DATE FILED: July 26, 2019 11:35 AM

SUPREME COURT, STATE of COLORADO 2 East 14th Avenue Denver, CO 80203 Appeal from District Court, Water Division 1 Honorable James F. Hartmann Case No. **16CW3053**	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE UNITED WATER AND SANITATION DISTRICT, acting by and through the UNITED WATER ACQUISITION PROJECT WATER ACTIVITY ENTERPRISE, IN ADAMS, ARAPAHOE, DENVER, DOUGLAS, ELBERT, MORGAN, AND WELD COUNTIES.	▲ **COURT USE ONLY** ▲
Applicant-Appellant: UNITED WATER AND SANITATION DISTRICT, acting by and through the UNITED WATER ACQUISITION PROJECT WATER ACTIVITY ENTERPRISE **v.** **Opposers-Appellees:** BURLINGTON DITCH RESERVOIR AND LAND COMPANY; CENTENNIAL WATER AND SANITATION DISTRICT; CITY OF AURORA; CITY OF BOULDER; CITY AND COUNTY OF DENVER ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS; CITY OF ENGLEWOOD; CITY OF BRIGHTON; CITY OF THORNTON; EDMUNDSON LAND LLC; FARMERS RESERVOIR AND IRRIGATION COMPANY; FORT MORGAN RESERVOIR & IRRIGATION COMPANY; HENRYLYN IRRIGATION	CASE NO. 19SA_____

DISTRICT; IRRIGATIONISTS ASSOCIATION WATER DISTRICT 1; LOWER LATHAM RESERVOIR COMPANY; PLATTE VALLEY IRRIGATION COMPANY; PUBLIC SERVICE COMPANY OF COLORADO; SOUTH ADAMS COUNTY WATER AND SANITATION DISTRICT; TODD CREEK VILLAGE METROPOLITAN DISTRICT; TOWN OF LOCHBUIE; WELD COUNTY BOARD OF COUNTY COMMISSIONERS **Appellee Pursuant to C.A.R. 1(e):** COREY DEANGELIS, DIVISION ENGINEER, WATER DIVISION NO. 1	
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NOTICE OF APPEAL

United Water and Sanitation District, acting by and through the United Water

Acquisition Project Water Activity Enterprise ("United"), by and through its undersigned co-counsel, and pursuant to Rule 3(d) of the Colorado Appellate Rules ("C.A.R."), submits this Notice of Appeal as follows.

1. Description of the nature of the case.

a. General statement of the nature of the controversy.

United is a Colorado water and sanitation district based in Elbert County but with a state-wide service area. In Case No. 16CW3053, Water Division No. 1, United sought conditional water storage rights in Highlands Reservoir, a new reservoir to be constructed by United in the Beebe Draw northeast of Denver. United claimed some of the water for municipal and commercial uses in the Highlands Development, a planned community that would surround Highlands Reservoir on land owned by entities collectively known as the Highlands Owners. Prior to filing its water rights application, United and the Highlands Owners entered a written water supply agreement ("Contract").

Given the long construction period for the Highlands Reservoir, the long planning and development period for the Highlands Development, and the uncertainties associated with the yield of the water rights under a 2016 priority, the Contract did not specify a minimum amount of water to be provided. Rather, the

contract specified the maximum amount of water to be delivered; mechanisms for determining storage capacity, deliveries and costs; and obligations requiring the parties to spend millions of dollars in infrastructure development in order to facilitate the eventual storage, delivery, and beneficial use of the water.

Opposer Farmers Reservoir and Irrigation Company ("FRICO"), filed a motion for determination of question of law and motion for partial summary judgment. FRICO argued that, because the Highlands Development was not located within United's territorial boundaries, United did not qualify for the governmental planning exception to the anti-speculation doctrine, and must satisfy the criteria for a private water appropriator in determining whether the claimed uses were non-speculative. FRICO further argued that United's claimed uses for the Highlands Development were speculative because the Contract did not specify a minimum amount of water to be provided.

The Water Court granted FRICO's motion in relevant part, holding that United was acting as a private water broker selling water to end users and thus not eligible for the governmental planning exception to the anti-speculation doctrine. The Water Court further held that the Contract was non-binding as to several essential terms, most notably that the Highlands Owners were not obligated to purchase any amount of water

from United, and that further negotiations would be required to determine storage volumes and costs. The Water Court summarily denied United's motion for reconsideration.

The Water Court erred in several of its determinations. First, the Water Court decided these issues involving disputed material facts on a motion for summary judgment. Second, the Water Court erred in determining that United did not qualify for the governmental planning exemption simply because it provided water outside its territorial boundaries, but within its service area. Third, the Water Court erred in determining that the Contract was non-binding simply because it did not specify a minimum amount of water to be delivered. Finally, the Water Court erred by summarily rejecting United's motion for reconsideration.

b. Judgment, order or parts being appealed and basis for appellate jurisdiction.

The Judgment from which United appeals is the Water Court's Order re: Motion to Withdraw Certain Claims and Enter Final Judgment, dated June 10, 2019, and attached hereto as Appendix A. Specifically, United appeals the Water Court's denial of a conditional water right in Highlands Reservoir for uses within the Highlands Development. The Water Court's basis for this denial is set forth in its Order re:

FRICO's Motion for Determination of Question of Law and Motion for Partial Summary Judgment, dated March 30, 2019, attached hereto as Appendix B. As noted above, the Water Court summarily rejected United's motion for reconsideration in its Order Denying United's Motion for Reconsideration of Order re: FRICO's Motion, dated April 3, 2019, attached hereto as Appendix C.

Appellate jurisdiction is provided under C.A.R. 1(a)(2), which provides that an appeal may be taken from "[a] judgment or decree, or any portion thereof, in a proceeding concerning water rights; and an order refusing, granting or modifying, cancelling, affirming or continuing in whole or in part a conditional water right." Supreme Court jurisdiction is appropriate under C.R.S. § 13-4-102(1)(d), which excludes from the Court of Appeal's jurisdiction appeals from final judgments of district courts in "water cases involving priorities or adjudications."

c. Whether judgment or order resolved all issues pending before the trial court including attorney's fees and costs.

The Judgment resolved all issues pending before the Water Court.

d. Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b).

Not applicable.

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

The Judgment was entered by the Water Court and electronically served on all parties via the Colorado Courts E-Filing System ("CCE") on June 10, 2019.

f. Whether there were any extensions granted to file any motion(s) for post-trial relief.

No such extensions were sought or granted.

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

Not applicable.

h. Date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j).

Not applicable.

i. Whether there were any extensions granted to file any notice(s) of appeal.

No such extensions were sought or granted.

2. Advisory listing of the issues to be raised on appeal.

a. Whether the Water Court erred in granting FRICO's Motion for Determination of Question of Law and Partial Summary Judgment, given that it rested on disputed issues of material fact and that United was entitled to all favorable inferences reasonably drawn from the undisputed facts.

b. Whether the Water Court erred in determining that United did not qualify

for the governmental planning exception to the anti-speculation doctrine.

c. Whether the Water Court erred in finding the Contract between United and the Highlands Owners insufficient to demonstrate a non-speculative intent to appropriate a conditional water right.

d. Whether the Water Court erred in summarily denying United's motion for reconsideration without providing a reason or basis for the denial.

3. Whether the transcript of any evidence taken before the trial court is necessary to resolve the issues raised on appeal.

