. This is incorrect: Elk Dance's property includes sections 15 and 22 of T. 2 S, R. 80 W of the 6th P.M., Vol. II at 269, top paragraph, while the property covered by 80 CW 504 does *not* include these sections, which are two square miles. Vol. I at 122, par. 5. The district court's determination that Elk Dance owns 80 CW 504 has, therefore--in addition to the changes noted in the Opening Brief–enlarged the augmented area, without any opportunity for other water users to be heard on the matter. This is an impermissible change of water right, compare Town of Breckenridge, supra.

And the plan's is not "appurtenant" to Elk Dance's property; quite the opposite. There was no mention of the decree in 80 CW 504 in the deed to this property from Met Life to Lane in 1989. In fact, Met Life never owned the plan, since the decree in 80 CW 504 was not mentioned in the mortgage Met Life foreclosed on. Vol. III

at 380, 383[3].[4] At any rate, because the Lane property was downzoned upon Lane's acquisition of it, to preclude development, there would have been no need for a plan for augmentation for it, so it cannot be said that the plan was "appurtenant" to the property.

Moreover, in the deed from Met Life to Lane, there is an express exception from the warranty of title for:

> Terms, agreements, provisions, conditions and obligations as contained in Resolution No. 80-34 and Planned Unit Development for Agreement for Spring Creek Condominium [sic] Ranch by and between the Board of County Commissioners and Spring Creek Development Co., Ltd., recorded March 19, 1980, at Reception No. 204557.

Vol. III at 397. This is the Spring Creek Ranch PUD, and the plan for augmentation is one of the "terms, ... conditions, and obligations" of Resolution No. 80-34 and the PUD Agreement. Lane knew he did not have it, therefore. In addition, because the Smith Ditch rights were bound up in the plan for augmentation, operation of these

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[3]Herbert Buchwald, the mortgagor, was the original owner of the ranch and promoter of Spring Creek Development Co. He conveyed all his rights to the company by quitclaim in 1985. Vol. III at 385.

[4]That the Smith Ditch rights *were* mortgaged, when they were concurrently being offered as the augmenting water rights in the application before the water court in 80 CW 504, is certainly problematic, and that a fraud was committed is possibly one of the arguments Homeowners will use if they find themselves in a position to litigate the issue of ownership of the irrigation rights directly.

water rights in accordance with that plan is itself a "term, condition, and obligation" of the PUD, and also a covenant running with the land, regardless of to whom they were conveyed. Any interest Lane and his successors acquired in these water rights is subordinate to the augmentation needs of Spring Creek Ranch.

While the ability of Elk Dance to be augmented under this plan is a different issue from the ability of Spring Creek Ranch to be augmented under the plan, Elk Dance has no right, under any document or theory. Its predecessor Lane's intention was not to develop this property. Any rights Lane might have had to the plan were knowingly and voluntarily relinquished with the downzoning.

F. Elk Dance's Argument about Attorney Fees Must be Rejected.

Elk Dance filed for attorney fees after the water court dismissed Homeowners' petitions, and the court denied its claim in an order dated Feb. 8, 2005, over four months after this appeal was filed. Elk Dance neither cross-appealed that order, nor did it file a new appeal, and, thus, this Court lacks jurisdiction to review this putative error. E.g., Estep v. People, 753 P.2d 1241 (Colo. 1988); Baldwin v. Bright Mortgage Co., 757 P.2d 1072 (Colo. 1988); Dawes Agency v. American Property Mortgage, 804 P.2d 255 (Colo. App. 1990).

New Rule 39.5, C.A.R., does not seem to override the jurisdictional requirement of filing a notice of appeal as to the attorney fee order. If, however, it may be interpreted to permit an argument nevertheless, Homeowners respond that Elk Dance has made numerous misrepresentations. They have not "brought five separate court actions against Shadow Creek Ranch": they have not brought even *one*. The cases below (00 CW 99 and 00 CW 302) are applications to change water rights, and were filed *by Shadow Creek.* Homeowners sought the right to participate as objectors. As to 03-M-1183, while Homeowners filed this suit in federal court originally against a number of defendants, including Elk Dance, they voluntarily dismissed it before any defendants were served. As to 03 CV 126, and the appeals filed in 03 CA 1718 and 04 CA 709. Elk Dance was a party to *none* of these cases; 04 CA 709 was also voluntarily withdrawn.

Homeowners have an urgent, even desperate, need to have a court look at their claims that the judgment in 99 CV 277 is invalid, since that judgment is being used as the means and device by Swenson, et al., to strip them not only of their water rights, but of their homes. So far, they have been unsuccessful; but that does not mean their claims are frivolous. This Court, even if it rules against Homeowners on the merits, must agree with the water court that attorney fees are not justified.

