

District (“RRWCD”) on remand, or from the Court’s additional review of the trial record, to lead to a contrary conclusion.

As a brief introduction, the Foundation is a non-profit organization that offers financial subsidies to nursing students who plan to provide medical services in rural areas upon completing their studies. The Foundation owns land on both the north and south sides of the South Fork of the Republican River (“the river”). The Foundation asserted at trial that land to the south of the river was irrigated with the Hale Ditch surface water right, while lands situated to the north were irrigated by the Tip Jack, the Hutton #1, and the Hutton #2 surface water rights, as well as with groundwater pumped from the Hutton Well. The Engineers claimed at trial that the Foundation abandoned all four of its surface water rights.

The Court found in favor of the Foundation with regard to all four surface rights and ordered the rights to be removed from the Engineers’ decennial abandonment list. The Engineers only challenged on appeal this Court’s findings of non-abandonment for the Tip Jack water right. The Supreme Court ruled that evidence of nonuse of the decreed diversion point for ten years or more raised the statutory presumption of abandonment, which then shifts the burden of proof to the Foundation to rebut the presumption. *Wolfe*, 344 P.3d at 860. The Supreme Court further held the presumption of abandonment may be rebutted through evidence of a fact or condition excusing nonuse of the decreed diversion point, or through presentation of evidence showing there was no intent by the Foundation to abandon the water right. *Id.* at 861.

This order is written to supplement and not replace the *Findings of Fact, Conclusions of Law, and Order of the Water Court* issued on December 16, 2013; therefore, the Court will not repeat here the content of that order, except when necessary to explain or to put into context the present analysis.

I. ANALYSIS

A. Legal Standards

Abandonment of a water right is defined as “the termination of a water right in whole or in part as the result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder.” C.R.S. § 37-92-103(2). The water user’s intent to abandon a water right is the critical inquiry to be determined when abandonment is claimed. *Denver v. Snake River Water Dist.*, 788 P.2d 772, 776 (Colo. 1990). Intent may be inferred from the totality of circumstances existing in the case and must be proved by a preponderance of the evidence. *Id.*

To rebut the presumption of intent to abandon the water right, based on an unreasonably lengthy period of non-use, “there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long non-use.” *People v. City of Thornton*, 775 P.2d 11, 18 (Colo. 1989) (quoting *Mason v. Hills Land & Cattle Co.* 204 P.2d 153, 156 (Colo. 1949)). Statements by a water right owner of intent to use the water right, without other evidence to support such statements, are insufficient to rebut the presumption of abandonment. *Thornton*, 775 P.2d at 776. When determining whether a water user intended to abandon the

right, the court may consider such factors as: (1) the repair and maintenance of diversion structures; (2) diversion records and the non-appearance of the water right on the state engineer's abandonment list; (3) attempts to put the water to beneficial use; (4) efforts to sell the water right; (5) leasing of the water right; (6) filing documents to change, protect, or preserve the right; (7) economic or legal obstacles to exercising the water right. *E. Twin Lakes Ditches & Water Works, Inc. v. Bd. Of Cnty Comm'rs*, 76 P.3d 918, 922 (Colo. 2003). Evidence showing that the water user diverted water at an unauthorized location is not evidence of abandonment, but instead is evidence of nonabandonment. *Lengel v. Davis*, 347 P. 2d 142, 146 (Colo. 1959).

However, merely possessing a chain of title to a water right is not enough to rebut the presumption of intent to abandon the water right based on non-use. *Haystack Ranch v. Fazzio*, 997 P.2d 548, 554 (Colo. 2000). In addition, subsequent efforts by a current owner to put the water right to beneficial use cannot revive a water right already abandoned by a previous owner. *Id.*

Finally, findings of abandonment are strongly disfavored under Colorado law. *Wolfe*, 344 P.3d at 861; *Williams v. Midway Ranches*, 938 P. 2d 515, 527 (Colo. 1997).