No testimony was presented to the Water Court. The Judgment was based on the pleadings leading to the Orders described above.

4. Whether the order on review was issued by a magistrate where consent was necessary.

Not applicable.

5. The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers.

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6. Appendices containing copies of judgment and order being appealed.

a. Appendix A – Judgment and Order of the Court, June 10, 2019.

b. Appendix B – Order re: FRICO's Motion for Determination of Question of Law and Motion for Partial Summary Judgment, March 30, 2019.

c. Appendix C – Order Denying United's Motion for Reconsideration of Order re: FRICO's Motion, April 3, 2019.

Respectfully submitted this 25th day of July, 2019

LAW OFFICE OF TOD J. SMITH, LLC

By: */s/ Tod J. Smith*_____
Tod J. Smith, #15417

ANN RHODES, LLC

By: */s/ Ann M. Rhodes*_____
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Co-Counsel for the Applicant-Appellant United Water & Sanitation District

Pursuant to C.A.R. 30, duly signed original on file at The Law Office of Tod J. Smith

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2019, I served via CCE a true and correct copy of the foregoing NOTIC OF APPEAL on the parties listed on its service list as follows:

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/s/ Ann M. Rhodes

WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631-1113 (970) 475-2400	DATE FILED: July 26, 2019 11:35 AM CASE NUMBER: 2016CW3053
CONCERNING THE APPLICATION FOR WATER RIGHTS OF **THE UNITED WATER AND SANITATION DISTRICT, acting by and through the UNITED WATER ACQUISITION PROJECT WATER ACTIVITY ENTERPRISE** IN ADAMS, ARAPAHOE, DENVER, DOUGLAS, ELBERT, MORGAN, AND WELD COUNTIES COUNTY, COLORADO	**▲COURT USE ONLY▲** Case No.: 2016CW3053 Water Division No. 1
ORDER RE: MOTION TO WITHDRAW CERTAIN CLAIMS AND ENTER FINAL JUDGMENT	

This matter comes before the court on United Water and Sanitation District's ("United") motion to withdraw certain claims and enter final judgment. In its motion, United seeks to withdraw its claims for conditional appropriative rights of exchange with prejudice pursuant to C.R.C.P. 41(a)(2), and to abandon its claimed uses of the conditional storage right for irrigation and for replacement of delivery losses. United also asks the court to enter final judgment on its claim for a conditional water storage right in Highlands Reservoir pursuant to C.R.C.P. 54(b). Opposers Farmers Reservoir and Irrigation Company and Burlington Ditch, Reservoir, and Land Company (collectively, "FRICO") do not contest United's requests for dismissal and entry final judgement generally; however, FRICO asks this court to include terms and conditions in its order dismissing with prejudice United's claimed irrigation and replacement uses, finding that "United was unable to meet the legal standards justifying issuance of a decree by this court for such claims, and is consequently barred from future litigation of the same issues to the same extent as if it had proceeded to adverse judgment."

Having reviewed all pleadings and being otherwise fully advised, the court dismisses with prejudice United's claims for conditional appropriative rights of

exchange and dismisses without prejudice United's claimed uses of the conditional storage right for replacement of delivery losses and for irrigation. Having thus disposed of all United's claims in this case, this ruling is a final judgment.

I. BACKGROUND

United filed its application for conditional water rights in the Highlands Reservoir, located in the Beebe Draw, on April 19, 2016. The application included conditional water storage rights in the reservoir as well as conditional appropriative rights of exchange to and from the reservoir. Claimed uses for the storage right included use in a prospective residential housing project called Highlands Development, irrigation of a 15-acre parcel of land ("DeSanti Parcel") owned by United, and replacement of delivery losses to the Beebe Draw to meet contractual obligations to East Cherry Creek Valley Water and Sanitation District ("ECCV") and Arapahoe County Water and Wastewater Authority ("ACWWA"). A 10-day trial in this matter was scheduled to begin on April 22, 2019.

On March 30, 2019, this court entered an order granting FRICO's request for summary judgment under C.R.C.P. 56. Chiefly, the court concluded that because United lacks a firm contractual commitment with the group of landowners ("Highland Owners") seeking to pursue the Highlands Development, the conditional storage right related to the Highland Development is speculative. The court declined to grant summary judgment related to the replacement of delivery losses because a genuine question of material fact exists as to how much water United needs to meet their contractual obligations to ECCV and ACWWA.

Based on the court's conclusions and after consultation with the other parties, United decided fewer days were necessary for trial, and on April 8, 2019 it filed a notice reducing the trial to only five days. With this notice, United also filed an unopposed motion for extension of certain trial deadlines; specifically, it asked to begin the trial on April 29, which was a week later than the scheduled starting date. The court denied this

motion, citing a greater difficultly in being able to fill available docket time the first week of trial compared to the second week.

On April 11, 2019, United filed an unopposed motion to vacate the trial. United indicated that it no longer wished to proceed to trial on the remaining claims and that it would file a separate motion to withdraw these claims and seek entry of final judgment. In granting the request to vacate, the court ordered United file the motion to dispose of the remaining claims and for entry of final judgment on or before April 18, 2019. The motion was timely filed and is addressed herein.

II. LEGAL STANDARD

Under C.R.C.P. 41(a)(2), a court may dismiss an action upon a plaintiff's motion "upon such terms and conditions as [it] deems proper." *Sinclair Transportation Company v. Sandberg*, 350 P.3d 915, 921 (Colo. Ct. App. 2014). The "request for a voluntary dismissal under C.R.C.P. 41(a)(2) generally should be granted unless a dismissal would result in legal prejudice to the defendant." *Id.* at 922 (citing *Powers v. Professional Rodeo Cowboys Ass'n*, 832 P.2d 1099, 1102 (Colo. App. 1992)). The Colorado Supreme Court has held that C.R.C.P. 41(a)(2) applies to water adjudications. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 381 (Colo. 1994). "Rule 41(a)(2) provides a means for preserving a potentially meritorious claim for another day or another forum provided that conditions of dismissal can be devised to protect the defendants from prejudice." *Id.* at 380.

Water court applicants "may voluntarily withdraw all or a portion of his or her water rights application without prejudice under Rule 41(a)(2), as long as the objectors will not be prejudiced." *Aspen Wilderness Workshop, Inc. v. Hines Highlands Limited Partnership*, 929 P.2d 718, 728 (Colo. 1996) (citing *Am. Water Dev., Inc.*, 832 P.2d at 381). Likewise, the water court has discretion to dismiss an application with prejudice. *See Groundwater Appropriators of S. Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 26 (Colo. 2003) ("Proceedings for the determination of water rights are in no way exempt from the application of res judicata-related doctrines, which have been expressly

acknowledged as important for the stability and reliability of Colorado water rights.") Like other civil actions, "a dismissal of a water rights application with prejudice operates to resolve any necessary facts pled by the applicant, against it." *Id.*

III. ANALYSIS

In the present matter, United seeks to dispose of several of its claims, narrowing the scope of its application to only the conditional storage right for use in the Highlands Development. With the other claims thus resolved, United also requests entry of final judgment—pursuant to C.R.C.P. 54(b) and this court's previous order of March 30, 2019—so that it may pursue an appeal of this court's decision to grant summary judgment regarding the Highlands Development claim. In seeking to dispose of the other claims, United makes two requests. First, United asks the court to dismiss with prejudice the claimed conditional appropriative right of exchange. Second, it asks the court's permission to abandon the other claimed uses for the conditional storage right, including irrigation of the DeSanti Parcel as well as replacement of delivery losses to ECCV and ACWWA. These requests are addressed in turn.

