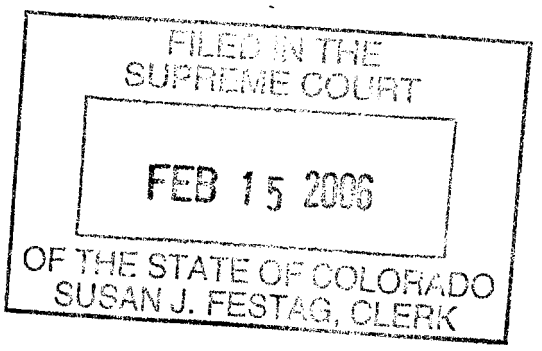
2-15-2006

Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist. (In re Application for Water Rights)

SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue, 4th Floor Denver, CO 80203	
Appeal from District Court, Water Division No. 4, Case No. 04CW120, Honorable J. Steven Patrick	
Concerning the Application for Water Rights of: NATURAL ENERGY RESOURCES COMPANY (NECO) in Gunnison County, Colorado	▲ COURT USE ONLY ▲ Case Number: 05SA267 Div.: Ctrm.:
NATURAL ENERGY RESOURCES COMPANY, Applicant-Appellant: UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT; CRYSTAL CREEK HOMEOWNERS ASSOCIATION; COCKRELL TRUSTEES; COLORADO RIVER WATER CONSERVATION DISTRICT; BOARD OF COUNTY COMMISSIONERS OF GUNNISON COUNTY; HIGH COUNTRY CITIZENS' ALLIANCE; CITY OF GUNNISON; COLORADO WATER CONSERVATION BOARD; FRANK KUGEL; TAYLOR PARK CATTLE ASSOCIATION; UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION; UNITED STATES OF AMERICA; TROUT UNLIMITED, Objectors-Appellees.	

Objectors-Appellees:	**Case Number: 05SA267**
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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

The National Energy Resources Company ("NECO") broadly states the issue on appeal as "Whether the Trial Court erred in granting the Opposer's [sic] Motion for Summary Judgment, dismissing the Application for Finding of Reasonable Diligence, and canceling and dismissing the conditional water right." NECO Opening Brief, at 5.

Objectors believe that the primary issue on appeal is more specifically stated as: Whether the water court's prior rulings that NECO's predecessor in interest cannot use Taylor Park Reservoir (upheld on appeal) are dispositive of NECO's inability to satisfy the applicable diligence standards.

II. STATEMENT OF THE CASE.

A. Statement of the Case and Disposition in the Trial Court.

This appeal involves NECO's challenge to the Division 4 Water Court's order granting Objectors' motion for summary judgment. The water court ruled that issue preclusion bars NECO from claiming any ability to use Taylor Park Reservoir as a way to meet the "can and will" test set forth in C.R.S. § 37-92-305(9)(b).

The conditional water storage right that is the subject of NECO's diligence application in Case No. 04CW120, Water Division 4, was originally decreed in Case No. 82CW340, Water Division 4. **Vol. I at 10.**[1] On March 9, 2005, the Objectors filed a motion for summary judgment on the basis that NECO cannot satisfy the "can and will" doctrine because the final and unappealable decisions of this Court and the Division 4 Water Court collaterally estop NECO from claiming that it is able to use

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[1]This Answer Brief uses the same general format for citation to the record as used in NECO's Opening Brief.

Taylor Park Reservoir as a forebay or afterbay for the conditional Union Park Reservoir storage right.[2] The Division 4 Water Judge (Judge J. Steven Patrick) entered an order, dated August 3, 2005, granting the Objectors' motion for summary judgment, denying NECO's diligence application, and thus cancelling and dismissing the conditional water storage right originally decreed in Case No. 82CW340 for failure to establish diligence. (Hereafter, "Summary Judgment Order"). **Vol. II at 308-316.**

On August 19, 2005, NECO filed a motion for reconsideration of the Summary Judgment Order. **Vol. II at 317.** Objectors filed a timely response to NECO's motion on September 6, 2005. **Vol. II at 329.** NECO's motion for reconsideration was denied by operation of law because the deadline for post-trial rulings pursuant to C.R.C.P. 59(j) expired before Judge Patrick ruled on the motion. However, Judge Patrick issued an Order on October 26, 2005, stating, as a point of clarification, that he would have denied NECO's motion for reconsideration on substantive grounds. **Vol. II at 377-78.**

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[2]Appellee, the Uncompahgre Valley Water Users Association is a party to this Answer Brief and supported, but did not join in, the Motion for Summary Judgment filed by the other Objectors.

B. Statement of Facts and Procedural History of Related Cases.

The history related to the conditional Union Park Reservoir storage right that is the subject of this case is complex. It involves the original application in Case No. 82CW340 for a hydro-power storage right, three subsequent diligence applications (including Case No. 04CW120 that is the subject of this appeal) and two virtually identical applications for a major transmountain diversion project. The three fundamental points of the factual history are that: (1) the conditional Union Park Reservoir cannot be developed as decreed without using the existing-Taylor Park Reservoir as a forebay/afterbay; (2) NECO and Arapahoe County are in privity; and (3) the water court and this Court have denied Arapahoe County's use of Taylor Park Reservoir for forebay/afterbay purposes associated with the Union Park Reservoir.