B. The owners of the Tip Jack water right never intended to abandon the right.

The Engineers included the Tip Jack water right on the decennial abandonment list in 2010. *See* C.R.S. § 37-92-402. The Engineers argue the Foundation has not rebutted the presumption that the Tip Jack water right was abandoned between 1985 and 2008. The Court finds the evidence presented at trial is to the contrary, and that the Foundation has convincingly shown there was never the intent by the Huttons and the Foundation to abandon the Tip Jack water right.

The Tip Jack Ditch is one of the oldest, and thereby among the most coveted, water rights on the South Fork of the Republican River. This right possesses the number ten priority on the river, and therefore can be used when a call on the river results in curtailment of more junior water rights. The genesis of the Tip Jack water right dates back to 1889, when Abner Spencer first filed a statement and map with the Arapahoe District Court. The Tip Jack water right decree was issued by the court in 1893 for a flow rate of 2 cubic feet per second ("cfs") for irrigation use. The original length of the Tip Jack Ditch was 3.8 miles, and its path meandered in a northeasterly direction from the original diversion point on the river to its terminus in Section 12. It is unknown which lands under the Tip Jack Ditch Mr. Spencer irrigated, as the ditch's original path cut through lands in Sections 15, 10, 11 and 12.

In 1948, Roscoe Hutton purchased land from Walter and Ruth Ryan in Section 12, along with the entire 2 cfs Tip Jack water right. Construction of Bonny Reservoir began a year later in 1949, and the reservoir was designed to capture and store water from the river. The location of the dam just happened to cover the original Tip Jack Ditch diversion point. In response to the prospect of losing the diversion point for his Tip Jack water right under thousands of tons of concrete, Roscoe filed a statement and map with the state engineer in 1949 requesting a change of the diversion point to a location eight hundred feet downstream from the original diversion point. Roscoe filed an amended map and statement with the state engineer to change the Tip

Jack Ditch diversion point in 1950. Although the Tip Jack water right was decreed at 2 cfs, the proposed relocated diversion structure was designed to carry 9 cfs of water, which is strong circumstantial evidence that Roscoe knew he needed a higher flow rate to move the water down to his Section 12 lands as early as 1950.

In addition to the destruction of the Tip Jack diversion point after the dam was constructed, Roscoe faced other daunting hurdles to using the original diversion structure or the proposed relocated Tip Jack Ditch diversion point to transport his water. According to the experts who testified at trial, the soil in this area is quite sandy and that makes it difficult to move water in the ditch. Also, the gradient of the ditch was such that water did not easily move down the ditch. In addition to the physical water-carrying limitations of the Tip Jack Ditch, the diversion rate was decreed at a mere 2 cfs and Roscoe's land was located at the very end of the ditch, which the evidence presented at trial showed made it unlikely that any water could physically make it to Roscoe's land from the original or relocated diversion points.

Being a resourceful person, Roscoe sought other alternatives to enable him to use his Tip Jack water right, albeit without permission from the water court. Roscoe wrote a letter to the Colorado Division of Natural Resources on March 3, 1971, explaining that the combination of a flood on the river in 1935 and the construction of the Bonny Reservoir dam in 1952 caused him to move the headgates for the Tip Jack water right to the Hutton #1 and Hutton #2 "in order to use water." Roscoe goes on to say in the letter, "I am sure you have that information." Roscoe also inquired in this letter whether his well, which was drilled in 1933, and the Tip Jack water right, filed with the court in 1889, would retain those respective priority dates. It is unknown whether the state engineer ever responded to Roscoe's questions.

The Court surmises several things from Roscoe's 1971 letter to the state engineer and from the aerial photographs taken in 1961 and 1970. First, water was likely not diverted from the original Tip Jack Ditch diversion point after the flood in 1935, but most certainly the original diversion point was not used after the Bonny Reservoir dam was completed in 1952. The 1961 and 1970 aerial photographs clearly show that the Tip Jack Ditch was carefully maintained east of the Hale Road, while the ditch was virtually non-existent on the west side of the road. The original diversion point for the Tip Jack Ditch was west of the Hale Road, yet there is no culvert under the Hale Road where it intersects with the Tip Jack Ditch. Thus, there was no way for water to get from the west side to the east side of the Hale Road, and down to Roscoe's land.