Regarding the first request, FRICO does not oppose outright United's request for dismissal with prejudice of the conditional appropriative right of exchange. Instead, in its response, FRICO asks the court to include terms and conditions to bolster the preclusive effect of the dismissal. Specifically, it asks the court to include a finding that the "dismissal of the conditional exchange claims is an adjudication on the merits of such claims," and "United is barred from future litigation of the same issues to the same extent as would be the case if it had proceeded to adverse judgment." Response at 8 (internal quotation marks omitted). In its reply, United takes exception with the exact phrasing of this term, but nevertheless includes something substantially similar in its

second proposed order.[1] As such, the court grants FRICO's request, but only to the extent that the appropriative right of exchange is now barred by claim preclusion – though not issue preclusion. In its second proposed term, FRICO goes further and asks the court to find that "United was not able to meet the legal requirements justifying entry of a decree for the claimed conditional exchange rights." *Id.* United contests the inclusion of this finding and argues that it is unnecessary, vague, and inaccurate. The court agrees with United that inclusion of this term is gratuitous as it would do no more to protect FRICO from prejudice than the first requested term. As such, the court declines to include this term.

The court turns next to United's other request—that it be allowed to abandon the claimed uses for irrigation and for replacement of delivery losses. As a preliminary matter, United cites no legal authority for a right to "abandon" these claimed uses, as FRICO correctly notes. In its reply, however, United argues that abandoning these claimed beneficial uses is akin to abandoning a theory of a case because the uses are themselves not individual claims but rather theories of need, which represent just one of the elements necessary to support a claim for a conditional storage right. The court declines to adopt this line of reasoning because it is unnecessary. C.R.C.P. 41(a)(2) is more than adequate in allowing United to dispose of these claims. At the core of its request, United is seeking a dismissal without prejudice of its conditional storage claims based on these two uses; essentially, it no longer wishes to pursue these uses now, but at the same time it is not waiving its right to do so in the future. FRICO, on the other hand, requests this the court dismiss these claimed uses with prejudice, similar to the aforementioned appropriative right of exchange.

As previously mentioned, courts have discretion to grant a request for voluntarily dismissal under Rule 41(a)(2) unless the dismissal would result in legal

[1] As United notes in its reply, FRICO requests, perhaps unintentionally, two variations for the same proposed finding: one that would have United "barred from future litigation of the same *issues*" and one that would have United "prohibited from pursuing the same *claims* in the future." Response 8 (emphases added). In its proposed order, FRICO uses the "issues" version. The court sees no justification for a term and condition imposing issue preclusion here, and FRICO provides no argument as to why it is needed in favor of claim preclusion. As such, the court adopts United's phrasing.

prejudice to the defendant. *Sinclair Transportation Co.*, 350 P.3d at 921. In determining whether dismissal is with or without prejudice, a court should consider the following factors:

> (1) the duplicative expense of a second litigation;
> (2) the extent to which the current suit has progressed, including the effort and expenses incurred by defendant in preparing for trial;
> (3) the adequacy of plaintiff's explanation for the need to dismiss;
> (4) the plaintiff's diligence in bringing the motion to dismiss;
> (5) any undue vexatiousness on plaintiff's part.

Id. at 922 (quoting *Powers*, 832 P.2d at 1102) (internal quotations omitted).

Here, FRICO is not likely to suffer harm if United is allowed to dismiss these claims without prejudice. First, FRICO has already been spared the cost and effort of going to trial. And to the extent FRICO is concerned about duplicative costs of relitigating this issue, other remedies exist for FRICO to protect itself, including recovery of costs as well as recovery of attorney fees if it can be shown the claims lacked substantial justification. Second, there is no question United was diligent in filing this motion to dismiss. United filed the motion on April 18, 2019, thereby meeting the court's deadline imposed in the April 13, 2019 order vacating the trial. Moreover, United has been reasonably diligent in the pursuit of the withdrawal of these claims after the court issued its order granting FRICO's request for summary judgement on March 30, 2019. After unsuccessful requests to first have the court reconsider its summary judgment decision and then to delay the start of trial, United next pursued a course of withdrawing these claims. United would have done so earlier had parties been able to agree on the terms of the withdrawal.

United also offers several justifiable reasons for withdrawing these claims under the circumstances. United believes that it would not be able—within the time remaining before trial—to develop and submit supplemental expert opinions to support the amount of water it would need to store in Highlands Reservoir to meet its replacement obligations to ECCV and ACWWA in isolation from the other water rights claimed.

Moreover, United indicates it is considering a course of action that includes appealing this court's March 30 order for summary judgment. In United's reasonable calculation, abandoning the remaining claims in this matter will allow for entry of judgement on this one narrow claim, thus terminating litigation in this case and providing an avenue for appeal of the court's order.

Finally, United has not acted with any undue vexatiousness either in pursuing or in withdrawing these conditional storage claims. Rather, it has been using the strategies and procedures allowed to it under state law in adjudicating a complex water right. FRICO, in arguing otherwise, highlights that this is not United's first attempt at seeking conditional storage rights for the Highlands Reservoir, nor is it the first time United has sought to withdraw the claims after it was clear they could not meet Colorado's anti-speculation requirements for conditional water right claims. This dynamic is not at all unusual in the water court process, particularly with larger and more complicated projects, where parties may not be successful on their first attempt because of legal and/or factual issues. This is one of the unique aspects of the state's water court system, in which applicants seek to use a limited and highly coveted resource belonging to the public. In making its decision regarding a water matter, a court is tasked with applying heightened standards to "guarantee security, assure reliability, and cultivate flexibility in the [use] of this scarce and valuable resource." *Empire Lodge Homeowners' Ass's v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001). As part of these high standards, applicants must meet certain procedures before a court will award a decree recognizing the right to use the public's water. For example, if the applicant is unable to meet the "can and will" requirement for a conditional water right, then the court cannot allow the party to speculatively hold the water right and the application will be denied. *See e.g. Rocky Mountain Power Co. Colo. River Water Conservation Dist.*, 646 P.2d 383, 388-89 (Colo. 1982). Nevertheless, just because the party cannot meet the "can and will" requirement under circumstances existing today, it does not mean that the applicant can never meet the burden of proof if circumstances change in the future.

FRICO is taking a surprisingly forceful approach in attempting to prevent United from pursuing its claims in the future on an otherwise routine matter, and it is an approach that runs counter to how many water adjudications in Colorado proceed. In its March 30 order in this case, the court made it clear that, at most, United had procured only an "agreement to agree" with Highland Owners and this agreement was not strong enough to overcome the anti-speculation doctrine. But FRICO's term asking that this court conclude that United would never be able to overcome the anti-speculation doctrine is inappropriate here. Doing so would punish water users from seeking a water right too early for fear that if they did not have all their ducks in a row from the very beginning, they could never again attempt to appropriate that water. There is no rule limiting applicants to one and only one bite at the apple, and the court declines to follow such a parochial approach now.

IV. CONCLUSION AND ORDER

The court hereby grants United's requested relief and ORDERS as follows:

1. United's claim in this case for appropriative rights of exchange is dismissed with prejudice and operates as an adjudication on the merits of such claim. United is prohibited from pursuing the same claim again in the future just as if it had proceeded to adverse judgment on this claim.