A brief outline of the history will help to clarify the pertinent undisputed facts, and to demonstrate why the water court correctly ruled that NECO is barred from asserting that it has any opportunity to use the existing Taylor Park Reservoir as part of the subject conditional water project (the Objectors also attach a schematic summary of the case history as Appendix 1 to this Brief):

1. *Case No. 82CW340, Water Division 4 - NECO's Union Park Reservoir Hydro-power Project.* A decree was entered in this case on June 14, 1984, awarding a conditional water storage right to NECO for the Union Park Reservoir in the amount of 325,000 acre feet with the right to refill and reuse for a pump-back storage hydroelectric project. **CD, Exhibit A.** The water right decreed in Case No. 82CW340 is the subject of NECO's diligence application in Case No. 04CW120, which is the subject of this appeal. (The conditional Union Park Reservoir storage right originally decreed in Case No. 82CW340 is referred to occasionally in this brief as the "Conditional Storage Right.").

   a. The sources of water identified in the decree in Case No. 82CW340 are (1) Lottis Creek, with an appropriation date of September 20, 1982, and (2) the Taylor River at Taylor Park Reservoir, with an appropriation date of October 15, 1982. **CD, Exhibit A at 2.**

   b. NECO's description of the use of Union Park Reservoir in its Statement of the Case is not correct because NECO fails to accurately quote the portion of the decree specifying the integration

of the existing Taylor Park Reservoir with the conditional Union Park Reservoir. The decreed use of Union Park Reservoir is accurately stated as follows:

> The use of the water will be for the generation of hydro-electric energy and power generation in general. Water will be released from Union Park Reservoir *through the primary pumping-generating facilities and into Taylor Park Reservoir* in generating mode where said water shall again be diverted by the same facilities in pumping mode into Union Park Reservoir for reuse as part of the hydro-electric power project.

CD, Exhibit A at 3, para. VII. (Emphasis added to show language excluded from NECO's description of the use of the conditional water right. *See* NECO Opening Brief at 6).

The Conditional Storage Right therefore contemplates circulating the water between the higher Union Park Reservoir and the lower Taylor Park Reservoir. This "pump back" project requires the use of Taylor Park Reservoir as the location of a pumping plant, a pumping forebay and hydropower release afterbay. **CD, Exhibit A at 3, 7.**

c. NECO does not currently have, and never has had, a right to use Taylor Park Reservoir for any purpose. The proposed forebay/afterbay purposes of the Taylor Park Reservoir are a critical component of the Conditional Storage Right. **CD, Exhibit A at 7.**

d. The Conditional Storage Right decreed in Case No. 82CW340 was assigned by NECO to Arapahoe County in 1988, and was subsequently assigned back to NECO in 2001. *Bd. of County Comm'rs of Arapahoe County v. United States*, 891 P.2d 952, 957 (Colo. 1995) (hereafter "*Arapahoe I*").

2. *Case No. 88CW20, Water Division 4 - First Diligence Decree.* A decree was entered in this case on November 30, 1990, granting Arapahoe County (NECO's successor in interest) a finding of reasonable diligence in the development of the Conditional Storage Right. **Vol. I at 83-84.**

3. *Case No. 96CW251, Water Division 4 - Second Diligence Decree.* A decree was entered in this case on July 21, 1998, granting Arapahoe County a subsequent finding of reasonable diligence in the development of the Conditional Storage Right. **CD, Exhibit E.** In Case No.

96CW251, the water court made express findings regarding the interrelationship between the Conditional Storage Right and Arapahoe County's proposed transmountain diversion project claimed in Case No. 88CW178. **CD, Exhibit E at 3-6**. (Arapahoe's application is discussed in paragraphs III.B.4 and 5, below).

4. *Case No. 86CW226, Water Division 4 - NECO's Transmountain Diversion Project*. This case involved an application filed by NECO for a large transmountain diversion project. After filing the application, NECO assigned this water right to Arapahoe County. The application and decree in Case No. 86CW226 expressly incorporated the Conditional Storage Right decreed in Case No. 82CW340. **Vol. II at 345-46**. "Union Park Project is an integrated hydroelectric and water project which was begun in 1982 and was partially decreed in 82CW340 . . . ." **Vol. II at 349, para.5.B;** "the 900,000 acre feet capacity contemplated by the application in 86CW226 included the 325,000 acre feet capacity in 82CW340." **Vol. II at 357, para. 6.a.**

The majority of the application in Case No. 86CW226 was dismissed as speculative by the Division 4 Water Court on December 29, 1988. The water court's ruling was upheld on appeal by this Court in *Arapahoe I*, 891 P.2d at 973.

5. *Case No. 88CW178, Water Division 4 - Arapahoe County's Transmountain Diversion Project.* This case involved an application filed by Arapahoe County in an attempt to preserve the transmountain water right claims sought in Case No. 86CW226 to counter the argument that NECO's claims were speculative. *Arapahoe I* at 957; and **Vol. II at 360 para. 5.** Except for the appropriation date, the claims in Arapahoe's application in Case No. 88CW178 are identical to the claims made by NECO in Case No. 86CW226. *Board of County Commissioners of Arapahoe County v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325, 329-30 (Colo. 2000) (hereinafter *"Arapahoe II"*). The water rights claimed in Case No. 88CW178 by Arapahoe County therefore necessarily included and relied upon the conditional Union Park Reservoir storage right decreed in Case No. 82CW340. **Vol. II at**

360, para. 5.a.; and Vol. II at 372, para. 7.c.

