

DISTRICT COURT, WATER DIVISION NO. 5, COLORADO 109 8 <sup>th</sup> St., Suite 104, Glenwood Springs, CO 81601-3361	DATE FILED: January 31, 2024 12:34 PM FILING ID: D9FB4918F0237 CASE NUMBER: 2023CW3176
CONCERNING THE APPLICATION FOR WATER RIGHTS OF MIDDLE PARK WATER CONSERVANCY DISTRICT IN GRAND COUNTY, COLORADO	▲ COURT USE ONLY ▲
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<b>STATEMENT OF OPPOSITION</b>	

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

Save the Worlds Rivers  
 P.O. Box 1066  
 Ft. Collins, CO 80522  
 info@savethecolorado.org  
 (970) 218-8310

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

- A. Save the Worlds Rivers holds Applicant to “strict proof” on its claims of reasonable diligence in developing the conditional rights for the Haypark Reservoir and Troublesome Project. *Shirola v. Turkey Canon Ranch Ltd. Liab. Co.*, 937 P.2d 739, 747 (Colo. 1997). To demonstrate reasonable diligence in developing a conditional water right, Applicant must show that “the waters ‘can and will’ be stored” and put to beneficial use, “and that the project ‘can and will’ be completed with diligence and within a reasonable time.” *Vermillion Ranch Ltd. P’ship v. Raftopoulos Bros.*, 307 P.3d 1056, 1067 (Colo. 2013). The “can and will” test is “a question of fact and law” that balances multiple factors to determine whether there is “a substantial probability” the project will be completed. *Id.* The ultimate question is whether “evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies.” *City of Aurora v. ACJ P’ship*, 209 P.3d 1076, 1085 (Colo. 2009) (quoting *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 45 (Colo. 1996)). A non-exhaustive list of factors include:

[T]he legal and physical availability of unappropriated water; the technical feasibility of a project; the applicant’s present right and prospective ability to access the property; the applicant’s ability to obtain necessary permits for construction; and the economic feasibility of a project.

*Vermillion Ranch*, 307 P.3d at 1067 (internal citations omitted).

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

- B. Applicant has failed to provide sufficient facts to support a finding that there is a substantial probability Haypark Reservoir can and will be completed with diligence and within a reasonable time.

- i. Applicant has not shown that the East Fork of Troublesome Creek has sufficient “legal and physical availability of unappropriated water” to support a substantial probability that Haypark Reservoir can and will put water to beneficial use within a reasonable amount of time. *Id.*
  - a. For most of the last ten years, the water intended for the Haypark Reservoir has not been physically and legally available. Specifically, from January 1, 2014, through January 1, 2024, the conditional right for Haypark Reservoir (Admin Number 40028) was out of priority 59.34% of the time.<sup>1</sup>
  - b. Water intended for Haypark Reservoir is less likely to be physically and legally available in the future because of the impacts of climate change. The increasing temperature resulting from climate change has created “drier soils, greater atmospheric evaporative demand, and reduced flows in major river basins such as the Colorado[.]” U.S. GLOBAL CHANGE RESEARCH PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT, Chapter 28 Southwest 28-9 (2023). With continuing warming trends, there is an expected corresponding reduction in the amount of runoff in the Colorado River Basin. *See id.* at 28-10.
  - c. Because of reduced flows from climate change, the increasing risk of curtailment under the Colorado River Compact renders the water intended for Haypark Reservoir unlikely to be legally and physically available. Because the rights supporting Haypark Reservoir hold an appropriation date of 1959, any Compact curtailment scenario would likely put those rights out of priority. For example, producing 100,000 acre-feet of water for Compact obligations would result in the curtailment

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<sup>1</sup> Colorado’s Decision Support Systems CWCB / DWR, *Administrative Calls – Structure Call Analysis*, COLORADO DEPARTMENT OF NATURAL RESOURCES, <https://dwr.state.co.us/Tools/AdministrativeCalls/StructureCalls?submitButton=Submit&SelectedGeoValue=waterDivisionDiv&SelectedWaterDivisionId=5&StartDate=01%2F01%2F2014&EndDate=01%2F01%2F2024&SelectedAdminNo=40028&SelectedWDID=5003615&SelectedAdditionalValue=WDIDSearch&WDIDSearch.wdidFrom=5003615&WDIDSearch.includeAssociatedWaterRights=False&WDIDSearch.Operator=1> (last visited January 25, 2024).

of post-1957 water rights in the Colorado River basin.  
COLORADO RIVER DISTRICT, PHASE III RISK STUDY, at 15 (2019).