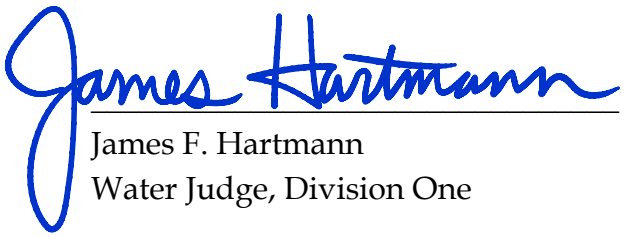
2. The claims to use the conditional water storage right claimed by United in this case for replacement of system losses in delivery of water to ECCV and ACWWA, and for irrigation of the DeSanti Parcel, are dismissed without prejudice.

3. United's claim for a conditional water storage right in Highlands Reservoir for uses within the Highlands Development was dismissed as speculative pursuant to the court's order on FRICO's motion for summary judgment, dated March 30, 2019.

4. Having disposed of all of United's claims filed in this case, this ruling serves as the final judgment of the water court.

Dated: June 10, 2019.

BY THE COURT:



James F. Hartmann
Water Judge, Division One

DISTRICT COURT, WATER DIVISION 1 WELD COUNTY, COLORADO Weld County Courthouse 901 9th Avenue, P.O. Box 2038 Greeley, CO 80631 (970) 475-2400	DATE FILED: March 30, 2019 9:35 AM CASE NUMBER: 2016CW3053
CONCERNING THE APPLICATION FOR WATER RIGHTS OF **UNITED WATER AND SANITATION DISTRICT, acting by and through the UNITED WATER ACQUISITION PROJECT WATER ACTIVITY ENTERPRISE** IN ADAMS, ARAPAHOE, DENVER, DOUGLAS, ELBERT, MORGAN, AND WELD COUNTIES	▲ **COURT USE ONLY** ▲
	Case No. 2016 CW3053 Water Division No. 1
ORDER RE: FRICO'S MOTION FOR DETERMINATION OF QUESTION OF LAW AND MOTION FOR PARTIAL SUMMARY JUDGMENT	

This matter comes before the court on a combined motion for a determination of question of law and partial summary judgment filed by Farmers Reservoir and Irrigation Company ("FRICO"). In its motion, FRICO asks the court to determine that Applicant United Water and Sanitation District, acting by and through the United Water Acquisition Project Water Activity Enterprise ("United"), does not qualify for the governmental planning exception to the anti-speculation doctrine, and instead must satisfy the anti-speculation criteria applicable to private water appropriators. FRICO further asks the court to rule that United's contracts with East Cherry Creek Water and Sanitation District ("ECCV"), Arapahoe County Water and Wastewater Authority ("ACWWA"), and a group of land owners seeking to develop a residential housing project called the Highlands Development ("Highlands Owners") are non-binding and

lack the necessary detail to form a non-speculative basis to appropriate a conditional water right. FRICO requests entry of partial summary judgment in its favor regarding United's claimed conditional water storage for the Highland Development.

FRICO's request for a ruling that United does not qualify for the governmental planning exception is identical to a motion it filed in consolidated cases 13CW3180, 13CW3182, 13CW3183 and 14CW3173, in which United pursued, in part, the same conditional storage water rights it seeks for the Highland Reservoir in this case. In the previous cases, United conceded that it was prepared to meet the standards applicable to private water appropriators, and thus, it was not necessary for the court to address the question of whether United qualified for the governmental planning exception to the non-speculation rule. Based on United's concession, the court did not address that question in the motion filed in the consolidated cases. In an order entered in the consolidated cases on April 16, 2016, the court concluded that United did not satisfy the anti-speculation doctrine because United did not have binding contractual commitments or agency relationships with the entities that would have used the water United sought to appropriate at the time the application was filed.

After the ruling was issued in the consolidated cases, United dismissed its applications in the consolidated cases and filed the application in the present matter for conditional storage rights in the Highland Reservoir.[1] United asserts that it now has valid, binding contracts in place with ACWWA, ECCV, and the Highland Owners, and therefore, it can prove the non-speculative intent necessary to appropriate a conditional storage water right in Highlands Reservoir. United also argues that summary judgment on the question of the validity of the contracts with the end users of the water turns on disputed questions of fact; thus, summary judgment is improper.

The court finds that United is acting as a water broker to sell water to end users, and not as a governmental agency that would serve its own municipal customers.

[1] United filed applications in separate cases for the other conditional water rights that were part of the consolidated cases that United dismissed after the April 16, 2016 ruling.

Therefore, United must satisfy the criteria applicable to private water appropriators to prove the Highland Reservoir conditional storage water right is not speculative.

The court further finds that United's contract with the Highland Owners is non-binding as to several essential terms, but most notably that the Highland Owners are not obligated to purchase any amount of water from United. The contract is also subject to further negotiations between the parties as to what volume of storage space in Highland Reservoir, if any, United will devote to Highland Development water, as well as the cost Highland Owners will pay United for reservoir maintenance, operation, and repair costs; however, there is no agreement presently in place that obligates United to provide any amount of water storage in Highland Reservoir to Highland Owners. The court finds summary judgment in FRICO's favor on the Highland Owners' contract is warranted.

United asserts that it is contractually obligated to provide ACWWA and ECCV with water to replace delivery losses incurred by those two entities, with up to 1,320 acre-feet (a.f.) of water provided by United to ACWWA and 1,800 a.f. to ECCV, for a total of 3,120 a.f. per year. FRICO points out that United recently received a conditional water right decree in Case 16CW3059 to provide this amount of replacement water to ACWWA and ECCV, and that ACWWA and ECCV also have decreed water rights to replace their delivery losses incurred in the Beebe Draw. FRICO argues that United does not need additional storage rights in Highland Reservoir to meet its contracts with ACWWA and ECCV. The court finds that the question of whether United requires storage in the Highland Reservoir to meet its contractual obligations to ACWWA and ECCV involves disputed questions of material fact, and therefore, summary judgment cannot be entered on this issue.

I. LEGAL STANDARDS

Motion for Determination of Question of Law

Under C.R.C.P. 56(h), "[a]t any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law.

If there is no genuine issue of material fact necessary for determination of the question of law, the court may enter an order deciding the question." "The purpose of Rule 56(h) is to 'allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds.'" *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995) (quoting 5 Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985)). In reviewing a motion for determination of question of law, a court may decline to enter an order deciding the question if there exists a genuine dispute over any material fact necessary for the determination of the question of law. C.R.C.P. § 56(h); *Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011).

Motion for Summary Judgment

Pursuant to C.R.C.P. Rule 56(c), summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 360 (Colo. 1994); *City of Westminster v. Church*, 167 Colo. 1, 15-16, 445 P.2d 52, 59 (1968). It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. *Greenberg v. Perkins*, 845 P.2d 530, 531 (Colo. 1993); *Elm Distrib., Inc. v. Tri-Centennial Corp.*, 768 P.2d 215, 218 (Colo. 1989). In determining whether summary judgment is proper, the trial court must resolve all doubts as to whether an issue of fact exists against the moving party. *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981); *AviComm, Inc. v. Colorado Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). Where affidavits show conflict, there is a genuine issue of material fact which should be determined by a fact-finding body after both parties have presented evidence in support of their respective positions. *McKinley Constr. Co. v. Dozier*, 487 P.2d 1335 (Colo. 1971). "Even if it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

II. ANALYSIS

In the present matter, United seeks a conditional water storage right in the Highland Reservoir for 2,000 a.f. annually, with one refill right of 2,000 a.f. The proposed capacity for Highland Reservoir is 2,800 a.f. United claims three proposed uses for this water: 1) to provide the Highland Owners with water for the Highland Development, which ultimately will be used for municipal, commercial, irrigation, domestic, storage, augmentation, and exchange by consumers in the Highland Development; 2) augmentation and substitute supply for United's contractual obligations to ACWWA and ECCV to replace delivery losses incurred by those two entities; and 3) direct irrigation use or as a replacement source in an augmentation plan for the DeSanti Parcel, which parcel encompasses fifteen acres of land.