The application in Case No. 88CW178 was dismissed with prejudice in the Division 4 Water Court's April 6, 1998, decree. The water court's 1998 decree was upheld on appeal by this Court in *Arapahoe II.*

6. *Prior Rulings of the Division 4 Water Court and the Colorado Supreme Court regarding the use of Taylor Park Reservoir.*

a. In an Order dated September 14, 1990, the Division 4 Water Court held that Arapahoe County's proposed use of Taylor Park Reservoir as a pumping forebay would "necessarily constitute a major operational change." **CD, Exhibit C at 14.**

b. On October 21, 1991, the water court dismissed, *inter alia*, Arapahoe County's claim regarding the use of Taylor Park Reservoir, stating, "the Court orders that the Applicant cannot rely on the use of Taylor Park Reservoir as a forebay or an afterbay, nor as a source of water for purposes of showing availability of water in these cases." **CD, Exhibit B at 78.** The court based the dismissal, in part, on a determination that Arapahoe County's use of Taylor

Park Reservoir as a forebay/afterbay would be "a violation of the Water Supply Act of 1954, 43 U.S.C. §390b which provides that a major operational change in a federal project requires congressional approval." **CD, Exhibit B at 57, para. 153.a.** A major operational change would exist because the forebay/afterbay uses contemplated would alter the water level and the rate of releases at Taylor Park Reservoir. **CD, Exhibit B at 57, para. 153.c.** The water court also based the dismissal of Arapahoe County's claim to use Taylor Park Reservoir as a pumping forebay on 43 C.F.R. § 429.6, which precludes the Bureau of Reclamation from issuing a right-of-use in a project facility (i.e. Taylor Park Reservoir) "when the proposed right-of-use will interfere with the functions of Reclamation or its ability to maintain its facilities." **CD, Exhibit B at 66, para. 176; and 67, para. 179.**

c. On remand following the Colorado Supreme Court's ruling in *Arapahoe I*, Arapahoe County sought once again to litigate the question of its ability to use Taylor Park Reservoir as a forebay and

afterbay. In its Order Regarding Pending Motions dated February 14, 1996, the Division 4 Water Court held that:

> [T]he Applicant's proposed pumping station *is inimical to the use of the Taylor Park Reservoir* by the United States and by the Uncompahgre Valley Water Users Association. The Applicant's use of Taylor Park Reservoir would clearly be a *major operational change* and would obviously be *disruptive and invasive* of the owner's own rights and uses for the Reservoir. The purposes for which Taylor Park Reservoir was built and is used are *not at all compatible* with the Applicant's use of the same.
> **Vol. II at 375, para. 41.** (Emphasis added).

d. Finally, in *Arapahoe II*, this Court upheld the water court's findings regarding Arapahoe's use of Taylor Park Reservoir. See *Arapahoe II*, 14 P.3d at 344 ("we uphold the water court's decision that Arapahoe did not meet the 'can and will' requirements [regarding the proposed use of Taylor Park Reservoir]").

III. SUMMARY OF THE ARGUMENT.

NECO's conditional storage right for the Union Park Reservoir "pump-back" hydro-electric project cannot be developed without using the existing federally-owned Taylor Park Reservoir as a forebay/afterbay. NECO cannot meet the statutory "can and will" test that is applicable to all diligence proceedings because NECO is

barred by the doctrine of issue preclusion from using Taylor Park Reservoir for the claimed purposes. Even if NECO was not barred by issue preclusion, its reliance on C.R.S. § 37-92-301(4)(c) is misplaced and is directly contrary to this Court's precedent regarding the "can and will" doctrine.

NECO asserts a mishmash of challenges to the water court's order granting the Objectors' Motion for Summary Judgment but none of NECO's arguments are valid: (1) NECO has substantially confused the doctrines of issue preclusion and claim preclusion; (2) NECO has asserted facts in rambling affidavits that have no bearing on the fundamental facts that are material to the Objectors' motion for summary judgment; and (3) the statute of limitations for correcting substantive errors in decrees does not apply to the Objectors' motion because the Objectors have not collaterally attacked any decree; instead, they argued (and the water court agreed) that NECO's conditional water right should be cancelled because NECO cannot prove reasonable diligence.

The Objectors have demonstrated that the elements of issue preclusion are present in this case. There is no genuine issue of material fact and the water court was correct in ruling that Objectors are entitled to judgment as a matter of law. The

Objectors are entitled to recover their reasonable attorney fees incurred in defending NECO's frivolous and groundless arguments in this appeal.

IV. ARGUMENT.

A. NECO fails the statutory "can and will" test because issue preclusion bars NECO from asserting that it is entitled to use Taylor Park Reservoir.

The Division 4 Water Court correctly ruled that NECO cannot satisfy the "can and will" test because the final, unappealable rulings of the water court and this Court confirm that Taylor Park Reservoir cannot be used for the forebay/afterbay purposes claimed by NECO. Summary Judgment Order at 6.

1. Explanation of the "can and will" test.

An applicant in a diligence proceeding must demonstrate "the steady application of effort to complete the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances." C.R.S. § 37-92-301(4)(b). In determining whether an applicant has satisfied this requirement, the water court considers factors including, but not limited to, the feasibility of the project. *See Dallas Creek Water Co. v. Huey,* 933 P. 2d 27, 36 (Colo. 1997). In addition, the applicant in a diligence proceeding must demonstrate that the conditional water right

sought to be maintained "can and will" be diverted and beneficially used upon completion of the project. *Municipal Subdistrict, Northern Colorado Water Conservancy District v. OXY USA, Inc.*, 990 P.2d 701, 707 (Colo. 1999) ("this court has plainly held that the 'can and will' requirement of section 37-92-305(9)(b) should be read into a hexennial diligence application proceeding"). The "can and will" statute provides:

> [N]o claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

C.R.S. § 37-92-305(9)(b).