IV. CONCLUSION

Elk Dance has provided no response to the argument that the Summit County district court improperly rezoned Spring Creek Ranch by determining that the plan for augmentation for Spring Creek Ranch did not, in fact, apply to Spring Creek Ranch, despite its being an express condition on which approval of the PUD was predicated; so that issue has been confessed.

And there is no preclusion. The jurisdictional issues Homeowners have raised have never been litigated, and are serious and substantial. Homeowners respectfully request this Court decide these issues, or remand so that they are afforded the opportunity to litigate them fully and fairly in the water court, as no other result comports with the ends of justice.

Dated this 4th day of January, 2006.

Alison Maynard

CERTIFICATE OF WORD COUNT

I, Alison Maynard, hereby certify, by my signature above, that the word processing system I used for this brief, WordPerfect 9, indicates that the number of words (exclusive of the table of contents, etc.) is 5461.

CERTIFICATE OF SERVICE

I, Alison Maynard, certify, by my signature above, that I have served the foregoing **"Appellants' Reply Brief"** on the other parties by depositing true copies in the United States mail, postage prepaid, this 4th day of January, 2006, addressed as follows:

Glenn Porzak, Esq.
Kristin Moseley, Esq.
Porzak, Browning & Bushong, LLP
929 Pearl St., Suite 300
Boulder, CO 80302

Jennifer Mele, Esq.
Colo. Dept. of Law
Natural Resources Section
1525 Sherman St., 5th floor
Denver, CO 80203

Ms. Halena Lewis
c/o Ms. Olga Pasionek
4317 Cherokee St.
Denver, CO 80216

COURT OF APPEALS. COLORADO
2 E. 14th Ave.. 3rd floor
Denver. CO 80203

Appeal from the District Court of Summit County
501 N. Park Ave.
Breckenridge. CO 80424
tel: (970) 453-2241

FILED SEP 02 2003
Clerk Court of Appeals

▲ COURT USE ONLY ▲

HALENA LEWIS. JOYCE C. McNICHOLS, KENNETH J. McNICHOLS. MARGUERITE SERGENT, individuals.

Appellants/Defendants.

v.

SPRING CREEK RANCHERS ASSOCIATION, INC., a Colorado nonprofit corporation, and CLAYTON BEATTIE. LISA LINDLEY. and ROBERT C. SWENSON. individuals.

Appellees/Plaintiffs.

ATTORNEY FOR APPELLANTS:
Alison Maynard. #16561
Attorney at Law
P.O. Box 22135
Denver. CO 80222
tel: (303) 758-7038: fax: (303) 758-1199
E-mail: AlisMynrd@aol.com

Case No.: ____________

Trial court case number:
99 CV 277, Division L

NOTICE OF APPEAL

EXHIBIT A

I. Trial court information

A. Case title in compliance with C.A.R. 12(a): set forth above.

B. District court from which the appeal is taken: Summit County District Court

C. Trial court judge: The Hon. David Lass

D. Parties initiating the appeal: Defendants Halena Lewis, Joyce McNichols, Ken McNichols, and Marguerite Sergent

E. Trial court case number: 99 CV 277

II. Nature of the case.

A. Nature of the Controversy.

Plaintiffs sued Defendants for a declaration that Plaintiffs were the duly elected board of the Spring Creek Ranch Homeowners' Association. A trial was held in November 2001, at which Defendants were unrepresented by counsel; and judgment entered for the Plaintiffs on January 28, 2002. Defendants did not appeal. Since the judgment, Plaintiffs have come to court on three separate occasions with Rule 70 motions asking the court to execute documents on behalf of the Defendants, who have refused to sign them. The second of those ("Plaintiffs' Second Motion for Execution of Documents") was granted by the Summit County District Court on January 23, 2003, and resulted in the purported adoption of new covenants to govern Spring Creek Ranch. On March 25, 2003, Defendants moved, pursuant to Rule 60(b), to set aside the January 23, 2003, order for fraud and fraud on the court. Their motion was denied on June 19, 2003, and the order denying that motion (Appendix A) is the subject of the present appeal. The final judgment in the case, from January 28, 2002, is attached for the Court's information as Appendix B.

B. Judgment or orders being appealed/basis of appellate court's jurisdiction.

The court's order of June 19, 2003, denying Defendants' Rule 60(b) motion to set aside the order of January 23, 2003.