To obtain a conditional water right, United must demonstrate that it has the intent to appropriate water that "is not based on a speculative sale or transfer of the water to be appropriated." *Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros.*, 307 P.3d 1056, 1064 (Colo. 2013) (citing *City of Aurora v. ACJ P'ship,* 209 P.3d 1076, 1083 (Colo. 2009)). The definition of "appropriation" in the Water Rights Determination and Administration Act of 1969 ("1969 Act") prohibits appropriating water for speculative purposes:

> [N]o appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following:
>
> (I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation.

> (II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

C.R.S. § 37-92-103(3)(a). Accordingly, to demonstrate a non-speculative intent to appropriate, a non-governmental applicant seeking water for the use of others must prove: (1) that it is an "agent in fact" of the entities that will use the water it seeks to appropriate; and (2) that the appropriator has a specific plan and intent to use a specific amount of water for specific beneficial uses. *Id.*

Although United was formed as a water and sanitation district and may meet the definition of a quasi-governmental entity in some of its activities, in this instance United is not procuring the water to serve end users within its territorial boundaries.[2] Instead, United seeks to obtain water to sell to third parties for their use. Accordingly, United must satisfy the non-speculation criteria applicable to private appropriators before it may receive a conditional water right.

The Colorado Supreme Court has repeatedly held that the definition of "appropriation" in the 1969 Act provides the statutory basis for the anti-speculation doctrine articulated in *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979). *See, e.g.*, *Vermillion Ranch*, 307 P.3d at 1064; *Jaeger v. Colo. Ground Water Comm'n*, 746 P.2d 515, 522 (Colo. 1987) ("The definition of 'appropriation' set forth in the 1969 Act expressly incorporates the anti-speculation doctrine applied in *Vidler*."). *Vidler*, in turn, restates a longstanding prohibition against obtaining water for speculative purposes. *Rocky Mountain Power Co. v. Colo. River Water Conservation Dist.*, 646 P.2d 383, 388 (Colo. 1982) ("In *Vidler*, we reaffirmed our longstanding view that

[2] United claims that its territorial boundaries encompass the entire state of Colorado, but the reality is that United's actual territorial boundaries consist of a one acre parcel in Elbert County. Moreover, United does not provide end users with the facilities associated with and necessary for delivery of water for use by end users. Instead, United contracts with entities that deliver water to end users to secure water for those entities. United advertises on its website that it was formed to be a "water district for other water districts."

conditional decrees will not be granted to those who cannot show more than a speculative or conjectural future beneficial use.").

Under *Vidler*, relationships or agreements under which a prospective end user remains free to decline to purchase water from the applicant are inadequate to prove the applicant's non-speculative intent to appropriate water. *See Vidler*, 594 P.2d 566, 568 (Colo. 1979). In *Vidler*, a private water-right applicant sought conditional water storage rights, planning to sell the bulk of the stored water to cities in the Denver-metro area. *Id.* at 567. The applicant held preliminary discussions with a number of cities and granted the City of Golden an option to purchase 2,000 acre-feet of water, but failed to enter any contracts for use of water. *Id.* Reasoning that "the right to appropriate is for use," the court found that the applicant provided "no sufficient evidence that it represented anyone committed to actual beneficial use" of the water the applicant sought to appropriate. *Id.* at 568. The applicant's negotiations with various cities fell short because the negotiations did not "rise to the level of definite commitment for use required to prove [non-speculative intent to appropriate]." *Id.* The option contract with Golden was also inadequate, as Golden could "choose not to exercise" the option. *Id.* Without definite commitments from end users, the applicant could not "justify[] its claim to represent those whose future needs are asserted," and thus could not prove it sought water for use rather than speculation. *Id.* Thus, the court held that the applicant failed to demonstrate non-speculative intent with respect to the water it sought to appropriate for others. *Id.*

Post-*Vidler* cases have not altered the anti-speculation standard articulated in *Vidler*. *See Bd. Of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963–64 (Colo. 1995) (holding an applicant must identify "committed ultimate users" to demonstrate non-speculative intent); *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 314 (Colo. 2007) ("For a private entity to meet its intent burden, it must have contractual commitments for any appropriations that are not planned for its own use."); *Vermillion Ranch*, 307 P.3d at 1065 (holding that a "contract that does not require the [end user] to

purchase or use any specific quantity of water" does not provide evidence of non-speculative intent); *Rocky Mountain Power Co.*, 646 P.2d at 390 (reaffirming that "a definite commitment for use" is required to prove non-speculative intent, and stating that "serious negotiations" fail to meet that standard).

A commitment to use water that an end user can walk away from cannot be "definite," as required by *Vidler*. Accordingly, United, as a private water-right applicant in this matter, must prove the existence of a contract or agency relationship between United and its prospective end users that legally binds those users to purchase and place to beneficial use the water United seeks to appropriate. Like the option contract rejected by the *Vidler* court, any relationship short of a legally binding agreement leaves the end user free to walk away, thus providing no guarantee that United represents an entity that needs and intends to use water.

Preliminary steps, taken with the hope of reaching a final agreement, that are not legally binding do not demonstrate non-speculative intent to appropriate water. Because "there can be no binding contract if it appears that further negotiations are required to work out important and essential terms," *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1248 (Colo. App. 2001), United cannot demonstrate non-speculative intent by pointing to a partially-negotiated agreement lacking material terms. Similarly, because "[a]greements to agree are generally unenforceable," *id.*, an agreement to reach a final agreement at a later date does not establish non-speculative intent. Events occurring after an applicant files its application cannot provide evidence of the applicant's non-speculative intent to appropriate water.

United and Highland Owners signed a contract on April 18, 2016, which was the day before United filed the application in this case. Highland Owners own 665 acres in Weld County, Colorado and they have determined that the optimal use of the property is a residential development comprised of approximately 2,000 homes. The Highland Owners anticipate that the property "may be" developed by a third-party developer in the future. If the construction project for 2,000 new homes comes to fruition, Highland

Owners project a need for a total of 1,200 a.f. (.6 a.f. per home) of a mix of potable and non-potable water, with consumptive use estimated at 400 a.f. (.25 a.f. per home).