Satisfaction of the "can and will" test is necessary in order to demonstrate "that the decreed conditional appropriation is being pursued in a manner which affirms that capture, possession, control, and beneficial use of water can and will occur in the state, thereby justifying continued reservation of the antedated priority pending perfection of a water right." *Dallas Creek*, 933 P.2d at 37 (footnote omitted). The

"can and will" test requires that an applicant establish a "substantial probability that [the] intended appropriation can and will reach fruition . . . ." *OXY USA*, 990 P.2d at 706.

2. Issue preclusion bars NECO from asserting that it is entitled to use Taylor Park Reservoir.

The water court correctly held that issue preclusion bars NECO from claiming any potential to use Taylor Park Reservoir. The Decree in Case No. 82CW340 expressly identifies Taylor Park Reservoir as an integral component of the operation of NECO's Union Park Reservoir pump-back hydropower project. **CD, Exhibit A at 3**. NECO's inability to utilize Taylor Park Reservoir therefore was a critical element in the water court's determination that NECO cannot and will not be able to bring the conditional Union Park Reservoir project to fruition.

The doctrine of issue preclusion (formerly known as "collateral estoppel") mandates that the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 82 (Colo. 1996). Issue preclusion bars re-litigation of an issue if: (1) the issue is identical to an issue actually and necessarily adjudicated

in a prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity with a party in the proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *Id.*

All four of these conditions are satisfied in the present case. First, the issues regarding the use of Taylor Park Reservoir are identical because the conditional storage right for the Union Park Reservoir hydro-power project decreed in Case No. 82CW340 was incorporated into the applications in Case Nos. 86CW226 and 88CW178. **Vol. II at 349, para. 5.B.; and 357, para. 6.A.** NECO and Arapahoe both asserted in the water court that the conditional Union Park Reservoir storage right decreed in Case No. 82CW340 was incorporated into the claims made in Case Nos. 86CW226 and 88CW178. **Vol. II at 345, para. 2.D.** Perhaps more importantly, the water court entered a finding of reasonable diligence in Case No. 96CW251 for the water rights that are the subject of this appeal based on the integrated nature of the conditional Union Park Reservoir right decreed in Case No. 82CW340 and the claimed conditional storage right for Union Park Reservoir in Case No. 88CW178. In its July 21, 1998 decree in Case No. 96CW251, the water court found that "there

are common features between the projects which are the subject of this case and Case 88CW178:

a. Both cases seek to utilize the same reservoir and the same pumpback system to accomplish the purpose of hydroelectric power generation which is common to both cases.

b. Arapahoe's expert, Alan Leak, testified that when developed the facilities for both 82CW340 and 88CW178 will be integrated, both physically and operationally.

c. In its application in 88CW178, Arapahoe gave notice that the features of both projects were part of "a unified, integrated and interdependent facility"."

CD, Exhibit E at 5, para. 7(c).

The issue in this case is whether NECO can use Taylor Park Reservoir as a forebay/afterbay. The Division 4 Water Court dismissed the applications in Case Nos. 86CW226 and 88CW178 due, in part, to the applicants' inability to use Taylor Park Reservoir as a forebay/afterbay. Those cases involved a proposed transmountain diversion project (plus an in-basin hydro-electric project), but the proposed forebay/afterbay use of Taylor Park Reservoir in both scenarios is functionally the same. **CD, Exhibit B at 41, para. 94; and Exhibit B at 3, para. 6.a.** Therefore, this issue was actually and necessarily adjudicated in Case Nos. 86CW226 and 88CW178. **CD, Exhibit B at 78, para. VII.B.3.**

The second element of issue preclusion – privity – exists here because NECO initiated the application in Case No. 86CW226 before assigning the case to Arapahoe County and is here the successor to Arapahoe County in Case No. 88CW178. *See Green v. Chaffee Ditch Co.,* 150 Colo. 91, 98, 371 P.2d 775, 779 (1962) (successors are in privity for collateral estoppel/issue preclusion purposes); *see also Argus Real Estate, Inc. v. E-470 Public Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005) (successors in interest are in privity for claim preclusion purposes); *accord, Cruz v. Benine*, 984 P.2d 1173, 1176-77 (Colo. 1999).

The third element was satisfied because there was a final unappealable decision on the merits regarding the use of Taylor Park Reservoir as a forebay/afterbay. **CD, Exhibit B at 78, affirmed by *Arapahoe II*, 14 P.3d at 346.**

Finally, NECO's predecessor in interest had a full and fair opportunity to litigate (and in fact did litigate) issues concerning the use of Taylor Park Reservoir in Case Nos. 86CW226 and 88CW178, and in the appeals before this Court in *Arapahoe I* and *Arapahoe II.*

The water court found in this case that all four elements of issue preclusion exist and, therefore, correctly held that NECO is barred from asserting that it can use

Taylor Park Reservoir as a forebay/afterbay to develop the conditional Union Park Reservoir right.