Basis of appellate court's jurisdiction: C.A.R. 1(a); Sec. 13-4-102(1), C.R.S. (2002); Rule 60(b), C.R.C.P., and see Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

C. Whether the judgment resolved all issues pending before the trial court, including attorney fees and costs.

It resolved only the Rule 60(b) motion made by Defendants on March 25, 2003.

D. Whether the judgment was made final for purposes of appeal pursuant to Rule 54(b).

No. The order being appealed from denied a Rule 60(b) motion. Rule 54(b) is inapplicable.

E. Date the judgment or order was entered and date of mailing to counsel.

June 19, 2003, although the court's stamp says June 20, 2003. The order was served on the parties via Justicelink.

F. Whether any extensions were granted to file motions for post-trial relief.

No.

G. Date any motion for post-trial relief was filed.

Inapplicable.

H. Date any motion for post-trial relief was denied.

Inapplicable.

I. Whether there were any extensions granted to file any notice of appeal.

An extension has been sought contemporaneously herewith, with this Court.

III. Advisory listing of issues to be raised on appeal.

A. Whether the trial court abused its discretion in denying Defendants' Rule 60(b) motion to set aside the January 23, 2003, order.

IV. Necessity of a transcript.

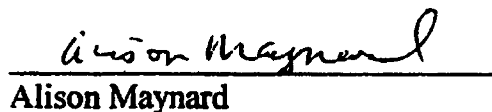
No transcript is available as far as the Rule 60(b) motion goes. A transcript from the November 2001 trial has already been prepared.

V. No preargument conference is requested.

VI. Information as to counsel for the parties:

Attorney for Appellants:	Alison Maynard, #16561 Attorney at Law P.O. Box 22135 Denver, CO 80222 Tel: (303) 758-7038; Fax: (303) 758-1199
Attorney for Appellees:	Victor Boog, Esq. Victor F. Boog and Associates, P.C. 143 Union Blvd., Suite 625 Lakewood, CO 80228 Tel: (303) 986-5769; fax: (303) 985-3297

There are two individuals, defendants below who have remained unrepresented by counsel, Richard and Jacquelyn Wade. They will be copied on this pleading.



Alison Maynard

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that I have served the foregoing "Notice of Appeal" on the other parties in the trial court by depositing it in the United States mail, postage prepaid, this 2nd day of September, 2003, addressed as follows:

Victor F. Boog, Esq.
Victor F. Boog & Associates, P.C.
143 Union Blvd., Suite 625
Lakewood, CO 80228-1827

Richard and Jacquelyn Wade
4569 W. Moncrieff Pl.
Denver, CO 80212

I further certify that I have also deposited a true copy in the mail addressed to the clerk of the district court of Summit County, at the address on the cover sheet. A bond will be filed with the trial court assuming the motion for extension to file the present appeal, filed contemporaneously herewith, is granted.

[signature]

COURT OF APPEALS, COLORADO 2 E. 14th Ave., 3rd floor Denver, CO 80203 Appeal from the District Court of Summit County 501 N. Park Ave. Breckenridge, CO 80424 tel: (970) 453-2241	▲ COURT USE ONLY ▲
SPRING CREEK RANCHERS ASSOCIATION, INC., a Colorado nonprofit corporation, and CLAYTON BEATTIE, LISA LINDLEY, and ROBERT C. SWENSON, individuals, Appellees/Plaintiffs, v. HALENA LEWIS, JOYCE C. McNICHOLS, KENNETH J. McNICHOLS, MARGUERITE SERGENT, individuals, Appellants/Defendants,	
ATTORNEY FOR APPELLANTS: Alison Maynard, #16561 Attorney at Law P.O. Box 22135 Denver, CO 80222 tel: (303) 758-7038; fax: (303) 758-1199 E-mail: AlisMynrd@aol.com	Case No.: 03 CA 1718 Trial court case number: 99 CV 277, Division L

MOTION TO AMEND NOTICE OF APPEAL, AND FOR EXTENSION

EXHIBIT C

Appellants/Defendants ("Homeowners"), through their attorney undersigned, respectfully ask for leave to amend their notice of appeal, as well as for an extension of 30 days from the date leave to amend is granted, to submit their opening brief. As grounds therefor, they state as follows:

1. Homeowners' opening brief is presently due January 21, 2004. No extensions have yet been requested.

2. The appeal presently asks only for review of an order of the trial court denying Homeowners' Rule 60(b) motion to set aside its order of January 23, 2003. By this motion, Homeowners seek leave to amend the notice of appeal, so that they may appeal the January 23, 2003, order directly.