In paragraph 4.6 of the contract, United indicates it "will make available to the Highlands Project water annually available to United in the Highland Reservoir …." The contract, in paragraph 5.2, establishes a method for calculating the price per acre foot of water, with further agreement for mediation and binding arbitration if the parties cannot agree on a price; however, there is no provision in the contract that requires Highland Owners to purchase any amount of water from United. The closest the contract comes to obligating Highland Owners to pay anything to United is found in contract paragraph 5.1, which calls for the Highland Owners to reimburse United for Highland Owners' share of the operation, maintenance, and repair costs of the Highland Reservoir, based on the Highland Owners' contractual capacity proportionate to the total capacity of the reservoir. However, this obligation is contingent on United and Highland Owners agreeing in writing, at some point in the future, as to what Highland Owners' proportional share in the reservoir will be, what costs will be reimbursable to United, and how those fees will be budgeted. At this time, Highland Owners are not contractually obligated to purchase any amount of water from United, nor are Highland Owners obligated to store water in Highland Reservoir or reimburse United for operation and maintenance costs in the reservoir. If United and Highland Owners are later unable to agree on the terms for storage space in Highland Reservoir that will be devoted to water for use in the Highland Development, there is nothing preventing Highland Owners from seeking water for their project elsewhere.

Likewise, there is nothing in the contract that specifies how much water United pledges to deliver to Highland Owners each year. The contract contains only vague references to the storage capacity anticipated in the reservoir, that the amount of water diverted to storage may be less than the reservoir capacity, and that planning for the Highland Development will have to account for variable supplies. United does agree to notify Highland Owners by the last day of February each year the projected amount of

water available for use in the Highland Development. This clause does not require Highland Owners to purchase the amount of water United projects will be available for use in the Highland Development.

Because United does not have a firm contractual commitment with Highland Owners that binds Highland Owners to purchase any water from United, and at best this is an "agreement to agree" between United and Highland Owners that requires additional negotiations and agreements, the conditional storage right related to Highland Owners is speculative. The court enters summary judgment in favor of FRICO and against United on this claimed use.

As to United's claim for a storage right in Highland Reservoir to meet its contractual obligations to ACWWA and ECCV to replace their water delivery losses, the court concludes that there are disputes between the parties related to material facts, and therefore summary judgment cannot be entered.

FRICO asserts that United does not need the full amount of water claimed for storage to meet its contractual replacement obligations[3] to ACWWA and ECCV, based on United's decree in 16CW3059,[4] as well as separate decrees obtained by ACWWA and ECCV to replace their delivery losses themselves. It remains to be seen how much water, if any, United will prove it needs to store in Highland Reservoir to meet its replacement obligations to ACWWA and ECCV. United concedes that the maximum amount that can be stored for this use under the conditional rights approved in 16CW3059 and in the current case will not exceed 3,120 a.f. (1,800 a.f. for ECCV and 1,320 a.f. for ACWWA) combined between the cases. United also concedes that the amount of water that may actually be necessary for ACWWA and ECCV to meet their replacement obligations could be 1,500 a.f. (900 a.f. for ECCV and 600 a.f. for ACWWA) or less per year, based on historical use.

[3] FRICO contests whether United has a contractual obligation to ACWWA and ECCV to replace delivery losses and that, too, involves a disputed material fact between the parties.
[4] Case 16CW3059 involves conditional storage rights in 70 Ranch Reservoir and Milliken Reservoir.

III. ORDER

Based on the foregoing, the court concludes:

1. United must satisfy the private appropriator standard to prove non-speculative intent, and United is not subject to the governmental planning exception to the non-speculation rule for appropriating conditional water rights in the present matter.

2. The contract between United and Highland Owners does not bind Highland Owners to purchase any water from United, and therefore United's claim pertaining to the Highland Development is speculative and cannot support a conditional water right. Further negotiations and agreements are required between United and Highland Owners before any storage space in the Highland Reservoir is designated for use in the Highland Development. Summary judgment on this claimed use is granted in FRICO's favor and against United.

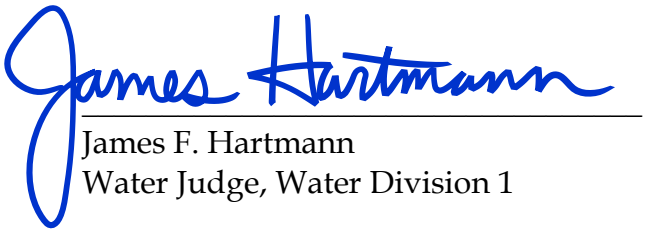
3. A genuine question of material fact exists as to how much water United needs to store in Highland Reservoir to meet its contractual obligations to provide replacement water to ECCV and ACWWA, and thus, FRICO's motion for summary judgment on this claim is denied.

4. Also pending before the court are FRICO's motion to compel discovery and amended motion to compel discovery, filed with the court on March 22, 2019 and March 26, 2019, respectively. FRICO is granted leave of five days from the date of this order to file a notice with the court and United as to which of its requests in the motions to compel discovery remain at issue after the court's rulings in the present order.

5. In light of the court's order granting summary judgment on the Highland Owners' claim, the parties are to confer as to the anticipated length of trial and inform the court by April 8, 2019 how many days they believe will be necessary to try the remaining claims.

DATED: March 30, 2019

BY THE COURT:



James F. Hartmann
Water Judge, Water Division 1

DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 915 10th Street, Greeley, CO, 80632	DATE FILED: July 26, 2019 9:39 AM CASE NUMBER: 2016CW3053
In the Interest of: **In the Interest of:** UNITED WATER AND SANITATION DISTRICT	⚠ **COURT USE ONLY** ⚠ Case Number: 2016CW3053 Division: 1 Courtroom:

Order Denying United's Motion for Reconsideration of Order re: FRICO's Motion

The motion/proposed order attached hereto: ACTION TAKEN.

United Water and Sanitation District's motion for reconsideration is denied.

Issue Date: 4/3/2019

James Hartmann

JAMES FRANCIS HARTMANN
District Court Judge

DISTRICT COURT, WATER DIVISION NO. 1, STATE of COLORADO, Court Address: 901 9th Avenue Greeley, Colorado 80631	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE UNITED WATER AND SANITATION DISTRICT, acting by and through the UNITED WATER ACQUISITION PROJECT WATER ACTIVITY ENTERPRISE, **IN ADAMS, ARAPAHOE, DENVER, DOUGLAS, ELBERT, MORGAN, AND WELD COUNTIES.**	▲ **COURT USE ONLY** ▲
Co-Counsel for the Applicant United Water and Sanitation District: Tod J. Smith, #15417 LAW OFFICE OF TOD J. SMITH, LLC 2919 Valmont Road, Suite 205 Boulder, Colorado 80301 Phone: (303) 444-4203 Email: tod@tjs-law.com Ann M. Rhodes, #39095 ANN RHODES, LLC 610 Emporia Rd. Boulder, Colorado 80305 Phone: (303) 870-7887 Email: amr@amr-law.com	**Case No. 16CW3053** Water Division No. 1
MOTION FOR RECONSIDERATION OF COURT'S ORDER RE: FRICO'S MOTION FOR DETERMINATION OF QUESTION OF LAW AND MOTION FOR PARTIAL SUMMARY JUDGMENT	

Attachment to Order - 2016CW3053

The Applicant, United Water and Sanitation District, acting by and through its United Water Acquisition Project Water Activity Enterprise ("United"), by its undersigned co-counsel, hereby requests that the Court reconsider its Order Re: FRICO's Motion for Determination of Question of Law and Motion for Partial Summary Judgment (March 30, 2019) ("Order") with respect to its granting partial summary judgment as follows:

The contract between United and Highland Owners does not bind Highland

> Owners to purchase any water from United, and therefore United's claim pertaining to the Highland Development is speculative and cannot support a conditional water right. Further negotiations and agreements are required between United and Highland Owners before any storage space in the Highland Reservoir is designated for use in the Highland Development. Summary judgment on this claimed use is granted in FRICO's favor and against United.