NECO is bound by the prior determinations of this Court and the Division 4 Water Court that Taylor Park Reservoir cannot be used for the claimed forebay/afterbay purposes. The Division 4 Water Court therefore correctly applied the "can and will" standard articulated in *OXY* and *Dallas Creek*, and held that NECO's inability to demonstrate the feasibility of its project requires the dismissal of NECO's diligence application. **Vol. II at 312-314.**

B. The diligence "leniency" provisions of C.R.S. § 37-92-301(4)(c) do not override NECO's inability to satisfy the "can and will" doctrine.

NECO cites C.R.S. § 37-92-301(4)(c) for the premise that the lack of a governmental permit is not a basis for denial of diligence and that a party's present and prospective ability to access property are not conclusive in determining whether the "can and will" test has been met. NECO Opening Brief at 9. C.R.S. § 37-92-301(4)(c) states in part that the "fact that one or more governmental permits or approvals have not been obtained shall [not] be considered sufficient to deny a diligence application." This section of the Water Rights Determination and Administration Act recognizes that it takes time to develop a conditional water right,

and that state or federal permits and approvals often are necessary. NECO's argument regarding Section 301(4)(c) is barred by issue preclusion for the reasons demonstrated in paragraph IV.A.2, above.

Even if it was not barred, NECO's argument regarding Section 301(4)(c) and *City of Black Hawk v. City of Central*, 97 P.3d 951 (Colo. 2004) is not valid. NECO cannot obtain approval to use Taylor Park Reservoir by merely applying for a governmental permit for a right-of-use. Instead, according to the water court's prior decisions, NECO will have to seek approval of the United States Congress if it wishes to use Taylor Park Reservoir for the claimed purposes. **CD, Exhibit B at 56-58**, *See also* 43 U.S.C. § 390b(d). NECO recognizes this predicament in its Opening Brief, but claims it is entitled to benefit from the leniency provisions of Section 301(c) because (1) 43 U.S.C. § 390b(d) does not prohibit major changes to federal reservoirs – it only makes such changes subject to approval of the United States Congress, (2) there has been no showing that NECO cannot obtain Congressional approval, and (3) there has been no showing that NECO cannot obtain the approval of the United States Bureau of Reclamation ("Reclamation") for a right-of-use of Taylor Park Reservoir pursuant to 43 C.F.R. § 429.6, or failing that, obtain an Act of Congress requiring

Reclamation to issue a right-of-use to NECO. NECO Opening Brief at 10-11.

NECO claims that its situation is similar to *Black Hawk* because, in that case, the applicant was not foreclosed from securing a right to use the disputed land for its conditional water right. NECO's analogy to *Black Hawk* is misplaced, does not comport with reality, and disregards the Colorado General Assembly's primary intent in adopting the "can and will" doctrine. In *Black Hawk*, the applicant still had realistic options for obtaining the land it needed for the claimed reservoir expansion. As noted by Justice Bender, the resolution passed by Central City regarding access to water facilities that was at issue in *Black Hawk* was non-binding, was general in nature (i.e., it did not expressly apply to Black Hawk), and was passed only nine days prior to trial (perhaps suggesting that the resolution was more of a litigation tactic than a permanent policy decision by Central City). *Black Hawk,* 97 P.3d at 958. The situation in *Black Hawk* did not involve a final denial of access to state or federal property. *Id.* In light of those circumstances, this Court noted that unresolved "contingencies" do not necessarily mean that an applicant cannot meet the "can and will" test. *Id.* at 957-58.

Here, there are no unresolved contingencies. The final and unappealable law of this case is that (1) Taylor Park Reservoir cannot be used for the forebay/afterbay purposes sought by NECO because doing so would constitute a major operational change (in violation of 43 U.S.C. § 390b) and would "interfere with the functions of Reclamation" in operating the reservoir (in violation of 43 C.F.R. § 429.6); (2) NECO's proposed uses of Taylor Park Reservoir are "inimical" to the use of the reservoir by its owners and users; and (3) the "purposes for which Taylor Park Reservoir was built and is used are not at all compatible" with NECO's proposed use. **CD, Exhibit B at 57, para. 153.a; Exhibit B at 66, para. 176; Exhibit B at 78; and Vol. II at 375.**

The instant case is more similar to *FWS Land and Cattle Co. v. Division of Wildlife*, 795 P.2d 837 (Colo. 1990) and *West Elk Ranch, L.L.C. v. United States*, 65 P.3d 479 (Colo. 2002) than the *Black Hawk* case. In *FWS,* the application was denied for failure to satisfy the "can and will" test because the applicant did not have the necessary permission from the Colorado Division of Wildlife to use State lands for its water storage right. The applicant argued on appeal that disputed facts existed regarding its right to use the State lands, but this Court upheld the water court, ruling

that the inability of *FWS* to obtain permission was final. *FWS,* 795 P.2d at 840-41.

In *West Elk*, this Court upheld the water court's determination that the applicant could not meet the "can and will" test because the Forest Service had issued a final decision denying the applicant's request for a special use permit necessary to complete the appropriation of West Elk's conditional water right. *West Elk*, 65 P.3d at 483. Like *FWS* and *West Elk*, the water court's prior rulings that NECO cannot use Taylor Park Reservoir as a pumping forebay and power generation afterbay are final determinations, and are dispositive of NECO's inability to satisfy the applicable "can and will" doctrine. When a final, unappealable determination has been made on an issue critical to the development of the claimed water right, that determination is conclusive of the applicant's inability to meet the "can and will" doctrine. *Black Hawk*, 97 P.3d at 957-958.