- d. The likely unavailability of water for Haypark Reservoir also increases the risk of potential injury to downstream water users that would stall or end the project. Being out of priority for extended periods of time leaves Haypark Reservoir at risk of creating a 907-acre-foot dead pool consisting of water rightfully belonging to senior downstream water users. *See* THE MIDDLE PARK WATER CONSERVANCY DISTRICT, GENERAL MAP OF THE TROUBLESOME PROJECT (1959), attached as Exhibit A.
  - e. For these reasons, Applicant has failed to show that the East Fork of Troublesome Creek has enough legally and physically available water to support finding a substantial probability that Haypark Reservoir can and will put water to beneficial use within a reasonable amount of time.
- ii. Applicant has also failed to show a “present right and prospective ability to access the property” and “to obtain necessary permits for construction” to support a substantial probability of Haypark Reservoir being completed with diligence and within a reasonable amount of time. *Vermillion Ranch*, 307 P.3d at 1067.
- a. Applicant has only listed the names and addresses of owners of the land where the project will be constructed, which does not demonstrate either a present right or prospective ability to access that property or obtain necessary permits. 23CW3176, Application for Finding of Reasonable Diligence, ¶ 5.
  - b. Applicant “exploring potential partnerships” and having “[d]iscussions” does not demonstrate either a present right or prospective ability to access property or obtain necessary permits. *Id.* at ¶ 4(A).
  - c. Despite holding the conditional rights for Haypark Reservoir and Troublesome Project for over 60 years, Applicant has failed to acquire property or the necessary permits for Haypark Reservoir during that time.

- d. Applicant's failure to make progress on securing any property interest or permits required for the construction of Haypark Reservoir over six decades demonstrates that Applicant has failed to show there is a substantial probability of Haypark Reservoir being completed with diligence and within a reasonable amount of time.
    - iii. Like in *Vermillion Ranch*, Applicant here has "presented no evidence regarding a timeline for construction, the costs of construction and land acquisition, the ability to finance those costs, the status of necessary permits or government approvals, or the technical feasibility, design, or construction" of the reservoir. *Vermillion Ranch*, 307 P.3d at 1072.
    - iv. Thus, Applicant has "failed to meet its burden to prove by a preponderance of the evidence" that "there is a substantial probability that the reservoir necessary to effect the appropriation 'can and will' be completed with diligence within a reasonable time." *Id.* (citing *Natural Energy Res. Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265, 1277 (Colo. 2006)).
- C. Applicant has failed to steadily apply effort to develop the water rights involved in the Troublesome Project in a reasonably expedient and efficient manner as required by Colo. Rev. Stat. § 37-92-301(4)(b).
  - i. The General Assembly requires water courts to review the development of conditional rights for reasonable diligence in order "to prevent the accumulation of undeveloped and unproductive conditional water rights to the detriment of those seeking to apply the state's water beneficially." *Trans-County Water, Inc. v. Cent. Colo. Water Conservancy Dist.*, 727 P.2d 60, 65 (Colo. 1986).
  - ii. "To allow" Applicant "to maintain its conditional appropriation indefinitely and without progress would frustrate that fundamental policy." *Id.*
  - iii. With a priority date of 1959, Applicant has seemingly made no measurable progress towards developing Haypark Reservoir and the Troublesome Project.

- iv. Applicant relies solely on monetary expenses to support its application and fails to articulate, with any specificity, the amount spent directly on the development of Haypark Reservoir. Applicant is also unclear regarding which expenses relate to the Troublesome Project broadly. Applicant does not assert that any money has been spent towards developing the Haypark Reservoir specifically.

D. For these reasons, the Application for Finding of Reasonable Diligence should not be granted.

2. This Statement of Opposition is ongoing and shall apply to any subsequent amended applications that may be filed.

Respectfully submitted on January 31, 2024.

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*Counsel for Opposer Save the Worlds Rivers*

**VERIFICATION**

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

Executed on the 30 day of January, 2024, at Fort Collins Colorado  
(date) (month) (year) (city or other location, and state OR country)

Jennifer Sunderland  
Printed Name

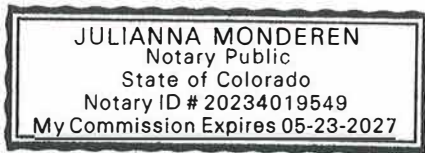
[Signature]  
Signature

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

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

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

The foregoing instrument was acknowledged before me in the County of Larimer, State of Colorado, this 30 day of January, 2024, by the person whose signature appears above.



My Commission Expires: 05-23-2027

Julianna Monderen  
Notary Public/Deputy Clerk

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

**CERTIFICATE OF SERVICE**

I certify that on January 31, 2024, a true and correct copy of the forgoing Statement of Opposition was electronically filed with the clerk of the District Court, Water Division 5, and served on each of the following via electronic service:

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