Order at 11, ¶ 2. This Motion is proper and timely pursuant to Colo. R. Civ. Pro. 54(b), which provides that

> any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

As grounds for this Motion, United states as follows.

CONFERRAL

Pursuant to C.R.C.P. 121, §1-15(8), counsel for United has conferred with counsel for the Farmers Reservoir and Irrigation Company ("FRICO") who has indicated that FRICO will oppose this Motion.

ARGUMENT

United respectfully requests that the Court reconsider its Order granting partial summary judgment holding that the Water Supply Contract between United and the Highlands Owners (the "Highlands WSA" or "Contract") is speculative and cannot support a conditional water right. Order at 11, ¶ 2. Specifically, the Court found that "there is no provision in the Contract that requires the Highlands Owners to purchase any amount of water from United." *Id.* And, that "there is nothing preventing the Highlands Owners from seeking water for their project elsewhere." *Id.* at 9. Both findings are, United believes, inconsistent with the terms of the

Attachment to Order - 2016CW3053

Contract when read as a whole.[1]

"Contracts should be construed to give effect to the intent of the parties." *Concerning the Application for Water Rights of the Town of Estes Park v. Northern Colo. Water Conservancy Dist.,* 677 P.2d 320, 326 (Colo. 1984) (citing *Fort Lyon Canal Co. v. Catlin Canal Co.,* 642 P.2d 501 (Colo.1982)). "In order to determine intent, a contract must be construed as a whole and effect must be given to every provision, if possible." *Id.* (citing *Gandy v. Park National Bank,* 615 P.2d 20, 22 (Colo.1980)). Applying these principles of contract law to this case, the Highlands Water Supply Agreement obligates the Highlands Owners to purchase the water supplied by the water rights that are ultimately decreed in this case and obligates United to make that water available to the Owners each year, recognizing the parties understanding that there will be significant annual variations in the water supply decreed in this case.

In its prior order issued in Consolidated Case Nos. 13CW3180, 3182, 3183, and 14CW3173 ("Consolidated Order"), this Court required that United and the Highlands Owners have a binding agreement in place before United applied for conditional water rights. (That agreement does not necessarily have to be "in writing to provide the quantum of evidence necessary to prove non-speculative intent . . .." Order at 5). Under those circumstances, there are, inevitably, unknowns which cannot be specifically addressed in the Contract until after the water right is decreed, the reservoir is constructed, and the development project proceeds. The Supreme Court has recognized that the purpose of "conditional decrees [is to] encourage the pursuit of projects designed to place waters of the state to beneficial uses by reserving an antedated priority,

Attachment to Order - 2016CW3053

1 In light of the Court's ruling, which determines that the parties are not bound by the Contract to sell and purchase water, attached is an affidavit from Josh Shipman, Attachment A, representatives of the owner of approximately 70% of the land and capital invested in the Highlands Development, stating their intent and understanding that the Contract binds the Highlands Owners to purchase water decreed in this case pursuant to paragraph 5.2.

in light of the necessity to obtain and complete financing, engineering, and the construction of works that will capture, possess, or otherwise control the water." *Dallas Creek Water Company v. Huey*, 933 P.2d 27, 35 (Colo. 1997) (citing *Public Serv. Co. v. Blue River Irrigation Co.,* 753 P.2d 737, 739 (Colo.1988).") ("*Dallas Creek*"). In the Highlands Water Supply Agreement, the parties recognized several aspects of the project would be finalized and completed in the future: the final capacity of the reservoir, Highlands WSA at ¶ 3.1[2]; what proportion of the Reservoir's final capacity would be needed for the water decreed in this case for the Highlands Owners, *id.* at ¶ 5.1, the final cost of construction of the Reservoir, *id.* at ¶ 5.2, the final design of the Highlands Development, *id.* at ¶¶ A, 4.5, and, most importantly, the yield of the claimed conditional water right in light of its junior 2016 appropriation date and competing demands for the water, *id.* at ¶¶ 4.3, 4.6. Recognizing those factors, the parties drafted a Contract which assures that both parties are obligated to provide and purchase the water rights while taking into consideration the unknowns when the Contract was entered.

A. The Highlands Owners are obligated to purchase storage capacity and water.

The Highlands Owners are obligated to pay for the water based upon the average annual per acre-foot yield: the Highlands Owners "*shall* pay United for storage capacity and water in [Highlands] Reservoir" (emphasis added), and the purchase price will be based upon the "estimated annual average yield . . . taking into account, among others, the geographic location of the Highlands Reservoir, the cost of United Water Facilities [which includes the Reservoir] used to deliver or augment water for the Highlands Project, and all provisions of any decree for storage in Highlands Reservoir." *Id.* at ¶ 5.2. The Highlands Owners are bound, and while the Water Supply Agreement recognizes that due to the variable nature of this water right, they may

[2] The WSA estimated the reservoir capacity at 2,800 acre-feet, *id.* at ¶ 3.1. Since then, construction has begun and

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seek additional sources of supply, *see id.* at ¶ 4.4, like any party to any contract, they could fail to meet their contractual obligations and, as the Court concluded, Order at 9, seek water elsewhere. But that would be a breach which, under the Contract's terms, cannot justify or permit the termination of any continuing obligations. *Id.* at ¶ 7.2. Certainly, the possibility that a party to a contract might fail to meet its contractual obligations and breach the contract is true for any contract and cannot be the basis for determining that this Contract does not meet the anti-speculation standard for obtaining a conditional water right.

B. Payment is based upon a particular amount of water which takes into account the variable nature of the water supply.

The Court incorrectly determined that the Contract does not establish an obligation to purchase any particular amount of water. Order at 3. On the contrary, the parties structured the Contract recognizing the variable nature of the water supply and its junior appropriation date, which may result in significant variations in the water supply available from year to year. Therefore, the parties agreed that the Highlands Owners would pay for the storage capacity and water in Highlands Reservoir based on the per annual average acre-foot of water available from the water rights claimed in this case. Moreover, in establishing the price, the parties also agreed to take into consideration other unknown factors at time the Contract was entered, including the cost of the Reservoir and other infrastructure, and the terms and conditions imposed in the decree. The final price is subject to agreement of the parties and, if no agreement is reached, binding arbitration. Highlands WSA at ¶ 5.2.

Notably, the payment is a one-time per average annual acre-foot payment which then provides the Highlands Owners with a right to storage capacity and the water yielded by the

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the currently estimated capacity, as set out in the proposed decree, is 4,500 acre-feet.

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junior water rights each year. Consequently, there was no need for a minimum amount being purchased – the water is purchased outright based upon the average annual yield and the Highlands Owners are entitled to whatever water is available under the water right each year.