NECO claims that there *could* be a future Act of Congress someday that would authorize NECO to modify the use of Taylor Park Reservoir in a manner "inimical" to its existing authorized purposes. NECO Opening Brief at 10. NECO's analogy of a possible future Act of Congress to the non-binding city council resolution at issue in *Black Hawk* turns the "can and will" doctrine on its head. The "can and will"

doctrine is intended to weed-out conditional water rights for questionable water projects that have no likelihood of completion, so that the State's water resources can be put to beneficial use by other, more feasible, water projects. *See Arapahoe I*, 891 P.2d at 960 (purpose of the "can and will" doctrine is to prevent speculation by denying conditional water rights that have no substantial probability of maturing into completed appropriations).

Under NECO's view of the world, no conditional water right would ever be cancelled for failure to meet the "can and will" standard, because possible future legislative action might authorize an applicant to jump a previously insurmountable barrier to the development of its conditional water right. Taken to its logical conclusion, NECO's argument means that the applicant in *FWS* could have overcome the finality of the Colorado Division of Wildlife's decision not to allow the use of its land simply by asserting that the Colorado Legislature might someday enact a law requiring the Division of Wildlife to authorize the use of the disputed land. Similarly, the applicant in *West Elk* could have defeated the application of the "can and will" doctrine simply by asserting that the United States Congress might eventually pass a law requiring that the Forest Service provide West Elk with its desired right of

access. Such an absurd result would defeat the "can and will" doctrine's primary purpose of weeding-out questionable water projects.

C. NECO is judicially estopped from arguing that Case Nos. 82CW340 and 88CW178 are not related.

NECO argues that the conditional water right adjudicated in Case No. 82CW340 is different than the water right sought by Arapahoe County in Case No. 88CW178 and that the water court's decision in Case No. 88CW178 therefore should not affect the outcome of NECO's application in Case No. 04CW120. NECO Opening Brief at 19. However, both NECO and its predecessor in interest previously argued that the claims in Case No. 82CW340 were "fully integrated" into the claims in Case Nos. 86CW226 and 88CW178, and that the facilities for Case No. 88CW178 include "all facilities subject to [Case No. 82CW340]." **Vol. II at 364; and CD, Exhibit E at 5, para. 7(c).**

The doctrine of judicial estoppel applies in Colorado. *Estate of Burford v. Burford*, 935 P.2d 943, 947 (Colo. 1997). The doctrine requires "parties to maintain consistency of positions in the proceedings, assuring promotion of truth and preventing the parties from deliberately shifting positions to suit the exigencies of the moment." *Id.* The United States Supreme Court has provided additional guidance

on judicial estoppel:

> Several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be 'clearly inconsistent' with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled . . . .' A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750 (2001).

In Case No. 96CW251, NECO's predecessor in interest claimed diligence on the water right decreed in Case No. 82CW340 based on its prosecution of the "applications in Case Nos. 86CW226 and 88CW178 . . . for water rights for multiple uses of the water diverted and stored in the Union Park Reservoir Project, which features are fully integrated with the conditional water rights in this Application" (i.e. the water right originally decreed in Case No. 82CW340.). **Vol. II at 364.**

Applying the Supreme Court's first factor, NECO's position in this case is "clearly inconsistent" with positions that both NECO and Arapahoe previously have taken. Second, Arapahoe was successful in its diligence case in persuading the Division 4 Water Court to accept the position that the water rights were fully

integrated. *See* **CD, Exhibit E at 5, para. 7(c).** (See also para. IV.A.2of this Brief, above). NECO cannot now claim that the water rights are different simply because it is no longer convenient to NECO's argument. Third, NECO should not be allowed to obtain an unfair advantage by changing its position to avoid dismissal of its conditional water right, or otherwise "deliberately shift positions to suit the exigencies of the moment." *Estate of Burford*, 935 P.2d at 947. Judicial estoppel therefore applies to bar NECO from arguing that the water court's prior rulings regarding the inability to use Taylor Park Reservoir do not apply with equal force to the conditional Union Park Reservoir right decreed in Case No. 82CW340.

D. NECO contorts the doctrines of res judicata and collateral estoppel.

1. NECO misinterprets the water court's October 21, 1991 ruling regarding res judicata in Case Nos. 86CW226 and 88CW178.

NECO appears to claim that collateral estoppel (issue preclusion) does not apply because Arapahoe was prevented from invoking res judicata (claim preclusion) to establish the availability of water within Colorado's priority system for the Willow Creek Component of the proposed transmountain diversion project. NECO Opening Brief at 24. NECO has confused the doctrines of res judicata and collateral estoppel. Arapahoe tried to use res judicata "offensively" in Case Nos. 86CW226 and

88CW178 by claiming that the decree in Case No. 82CW340 was res judicata as to water availability for the Willow Creek Component of the transmountain diversion project. **CD, Exhibit B at 53, para. 138.** The water court ruled against Arapahoe and held that res judicata did not apply, in part, because (1) the parties in the two cases were not the same (i.e., there were objectors in Case Nos. 86CW226 and 88CW178 that were not parties in Case No. 02CW340), and (2) the Willow Creek Component of Case Nos. 86CW226 and 88CW178 was "for a different collection system" than the Willow Creek Collection System that was decreed as part of Case No. 82CW340 (i.e., the claim was different). **CD, Exhibit B at 53, paras . 139-140.**

Here, the Objectors have not asserted any claim against NECO, rather they assert defenses to NECO's claim that it is entitled to a finding of reasonable diligence. Therefore, NECO's argument about res judicata (claim preclusion) is not responsive to the Objectors' defense, and the water court's determination, that NECO is barred by issue preclusion. The pertinent issue here is the use of the federally-owned Taylor Park Reservoir. On that matter, the established precedent and law of the case is that Taylor Park Reservoir cannot be used for the purposes claimed in both

Case No. 82CW340 and Case No. 88CW178. The Objectors therefore are entitled to "defensively" assert issue preclusion against NECO's current claim for a finding of reasonable diligence.