3. The order of January 23, 2003, was entered approximately a year after the final judgment in this case (which was entered Jan. 28, 2002), and granted a motion putatively made pursuant to Rule 70 entitled "Plaintiffs' Second Motion for Execution of Documents by the Clerk of the Combined Courts of Summit County, Pursuant to Rule 70."

4. The order of January 23, 2003, was, in fact, never served on Homeowners by the court. The undersigned recited that fact to this Court in par. 2 of Homeowners' "Motion for Extension to File Notice of Appeal," filed Sept. 2, 2003 contemporaneously with the notice of appeal. The undersigned, on January 31, 2003, when she first entered an appearance in the trial court, sought an extension of time to respond to the Second Motion for Execution of Documents. Vol. IV, at 896-97. The court responded on February 6, 2003, by denying the extension, stating it had already granted the "Second Motion for Execution of Documents" on January 23, 2003. Vol. IV, at 898-

99. The order itself was neither mailed to Homeowners, nor served on them via Justicelink. They were required to go to the clerk and recorder for Summit County to find it, as recorded. See Vol. IV at 904, par. 1.

5. Appeal of the order of January 23, 2003, is thus timely, and should be permitted. C.A.R. 4(a) requires a notice of appeal to be filed with the appellate court within 45 days of the "date of the entry of the ... order from which the party appeals[.]" and further states:

> A judgment or order is entered within the meaning of this section (a) when it is entered pursuant to C.R.C.P. 58. *If notice of the entry of ... order is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the notice.*

(Emphasis added.) C.R.C.P. 58 states in pertinent part:

> Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment *shall be immediately mailed by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared.*

(Emphasis added.)

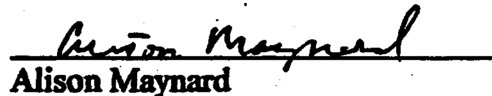
6. Because the January 23, 2003, order was never served on Homeowners, by mail or in any other fashion, and they had previously appeared in the action, the time for appeal has never commenced to run.

7. If the notice of appeal is permitted to be amended, the nature and scope of Homeowners' opening brief will be materially changed. Thus, they also seek an extension of time within which to file their brief, to that date which is 30 days from the date of the order permitting the amended notice of appeal to be filed.

8. Permitting amendment of the notice of appeal does not require any changes to the record. The record on appeal already includes all proceedings before the trial court.

WHEREFORE, cause being shown, the Court must permit the notice of appeal to be amended, so that Homeowners may appeal the January 23, 2003, order directly, instead of simply the order denying their Rule 60(b) motion to set aside the order of January 23, as it is in the interest of justice.

Dated this 5th day of January, 2004.



Alison Maynard

CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that I have served the foregoing "MOTION TO AMEND NOTICE OF APPEAL, AND FOR EXTENSION" on the other parties in the trial court by depositing it in the United States mail, postage prepaid, this 5th day of January, 2004, addressed as follows:

Victor F. Boog, Esq.
Victor F. Boog & Associates, P.C.
143 Union Blvd., Suite 625
Lakewood, CO 80228-1827

Richard and Jacquelyn Wade
4569 W. Moncrieff Pl.
Denver, CO 80212

I further certify that I have also deposited a true copy in the mail addressed to the clerk of the district court of Summit County, at the address on the cover sheet.

DEC. 30, 1999 12

DISTRICT COURT, COUNTY OF SUMMIT, STATE OF COLORADO

Case No. 99 CV 277, Division R

ANSWER AND COUNTERCLAIM OF THE DEFENDANT HALENA LEWIS

SPRING CREEK RANCHERS ASSOCIATION, INC.. A Colorado non-profit corporation, and CLAYTON BEATTIE, LISA LINDLEY, and ROBERT SWENSON, individually,

Plaintiff(s)

vs.

1stBANK OF SILVERTHORNE, a Colorado corporation, and HALENA LEWIS, JOYCE C. McNICHOLS, KENNETH J. McNICHOLS, JACQUELYN T. WADE, and RICHARD L. WADE, individually,

Defendant(s)

Comes now the Defendant by and through her attorney Fred M. Hamel and for her answer would state:

1. This Defendant admits the allegations of paragraphs 1, 2, 4, 6, 18, and 19 of Plaintiffs' Complaint.

2. This Defendant denies each and every allegation of paragraphs 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 17 of Plaintiffs' Complaint.

3. This Defendant admits that pursuant to the Articles of Incorporation the affairs of the Association shall be managed by a board of three persons, each of whom must be one of the seven tract owners, as alleged in paragraph 5 of Plaintiff's Complaint; but denies each and every other allegation of said paragraph.