C. Having been paid for the water, United is obligated to provide the water to the Highlands Owners each year.

Once paid pursuant to paragraph 5.2 of the Water Supply Agreement, United is obligated to make any water annually available under the water rights claimed in this case available to the Highlands Owners for their development, *id.* at ¶ 4.6 -- whether the amount available is one acre-foot or 2,000 acre-feet. The water available is a storage right and is only available once it is stored in Highlands Reservoir. Accordingly, it is reasonable to conclude that "available water" includes all water available in storage under this water right, and that the Highlands Owners will pay for both the storage capacity and water stored in that space. *See* Highlands WSA at art. V ("The Highlands Owners *shall* pay for *storage capacity* and water in the [Highlands] Reservoir." (emphasis added)). Additionally, the WSA requires the Highlands Owners to build substantial and costly infrastructure to connect the development to United's water facilities. *Id.* at ¶ 3.8 (Highlands Owners will "[c]onstruct the Highlands Water Facilities. . .."). It is highly unlikely that, having paid for the water and the cost of infrastructure, the Highlands Owners would not take water that is in storage and available to the extent it was needed for beneficial use within the Highlands Project. Moreover, the fact that the supply available each year may vary based upon all the factors identified in the Highlands Water Supply Agreement, does not make the Contract speculative – the parties have agreed that despite its variability the supply will provide an average annual yield over a period of time and that yield is a reasonable basis on which to determine a purchase price.

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The structure of the Highlands Water Supply Agreement is consistent with the nature and purpose of conditional water rights. *See Dallas Creek*, *supra.*, 753 P.2d at 739. At the time the contract was entered, the unknown nature, scope, and extent of a *claimed but not decreed* conditional water right, the variability of the supply, *see id.* at ¶¶ 4.3, 4.6, the cost of constructing the Reservoir and related infrastructure, and the estimated but not finally determined capacity of the Reservoir, provide no basis on which the parties could specifically identify a quantity water, determine a per acre-foot price, or allocate proportionate operation and maintenance costs. To do that would be nothing more than mere speculation and, in all likelihood, would require the parties to subsequently modify the Contract (which of course the parties to any contract can agree to do), once the conditional water rights are decreed, the average annual yield determined, the construction costs and capacity finalized. But those uncertainties at the time the Contract was entered, and the application was filed, are consistent with the nature and purpose of a conditional water right and do not undermine the Contract's terms which bind the Highlands Owners to purchase the water supply yield by the water rights and for United to sell and deliver that water to the Highlands Owners.

CONCLUSION

For the reasons set forth above, United respectfully requests that the Court reconsider its grant of partial summary judgment and hold that the Highlands Water Supply Agreement is a binding commitment to both purchase and provide water and therefore meets the anti-speculation standard applicable to a private water right applicant.

Respectfully submitted this 2nd day of April 2018

LAW OFFICE OF TOD J. SMITH, LLC

By: */s/ Tod J. Smith*
Tod J. Smith, #15417

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ANN RHODES, LLC

By: */s/ Ann M. Rhodes*
Ann M. Rhodes, #39095

Co-Counsel for the Applicant United Water & Sanitation District

This pleading was filed with the court through CES and the electronic procedures authorized by C.R.C.P. 121, sec. 1-26. The duly signed original of this Disclosure is on file at The Law Office of Tod J. Smith and is available for inspection and copying by other parties or the Court upon request.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, I electronically filed with CES a true and correct copy of the foregoing APPLICANT'S MOTION FOR RECONSIDERATION in Case No. 16CW3053, which was to be electronically served by CCES on the parties listed on its service list as follows:

Party Name	Party Type	Party Status	Attorney Name
Burlington Ditch Reservoir And Land Co	Opposer	Active	Kara Nicole Godbehere (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC) Scott E Holwick (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC)
Centennial Water And Sanitation District	Opposer	Active	Paul F Holleman (Buchanan Sperling and Holleman PC) Veronica A Sperling (Buchanan Sperling and Holleman PC)
City And County of Denver	Opposer	Active	James Michael Wittler (Denver Water) Mary Jane Brennan (Denver Water)
City of Aurora	Opposer	Active	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)
City of Boulder	Opposer	Active	Carolyn F Burr (Welborn Sullivan Meck & Tooley, P.C.) James Merle Noble (Welborn Sullivan Meck & Tooley, P.C.) Jens Jensen (Welborn Sullivan Meck & Tooley, P.C.) Jessica Lynn Pault-Atiase (Boulder City Attorneys Office)
City of Brighton	Opposer	Active	Brent A Bartlett (Fischer Brown Bartlett and Gunn PC) Sara Jl Irby (Fischer Brown Bartlett and Gunn PC)
City of Englewood	Opposer	Active	Geoffrey M Williamson (Berg Hill Greenleaf & Ruscitti LLP)

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Party Name	Party Type	Party Status	Attorney Name
			Megan Gutwein (Berg Hill Greenleaf & Ruscitti LLP) Peter D Nichols (Berg Hill Greenleaf & Ruscitti LLP)
City of Thornton	Opposer	Active	Joanne Herlihy (City of Thornton)
Division 1 Engineer	Division Engineer	Active	Division 1 Water Engineer (State of Colorado DWR Division 1)
Edmundson Land Llc	Opposer	Active	David Francis Bower (Johnson and Repucci LLP) Michael Stuart Davidson (Johnson and Repucci LLP) Stephen C Larson (Johnson and Repucci LLP)
Fort Morgan Reservoir And Irrigation Com	Opposer	Active	Andrea Luise Benson (Alperstein Covell PC) Cynthia Frazer Covell (Alperstein Covell PC)
Henrylyn Irrigation District	Opposer	Active	Alyson Meyer Gould (Holsinger Law LLC) Kent Hugh Holsinger (Holsinger Law LLC)
Irrigationists Association	Opposer	Active	Johanna Hamburger (Carlson, Hammond & Paddock, L.L.C.) Karl David Ohlsen (Carlson, Hammond & Paddock, L.L.C.) Mason Hamill Brown (Carlson, Hammond & Paddock, L.L.C.)
Lower Latham Reservoir Company	Opposer	Active	Daniel Kenneth Brown (Fischer Brown Bartlett and Gunn PC)
Platte Valley Irrigation Company	Opposer	Active	Kara Nicole Godbehere (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC) Scott E Holwick (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC)

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Party Name	Party Type	Party Status	Attorney Name
Public Service Company of Colorado	Opposer	Active	Carolyn F Burr (Welborn Sullivan Meck & Tooley, P.C.) James Merle Noble (Welborn Sullivan Meck & Tooley, P.C.) Jens Jensen (Welborn Sullivan Meck & Tooley, P.C.)
South Adams County Water And Sanitation	Opposer	Active	Alison Id Gorsevski (Moses, Wittemyer, Harrison and Woodruff, P.C.) Richard John Mehren (Moses, Wittemyer, Harrison and Woodruff, P.C.)
State Engineer	State Engineer	Active	Colorado Division Of Water Resources (State of Colorado - Division of Water Resources)
The Farmers Reservoir And Irrigation Co	Opposer	Active	Beth Van Vurst (Fairfield and Woods, P.C.) Beth Ann Jones Parsons (Fairfield and Woods, P.C.) Joseph B Dischinger (Fairfield and Woods, P.C.)
Todd Creek Village Metropolitan District	Opposer	Active	Michael Patrick Smith (Brownstein Hyatt Farber Schreck LLP) Wayne F Forman (Brownstein Hyatt Farber Schreck LLP)
Town of Lochbuie	Opposer	Active	Matthew Machado (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC) Steven Patrick Jeffers (Lyons Gaddis Kahn Hall Jeffers Dworak and Grant PC)
Weld County Board of Countycommissioners	Opposer	Active	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP) Ryan Matthew Donovan (Lawrence Jones Custer Grasmick LLP)

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/s/ Tod J. Smith

Pursuant to Rule 121, a printed or printable copy of the document bearing the original, electronic, or scanned signature is on file in the offices of Tod J. Smith

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