2. Claim preclusion does not bar Objectors' arguments because each diligence application constitutes a new cause of action.

NECO asserts that res judicata (claim preclusion) bars the Objectors from arguing the "can and will" doctrine in Case No. 04CW120 because the water court declined to apply the "can and will" doctrine in the prior diligence application, Case No. 96CW251. NECO Opening Brief at 38. NECO's argument fails because res judicata/claim preclusion is not applicable to separate causes of action.

The cause of action in Case No. 96CW251 was different than the cause of action at issue in Case No. 04CW120. Both are diligence cases for the same water right but the evidence necessary to support one diligence application is entirely different than the evidence necessary to support the next-succeeding diligence application for the same water right. *See e.g. Dallas Creek, supra,* 933 P.2d at 37 (each subsequent diligence proceeding requires a demonstration that the conditional appropriation is being pursued in a manner which affirms that capture, possession, control, and beneficial use of water can and will occur in the state, thereby justifying

continued reservation of the antedated priority pending perfection of a water right); *OXY*, 990 P.2d at 708 ("can and will" test applies until the conditional right matures into an absolute decree).

Claim preclusion does not apply when the evidence necessary to support one claim is different than the evidence in the case at issue. *Weibert v. Rothe Bros., Inc.*, 618 P.2d 1367, 1372 (Colo. 1980). Consequently, nothing in the prior diligence decrees or the original decree in Case No. 82CW340 can bar the Objectors in Case No. 04CW120 from challenging NECO's ability to use Taylor Park Reservoir.

NECO's argument also fails because the reasons stated by the water court for not applying the "can and will" test in the prior diligence case no longer exist. The water court noted in Case No. 96CW251 that it would be unfair to apply the "can and will" test in that case because (1) Arapahoe's claims in Case Nos. 86CW226 and 88CW178 were then-pending on appeal, and (2) the law regarding the application of the "can and will" doctrine in diligence proceedings was unsettled at that time. **CD, Exhibit E at 10-11**. In the current case, the water court had the benefit of this Court's decisions in *Arapahoe I* and *Arapahoe II*, and the remand litigation that followed. More importantly, the water court also now has the benefit of this Court's

decision in *OXY,* which clearly holds that the "can and will" doctrine applies in diligence proceedings. *OXY*, 990 P.2d at 707.

E. The additional facts asserted by NECO are not material because they do not change the prior rulings regarding Taylor Park Reservoir.

NECO asserts that its affidavits create a dispute of material fact, but NECO fails to offer any specific explanation to support its allegation. NECO Opening Brief at 19-20. The reason NECO cannot offer any explanation is because none of the affidavits controvert any material fact essential to the Summary Judgment Order. NECO fails to establish the existence of a genuine issue of material fact. The water court therefore correctly ruled in its Summary Judgment Order that none of the additional facts asserted by NECO alter the court's prior decisions regarding the inability to use Taylor Park Reservoir as a forebay/afterbay as claimed by NECO. **Vol. II at 315.**

Paragraph 4 of the Affidavit of Alan J. Leak supports the water court's prior determination that modifications of Taylor Park Reservoir would be required to operate NECO's claimed conditional water right. It is also an admission that Taylor Park Reservoir is an indispensable element of NECO's proposed project. Paragraphs

5 and 6 of the Leak affidavit purport to express opinions which amount to conclusions of law regarding the Water Supply Act of 1954, 43 U.S.C. § 390b(d) and which are contrary to the water court's conclusions in Case Nos. 86CW226 and 88CW178. Paragraph 7 contradicts what Mr. Leak states in Paragraphs 5 and 6. Mr. Leak is not in a position to make judgments about the potential impact on the Uncompaghre Project and whether a "major operational change" would result until he knows whether major structural changes are necessary. As to the assumptions in the Leak affidavit, there is no proof that any of them are valid, even if they did concern facts material to the Objectors' motion for summary judgment.

The First Affidavit of Allen D. Miller is mostly a self-serving statement about the claimed merits of using Taylor Park Reservoir as a component of a pump back hydropower project; it contains nothing relevant to the issue presented in the Objectors' motion for summary judgment, except the admission in Paragraph 7 that NECO is the successor of Arapahoe County. Regardless of NECO's lack of involvement in Case No. 96CW251, NECO is in privity with Arapahoe County and is bound by the rulings in that case for purposes of issue preclusion. See *Green v. Chaffee Ditch Co., supra* 150 Colo. at 98, 371 P.2d at 779. The remainder of the

affidavit alleges that NECO has been diligent but does not controvert any fact essential to the Objectors' motion for summary judgment.

The Second Affidavit of Allen D. Miller is basically just lengthy quotations from the water court's decrees and this Court's decisions in *Arapahoe I* and *Arapahoe II*. NECO fails to explain how the quotations support its position in this appeal; and an explanation of any relevance to Objectors' motion and the water court's Summary Judgment Order is notably absent from NECO's brief. The remainder of the affidavit is irrelevant to the material issues of the Objectors' motion.