Second, Roscoe explicitly informs the state engineer in the letter that he had been diverting the Tip Jack water right from the Hutton #1 and Hutton #2. The evidence shows Roscoe first diverted the Tip Jack water right from the Hutton #2 structure sometime prior to 1961. Water is clearly visible in the Hutton #2 in the 1961 and 1970 photographs. Moving water first from the river into the Hutton #2 and then from there to the Tip Jack Ditch was a laborious task. The first step involved building an earthen dam across the river, which caused the water to change course and flow north into the Hutton #2. Once the Hutton #2 was filled, water was pumped up gradient to the Tip Jack Ditch where it would flow down to Roscoe's Section 12 land. A second ditch, the Hutton #2 lateral, exists in this area and a concrete splitter was built above the Hutton #2 pump house to direct water pumped from the Hutton #2 ditch to the Tip Jack Ditch, the Hutton #2 lateral, or both.

In 1971, Roscoe's only surface water right was the Tip Jack and there can be no other conclusion reached except that he diverted the Tip Jack water right through the Hutton #2 ditch. He explained in his letter to the state engineer the reasons why it was necessary for him to move the headgates for the Tip Jack water right to the Hutton #1 and #2 ditches, as well as his belief that the engineer had this information prior to 1971.

Quite clearly, Roscoe acted without permission from the water court when he unilaterally elected to divert the Tip Jack water right from Hutton #2 during the 1960s and 70s. It also appears he did not garner the support of the state engineer for this practice because, in 1974, the state engineer chose to include Roscoe's Tip Jack water right on the engineer's abandonment list. In response, Roscoe promptly filed a protest to the inclusion of the Tip Jack water right on the abandonment list. In 1977, Roscoe filed a formal claim with the water court to change the Tip Jack water right diversion point; however, rather than seeking to move the diversion point to the locations of the Hutton #1 and Hutton #2 ditches, which the evidence shows is where he had been diverting the Tip Jack right during the 1960s and 70s, he instead reverted back to the proposed location contained in the statement and map he submitted to the engineers in 1949 and 1950. Roscoe also sought new water rights for the Hutton #1 and Hutton #2.

The court issued a decree in 1978 authorizing a change of the Tip Jack water right diversion point to a location 800 feet downstream from the original diversion structure. Other than the change in diversion point, the Tip Jack water right remained as originally decreed. The court also awarded Roscoe new water rights for the Hutton #1 (12.9 cfs) and Hutton #2 (4.92 cfs) ditches in the 1978 decree.

Although Roscoe received a change in the diversion point for the Tip Jack water right in 1978, the evidence presented at trial convincingly shows he never utilized the new diversion point. As with the original diversion point for the Tip Jack Ditch, the court-approved relocated diversion point was west of the Hale Road. Aerial photographs taken in 1980, 1988, 1993, and 1998 show the Tip Jack Ditch continued to be maintained and used east of the Hale Road; however, the Tip Jack Ditch was never reconstructed west of the Hale Road. There was simply no way for the Huttons to move water from the new diversion point to land in Section 12 because there was no ditch west of the Hale Road. In addition, Roscoe still faced the sandy soil conditions and unfavorable ditch gradient if he had attempted to move water from the relocated diversion point to his land. Finally, it would have been necessary for Roscoe to use a pump to move the water from the lower elevation of the river up to the upper section of the Tip Jack Ditch, but there was no evidence presented during the trial that a pump was ever installed or used at the court-approved relocated diversion point.

Because Roscoe did not divert the Tip Jack water right from the changed diversion point, one of two things occurred: either, (1) he stopped using that water right, or (2) he continued to divert, without court approval, the Tip Jack right from the Hutton #2 Ditch. The evidence presented by the Foundation convinces the Court that Roscoe and the successors to this right continued to use the Tip Jack water right from the Hutton #2 Ditch after 1978.

