

DISTRICT COURT, WELD COUNTY, COLORADO	
901 9 th Avenue Greeley, CO 80631-1113	DATE FILED: February 11, 2018 4:00 PM CASE NUMBER: 2016CW3092
Concerning the Application for Water Rights of:	▲ COURT USE ONLY ▲
THE JIM HUTTON EDUCATIONAL FOUNDATION, A COLORADO NON-PROFIT CORPORATION	
In Yuma County, Colorado	Case No.: 16CW3092 Div. No. 1
ORDER DENYING APPLICANT'S MOTION TO AMEND THE APPLICATION AND GRANTING THE MOTIONS TO DISMISS FILED BY OPPOSING PARTIES	

Pending before the Court is a motion to amend the application filed by the Jim Hutton Educational Foundation (Applicant), as well as requests to dismiss the original application filed by several opposing parties in various forms of pleadings. The opposing parties further request that the Court deny Applicant's motion to amend the application. For the reasons expressed herein, the Court agrees with the opposing parties that the original application must be dismissed. The Applicant must bring a separate action to address the question of whether the headgate relocation statute, C.R.S. § 37-86-111, applies to Applicant's proposal to relocate the diversion point for its Tip Jack Ditch right to a location downstream, rather than through an amendment to the original application.

On June 30, 2016, Applicant filed the application in this action requesting only a simplified change of the diversion point of the Tip Jack Ditch water right, pursuant to C.R.S. § 37-92-305(3.5). Resume notice was published for this single claim for relief, drawing objections from numerous parties, including the State and Division Engineers (Engineers). The Applicant and the Engineers filed competing motions for determination of questions of law, each seeking an answer from the Court as to whether the Applicant was authorized (Applicant's position) or precluded (Engineers' position) from utilizing the simplified change provisions to relocate its Tip Jack Ditch diversion point. In an order issued on October 27, 2017, the Court ruled that the Applicant is precluded from utilizing the simple change statute, C.R.S. § 37-92-305(3.5), to relocate the Tip Jack Ditch diversion point to a downstream location.

On November 10, 2017, Applicant moved to amend its application. Two claims for relief are found in the amended application: first, Applicant again claims that it is entitled to change the location of its Tip Jack Ditch headgate under the simple change statute; and second, Applicant seeks an order declaring that the headgate relocation statute applies to its Tip Jack Ditch right. Upon conferral with opposing parties prior to filing the motion, Applicant learned that numerous opposing parties objected to the Applicant's motion to amend the application.

The Engineers, during the briefing on their original motion for determination of a question of law, indicated that a finding by the Court that the simple change statute does not apply to Applicant's Tip Jack Ditch diversion point "should result in a dismissal of the application unless it is amended to request a change of water right under section 37-92-305(3), C.R.S." The inference from this sentence is that the Engineers would not have objected to a motion by Applicant to amend the application to seek a change of water right under C.R.S. § 37-92-305(3); however, the Applicant did not include in the proposed amended application such a claim, so the Engineers now request dismissal of the original application.

The Court finds that the original application cannot be saved through Applicant's attempt to amend by adding an entirely new claim alleging that the headgate relocation statute applies to its Tip Jack Ditch diversion point, for two reasons: first, the motion to amend was not timely filed under the presumptive case management deadlines; and second, good cause does not exist to amend an application that, by statute, should have been dismissed after the Court found that the provisions of the simple change statute do not apply to the Applicant's proposed change of the Tip Jack Ditch decreed diversion point.

The original application was filed in this case on June 30, 2016. The case was initially referred to the Water Referee, pursuant to Rule 6(a) of the Uniform Local Rules for All State Water Court Divisions (U.L.R.). Applicant verbally requested that the Referee re-refer this case to this Court during a status conference held on October 20, 2016, which was granted by the Referee in a written order issued on October 21, 2016. Thus, the case became at issue on December 9, 2016, which is forty-nine days after the Referee's order of re-referral, pursuant to U.L.R. 11(b)(1). The last date for amending the pleadings, absent a finding by the Court of good cause to extend the deadline, was April 7, 2017. *See* U.L.R. 11(b)(8) ("The time to join additional parties or amend pleadings shall be no later than 119 days (17 weeks) after the case is at issue."). None of the parties moved to amend the presumptive case management deadlines that are set forth in U.L.R. 11.

Applicant asserts that it was not until the briefing on the question of the applicability of the simple change statute occurred that Applicant considered that an alternate claim, utilizing the headgate relocation statute, might also apply to the Tip Jack Ditch diversion point. Applicant did not, however, move at that time to amend the application. Instead, Applicant simply raised this argument as part of its response to the Engineers' cross-motion for determination of a question of law, but the Court found that it did not have jurisdiction to address this question because the Applicant did not provide notice in the original resume that a change of diversion point under the headgate relocation statute, C.R.S. § 37-86-111, would be addressed in this action. Applicant points out that it filed the motion to amend the application very soon after the Court ruled that Applicant could not litigate the applicability of the headgate relocation statute based on lack of notice, and therefore, Applicant believes it has shown good cause for the amendment. The Court disagrees that good cause exists to allow Applicant to now amend its application.

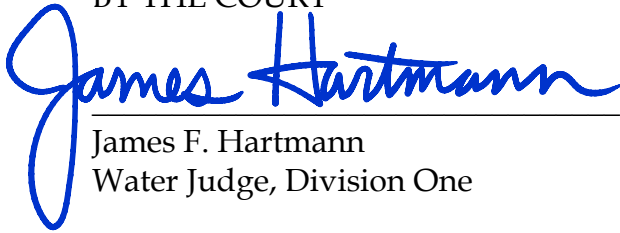
Pursuant to C.R.S. § 37-92-305(3.5)(d), if the Court determines that an applicant cannot make a prima facie showing that the necessary criteria exists for a simple change of the diversion point, then the Court "shall dismiss the application without prejudice to the applicant's filing an application for a change of water right that is not a simple change in a surface point of diversion." Most certainly, the provisions of the statute requiring dismissal of the entire application, when the applicant fails to make a *prima facie* showing of the applicability of the simple change statute, applies to an application containing only a claim (or claims) falling under the simple change statute, such as the Applicant's original application here. Because the statute requires that the application be dismissed upon findings such as those made by this Court, the Court should have *sua sponte* dismissed the application, without prejudice, as part of the October 27, 2017 order, even though dismissal was not specifically requested by the opposing parties. In dismissing the application, the Court is simply issuing an order that was statutorily required when the Court issued its findings and ruling on October 27, 2017. Good cause does not exist for the Applicant to attempt to revive a case, through an amendment to the application, that was statutorily required to be dismissed when the Court issued the October 27, 2017 order.

It is hereby ordered that the original application filed on June 30, 2016, is dismissed without prejudice. For purposes of appeal, the date of the final judgment on the order of dismissal will be February 12, 2018, because this order was issued by the Court on Sunday, February 11, 2018. The Applicant's motion to amend the application

is denied. The Court vacates the status conferences, the trial dates, and all presumptive case management deadlines.

Dated: February 11, 2018.

BY THE COURT


James F. Hartmann
Water Judge, Division One