None of the affidavits NECO has submitted demonstrate the existence of a genuine issue of material fact. The essential facts are recorded history. There can be no dispute as to what this Court and the Division 4 Water Court have previously ruled with respect to the use of Taylor Park Reservoir. No affidavit can change what is recorded in the existing decrees and this Court's opinions. It is therefore irrelevant whether the Objectors dispute or agree with NECO's affidavits.

"Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law." *Martini v.*

Smith, 42 P.3d 629, 632 (Colo. 2002). Summary judgment was properly granted in this case because no dispute of a material fact exists. *See also, State Farm Mut. Auto. Ins. Co. v. Tygart*, 971 P.2d 253, 255 (Colo. App. 1998) (affirming summary judgment where elements of collateral estoppel were proved).

F. The statute of limitations does not apply because Objectors have not attacked any existing decree.

NECO argues that the Objectors are barred from seeking the cancellation of the decree in Case No. 82CW340 because the three-year statute of limitations for correcting substantive errors in decrees set forth in C.R.S. § 37-92-304(10) has expired. NECO Opening Brief at 35. NECO's argument misses the point entirely. Objectors have not collaterally attacked the decree in Case No. 82CW340. Instead, the Objectors have challenged NECO's ability to satisfy the "can and will" test in its current diligence application, Case No. 04CW120.

NECO's reliance on *In the Matter of the Application for Water Rights of Columbine Assocs.*, 993 P.2d 483 (Colo. 2000) also is mistaken. *Columbine Associates* involved an attempt by an objector in a diligence proceeding to collaterally attack the original decree for the subject conditional water right. The objector claimed that the resume notice for the original decree was defective and that the water

court lacked jurisdiction. *Id.* at 487. This Court held that the water court had jurisdiction to enter the original decree because the resume provided sufficient inquiry notice. *Id.* at 492. The objector therefore was prevented from asserting other challenges to the original decree because the three-year statute of limitations had run. *Id.*

Columbine Associates is not applicable here because the Objectors have not asserted that there is anything wrong with the decree in Case No. 82CW340. Instead, the Objectors argued that NECO's diligence application in Case No. 04CW120 must be dismissed because NECO cannot satisfy the "can and will" test. NECO might view the resulting cancellation of its conditional water right in the same light, but the application of the law is very different than the situation in *Columbine Associates*.

V. MOTION FOR ATTORNEY FEES.

Objectors respectfully request that this Court award to Objectors their reasonable attorney fees and costs related to their necessary participation in this appeal. Appellate courts may award attorney fees pursuant to the Attorney Fees Act, C.R.S. § 13-17-101, *et seq.*, and C.A.R. 39.5. Attorney Fees may be awarded if an action is "substantially frivolous, substantially groundless, or substantially

vexatious." C.R.S. § 13-17-101. An appeal is frivolous if: (1) the action was continued without substantial justification; (2) the proponent can present no rational argument based on the evidence or law in support of his/her claim or defense; or (3) the appeal is prosecuted for the sole purpose of harassment or delay. *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925 (Colo. 1993); *see also* C.R.S. § 13-17-103(1).

C.R.S. § 13-17-103 lists various factors to be considered in determining whether to award attorney's fees, which include:

1. The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

3. The availability of facts to assist a party in determining the validity of a claim or defense; and

6. Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.

NECO asserts a series of "shotgun" arguments in its Opening Brief to challenge the water court's decision, but NECO's arguments lack any substantial justification. There is no rational basis to support NECO's claims. Objectors have incurred significant time and expense in answering NECO's baseless arguments.

Objectors have established that the elements of issue preclusion exist in this case. NECO has failed to even discuss the Objectors' argument except for substantially confusing it with claim preclusion. Objectors have also maintained that current law requires that the applicant provide proof of feasibility ("can and will") in each diligence proceeding. Rather than attempting to address that argument, NECO contends that it has no obligation to prove feasibility in this proceeding because the feasibility of its project was established in the original decree in Case No. 82CW340. That argument flies in the face of *OXY* and *Dallas Creek.* NECO has ignored the applicable law at its peril. Objectors respectfully request that this Court award their reasonable attorney fees incurred in responding to NECO's frivolous appeal.

Objectors did not seek attorney fees before the Division 4 Water Court associated with their motion for summary judgment but reserve the right to seek such fees following any mandate by this Court that affirms the water court's Summary

Judgment Order. Objectors therefore request that, if this Court awards Objectors their reasonable attorney fees associated with this appeal, that the Court remand the determination of the amount of such fees to the Division 4 Water Court. In the alternative, and at this Court's discretion, Objectors will submit affidavits of their attorney fees regarding this appeal to this Court.

VI. CONCLUSION.

The water court correctly determined that issue preclusion applies to prevent NECO from claiming that it can satisfy the statutory "can and will" test necessary to demonstrate reasonable diligence. None of NECO's arguments directly address the fundamental facts upon which the Objectors' motion for summary judgment is based. Objectors request that this Court affirm the Division 4 Water Court's August 3, 2005, Order granting the Objectors' Motion for Summary Judgment, and award to Objectors their reasonable costs and attorney fees in answering NECO's appeal.

Certification of compliance with word limitation: Objectors certify that, according to WordPerfect, this Answer Brief contains 7,892 words.

[Signatures on following page]

Respectfully submitted February 14, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing **Answer Brief of Objectors-Appellees** to the following parties by placing said copies in the United States Mail, first class, postage prepaid, on February 14, 2006.

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APPENDIX 1
Schematic Diagram of Case History