Roscoe's irrigation system contained four surface water rights and one well. Roscoe and later his son, Jim Hutton, used water from the Hutton Well to irrigate cropland, where primarily alfalfa was grown. The four surface rights were generally used in times of drought to divert water onto pasture land to grow native grasses for raising cattle. It was not necessary for the Huttons to flood irrigate the pastures to sustain the native grasses during wet years, and therefore the Huttons did not use river water every year.

The Hale Ditch was used to irrigate land on the south side of the river, while the Tip Jack Ditch, Hutton #1 Ditch, and Hutton #2 lateral irrigated land to the north of the river. The Tip Jack Ditch is located furthest to the north, the Hutton #2 lateral is situated between the Tip Jack Ditch and the river, and the Hutton #1 is located east and to the south of the Tip Jack and Hutton #2 lateral. Based on a review of the aerial photographs, it appears each of these three ditches irrigated separate parcels of land. For example, an aerial photograph from September of 1980, which is an infrared photo, shows significant native vegetative growth on the lands below each of the three ditches.

Roscoe Hutton built a water transfer station on the Hutton #2 that was operated through use of an electric pump. Service records show electricity was provided to the pump house from 1963 until 1985, which is further proof that Roscoe continued to divert the Tip Jack water right from the Hutton #2.

The Engineers focus their abandonment argument to the period of time after 1985, which is the year electricity was disconnected to the pump house. The events that occurred after 1985 establish the owners of the Tip Jack water right never intended to abandon that right.

Prior to his death in 1983, Roscoe transferred the land along with all of his water rights to his wife, Hazel, and his son, Jim. Hazel Hutton transferred her interests in the land and the water rights to Jim Hutton and Jim's wife, Thelma, in 1986.

Jim and Thelma Hutton leased the Hutton Ranch to the Colorado Department of Natural Resources for public hunting and fishing use in 1991. This lease includes the Hutton's land in Section 12. The Huttons expressly reserved the right to continue agricultural operations on the property and to "make full use all water rights presently owned by the Huttons for all purposes presently allowed by the decrees granting such rights" Although the Huttons did not specify by name each of the water rights they owned as part of the lease with the Department of Natural Resources, it is a fair assumption that "all water rights" included the Tip Jack water right.

Thelma Hutton died in 1994 without a will and her interest in the property passed via intestate succession to Jim Hutton. In 1995, Jim Hutton borrowed money and pledged the Hutton Ranch property and all of the water rights associated with the ranch as collateral in the deed of trust securing the loan.

On several occasions between 1993 and 1999, Mr. Patten worked on the Tip Jack Ditch with a backhoe to help Jim Hutton ready the ditch to run water. Aerial photographs taken in 1988, 1993, and 1999 show what appears to be water in the Tip Jack Ditch and the Hutton #2 lateral. In 1985, Mr. Patten helped Jim Hutton pump water from the Hutton #2 Ditch to the Tip

Jack Ditch by running a belt from the pump flywheel to a tractor. Mr. Patten said Jim Hutton always referred to the pump house as the “Tip Jack Ditch.”

Another long-time neighbor, Mr. Sneddon, observed water being used on the north side of the river on several occasions through the mid-1980s. Ms. Sneddon testified that he was frequently away from the area after the mid-1980s. He testified that Jim Hutton referred to the water used on the north side of the river as the “Tip Jack,” and Mr. Sneddon was not aware that Jim Hutton also owned the Hutton #1 and Hutton #2 water rights.

Jim Hutton created the Jim Hutton Educational Foundation in 2000, using the Hutton Ranch property to fund the Foundation. The Foundation provides low interest loans to high school and college students from Kit Carson and Yuma Counties committed to a career in nursing.