4. This Defendants responds as herein indicated to the allegations of paragraph 16 of Plaintiffs' Complaint.

EXHIBIT D

AFFIRMATIVE DEFENSES

5. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

6. Plaintiffs have failed to join indispensable parties in this action, namely Marguerite Sergent and Joseph Sergent.

7. (a) Pursuant to paragraph 9 of a Settlement Agreement, a copy of which is attached hereto as Exhibit A, dated May 27th 1989 and recorded in the records of the Summit County Clerk and Recorder August 16, 1989 at Reception No. 375462 executed by all persons and entities then being a record owner of a fee or undivided interest in the affected property; the Declarations, and amendments thereto, referred to in the Articles of Incorporation of the Plaintiff Spring Creek which were attached to Plaintiff's Complaint as Exhibit A, were terminated

   (b) Article V of the Articles of Incorporation of the Plaintiff Spring Creek designates members of the Plaintiff Spring Creek as:

   "Every person or entity who is a record owner of a fee or undivided interest in any lot or dwelling unit within the property or any other property hereafter acquired, or annexed, which is the subject under the terms of the Declaration to assessment by the Association."

   (c) Because the Declarations have been terminated as aforesaid, subsequent to August 16, 1989, there have been no persons or entities who qualify as members of the Association pursuant to its Articles of Incorporation; or who have voting rights therein pursuant to Article VI of said Articles of Incorporation.

   (d) Any actions taken by purported members of the Association subsequent to August 16, 1989; including, but not limited to, adoption of by-laws or election of Directors is void and without effect; and the duly elected members of the Board of Directors of the Plaintiff Spring Creek have been, and continue to be those Directors who held office on August 16, 1989.

FIRST COUNTERCLAIM

8. This Defendant incorporates by reference herein the allegations of paragraph 7. hereof.

9. This Defendant seeks declaratory relief pursuant to 13-51-101 et. seq. CRS and Rule 57 C.R.C.P., requesting an interpretation of the rights and legal status and relationship of the

parties under the law and facts, ruling that:

(a) The Board of Directors of the Association is that Board whose members were in office on or before August 16, 1989.

(b) Any Directors purportedly elected after August 16, 1989 including the Plaintiffs Beattie, Lindley, and Swenson are not validly elected directors.

(c) Any actions taken by the invalidly elected Directors and/or purported members after August 16, 1989, including but not limited to the enactment of by-laws, are invalid.

(d) The Plaintiff Spring Creek has no authority to assess, exert architectural control, or assert any control over the real property owned by these Defendants.

SECOND COUNTERCLAIM

10. This Defendant incorporates by reference herein the allegations of paragraph 7. hereof.

11. The Settlement Agreement referred to in paragraph 7(a) herein was executed individually by the then lot owners in consideration of an agreement among the then lot owners on May 27, 1989 and the Plaintiff Spring Creek which provided that the property which was to be transferred to The Plaintiff Spring Creek (done by Special Warranty Deed date July 19, 1989) would be divided into seven parcels and the owners of each of the seven lots would then be deeded one of said seven parcels.

12. The Plaintiff Spring Creek has breached the agreement described in paragraph 11 herein.

13. This Defendant is entitled to specific performance of their agreement with the Plaintiff Spring Creek.

THIRD COUNTERCLAIM

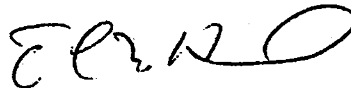
14. This Defendant incorporates by reference herein the allegations of paragraph 7. hereof.

15. By virtue of the provisions of paragraph 16 of the Settlement Agreement referred to in paragraph 7 herein, the current lot owners, including this Defendant, owns, as tenants in common, certain water rights described therein.

16. Pursuant to 38-28-101 et. seq. CRS, this defendant is entitled to a division and partition of said rights.

Wherefore this Defendant prays that Plaintiffs' Complaint be dismissed, for the relief requested in her counterclaims, and for such other relief as is appropriate.

Done this 3 9day of December 1999.



Fred M. Hamel, #3768
155 South Madison Street, Suite 206
Denver, CO 80209
(303) 322-9981
Attorney for the Defendant Halena Lewis

CERTIFICATE OF MAILING

The undersigned does hereby certify that on this 5 day of ~~December 1999,~~ Jan 2000 a true and correct copy of the foregoing pleading was mailed first class, proper postage prepaid, to:

Victor F. Boog
Attorney at Law
Victor F. Boog, PC
143 Union Boulevard, Suite 625
Lakewood, CO 80228
Attorney for Plaintiffs