John Cure met Jim Hutton in 2000, and in either 2000 or 2001 Mr. Cure entered into a written agreement with Jim Hutton to lease 3,587 acres of the Hutton Ranch. Jim Hutton included four water rights in the lease and Mr. Cure agreed to pay a higher lease payment on the land because the water rights were included. Jim Hutton did not list the water rights that were part of the lease by name, but he refers to the fact that all of the pastures leased by Mr. Cure have live running water. Mr. Cure began ranching operations on the Hutton Ranch in 2001; however, he did not use any of Jim Hutton’s water rights. Mr. Cure never discussed the historical use of the water on the Hutton Ranch with Jim Hutton, but there was a provision included by Jim Hutton in the lease that Jim “used the flood water in severe drought, but it will take some work on the ditches.” Mr. Cure recorded this lease with the Yuma County Clerk and Recorder on April 2, 2002. After Jim Hutton died in 2002, Mr. Cure contacted the Foundation and asked the Foundation to resolve the water rights dispute with the Engineers. The personal representative of Jim Hutton’s estate conveyed all of Jim Hutton’s water rights to the Foundation in 2004.

In 2008, Mr. Patten attempted to divert the Tip Jack water right through the Hutton #2 Ditch. Mr. Patten constructed a dirt dam across the river and water was diverted up to the pump house. The water commissioner stopped Mr. Patten from pumping water into the Tip Jack Ditch and he told Mr. Patten that he needed a federal permit before he could divert the water. This information was incorrect, but Mr. Patten nevertheless ceased efforts to divert water.

The Engineers cite to the fact that the pipe from the Hutton #2 to the Hutton #2 lateral and the Tip Jack Ditch has a carrying capacity of 4.92 cfs, which is the decreed flow rate of the Hutton #2 water right. Thus, the Engineers argue, the Hutton #2 and Tip Jack water rights cannot physically be diverted from this structure at the decreed flow rate at the same time.

The Engineers argument is misplaced. As the Court explained in the original order, administration of water rights on the South Fork of the Republican River was virtually non-existent prior to 1999. There were very few diversion records kept by the Engineers prior to 1999, and the evidence shows there were many years the Huttons used their water rights and no diversion records were kept by the Engineers. Therefore, there is no way for the Court, or Engineers for that matter, to calculate how much of the water diverted was attributable to the Tip Jack water right and Hutton #2 water right at any given time. Suffice to say, it is illogical for

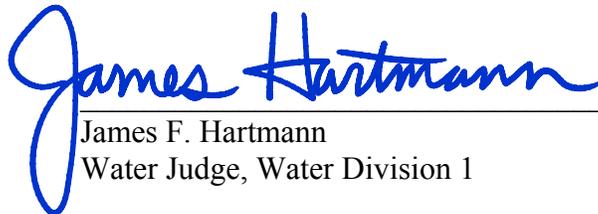
people as resourceful as Roscoe and Jim Hutton, whose very livelihood depended on the use of this water during drought conditions, would abandon the valuable, senior-in-priority Tip Jack water right to rely completely on the junior Hutton # 2 water right. The very fact the Huttons referred to the water right north of the river as the "Tip Jack" when speaking to fellow ranchers contradicts such a notion.

The Court finds the Foundation has rebutted the presumption of abandonment of the Tip Jack water right by presenting evidence that the Huttons and the Foundation never intended to abandon the Tip Jack water right. In summary, evidence was presented that the Tip Jack water right was diverted from the Hutton #2 in 1985, after the electricity was disconnected to the pump house, and this water right was also used on several occasions between 1993 and 1999. Jim and Thelma Hutton leased their land to the state in 1991 to be used as a public hunting and fishing area, but the Huttons specifically excluded from the lease the water rights, which included the Tip Jack right. The express language contained in the lease specified the Huttons intended to continue using all of their water rights for all purposes permitted by the decrees. Jim Hutton pledged his water rights, including the Tip Jack right, as collateral for a loan in 1995. Jim Hutton leased a large parcel of his land to Mr. Cure in 2000 or 2001, along with his water rights. In 2008, Mr. Patten attempted to divert the Tip Jack water right through the Hutton #2 Ditch, but was stopped by the water commissioner.

The Engineers are hereby ordered to remove the Tip Jack water right from the 2010 decennial abandonment list. Nothing in this order is intended to confer a right to the Foundation to continue diverting the Tip Jack water right from any non-decreed point of diversion.

Dated: October 2, 2015.

BY THE COURT:



James F. Hartmann
Water Judge, Water Division 1