

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO 901 9 th Avenue P.O. Box 2038 Greeley, Colorado 80631	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE JIM HUTTON EDUCATIONAL FOUNDATION, A COLORADO NON-PROFIT CORPORATION, IN YUMA COUNTY, COLORADO	
Porzak Browning & Bushong LLP Steven J. Bushong (#21782) Karen L. Henderson (#39137) 2120 13 th Street Boulder, CO 80302 Tel: 303-443-6800 Fax: 303-443-6864 Email: sjbushong@pbblaw.com ; khenderson@pbblaw.com	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: center;">Consolidated Case Nos.: 18CW3032 & 18CW3031</p> <p style="text-align: center;">Water Division: 1</p>
MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF QUESTION OF LAW	

Applicant, The Jim Hutton Educational Foundation (“Foundation”), acting by and through its legal counsel, hereby submits this Motion for Summary Judgment or, in the Alternative, Motion for Determination of Question of Law (“Motion”). As a basis therefore, the Foundation states as follows.

I. BACKGROUND

The Foundation is a non-profit corporation providing low interest loans to nursing students who desire to provide health services in rural, eastern Colorado. The Foundation owns a 4000-acre ranch in Yuma County, Colorado near the Kansas border (“Hutton Ranch”) that is primarily irrigated with surface water rights on the South Fork of the Republican River (“South Fork”). The Foundation leases the Hutton Ranch and its water rights to generate revenue. The

Tip Jack Ditch is a vital water right for the Foundation and one of the most senior water rights on the South Fork. By this Application, the Foundation seeks a determination that the headgate of the Tip Jack Ditch was properly relocated to the Hutton No. 2 point of diversion where the Tip Jack Ditch water right has long been diverted.

The Tip Jack Ditch water right has been the subject of prior litigation before this Court. Specifically, after a trial in Case No. 12CW111, this Court ruled that the Foundation had not abandoned its Tip Jack Ditch water right as was asserted by the State Engineer and Division Engineer for Water Division No. 1 (“Engineers”) and other parties. After an appeal by the Engineers, this Court again ruled on remand that the Tip Jack Ditch water right had not been abandoned. In its rulings in Case No. 12CW111, this Court held that the Tip Jack Ditch water right had historically been used to irrigate the Hutton Ranch. This Court also found that the Tip Jack Ditch water right had been moved to the Hutton No. 2 Ditch diversion point after construction of Bonny Dam and prior to 1961. That ruling did not, however, authorize the continued diversion of the Tip Jack Ditch water right at that location.

In Case No. 16CW3092, the Foundation sought a “simple change” in the Tip Jack Ditch’s point of diversion to the Hutton No. 2 diversion point. In opposition, the Engineers identified a small channel emanating from the middle of Bonny Dam. In reviewing aerial photographs and technical documents associated with the construction of Bonny Dam, it became clear the newly identified channel was used during construction of Bonny Dam to divert water to facilitate construction, but continued to flow with water after the Dam was completed. The Engineers argued the channel precluded a simple change because it joined the historical channel of the South Fork below the currently decreed location for the Tip Jack Ditch. The Foundation asserted, among other things, that the channel reflected an unlawful diversion around its senior

water right. The Foundation also asserted that, in any event, the facts recognized by the parties justified the relocation of the Tip Jack Ditch under C.R.S. § 37-86-111 (the “Headgate Relocation Statute”).

This Court agreed with the Engineers in Case No. 16CW3092 that the bypass channel rendered a simple change inapplicable. The Court did not, however, rule on the applicability of the Headgate Relocation Statute due to notice concerns. The Foundation’s effort to amend the application in Case No. 16CW3092 was denied and the application was ultimately dismissed, without prejudice. In this case, the Foundation renewed its assertion that the headgate of the Tip Jack Ditch was properly relocated to the Hutton No. 2 Ditch pursuant to the Headgate Relocation Statute. The same parties that existed in Case No. 16CW3092 are again involved in this matter.

By this Motion, the Foundation seeks summary judgment or, in the alternative, determination of questions of law raised herein to narrow and frame the issues for trial. This Motion is predicated solely on the events that occurred before, during, and shortly after the construction of Bonny Dam as those facts should not be in dispute given the prior litigation in Case Nos. 12CW111 and 16CW3092. More recent facts that support the relocation are not a basis for this Motion.

II. RELEVANT FACTS

The essential facts relied upon for this Motion have either already been determined in Case No. 12CW112 or were undisputed in the prior litigation in Case No. 16CW3092. The following includes a list of relevant and established facts for purposes of this Motion:

1. The Tip Jack Ditch water right was appropriated in 1889 and is “one of the oldest, and thereby most coveted, water rights on the South Fork.” (Supplemental Findings of Fact, Conclusions of Law and Order of the Water Court regarding the Tip Jack Ditch Water

Right, Case No. 2012CW111, dated October 2, 2015, p.3, **Exhibit A**) (“2015 Order”); (See also Map and Filing Statement of the Tip Jack Ditch dated April 22, 1889, **Exhibit B**; and excerpt of CA-18162 decree dated December 28, 1893, **Exhibit C**).

2. Bonny Dam was constructed by the Bureau of Reclamation (“BOR”) between about 1948 and 1951. (Order Re: Engineers’ Motion for Determination of Question of Law & Applicant’s Cross-Motion for Determination of Question of Law in Case No. 16CW3092, dated October 27, 2017 p.2, **Exhibit D**); (See also, State Engineer and Division Engineer for Water Division No. 1’s Motion for Determination of Question of Law, Case No. 16CW3092 (“Engineers’ Motion”), p.5, **Exhibit E**).
3. “The original diversion point for the Tip Jack Ditch was located on the South Fork of the Republican River at a location that is now covered by the Bonny Reservoir Dam.” (Findings of Fact, Conclusions of Law and Order of the Water Court in Case No. 2012CW111, dated December 16, 2013, p. 3, **Exhibit F**) (“2013 Order”).
4. While Bonny Reservoir was under construction, Roscoe Hutton commenced work by survey on September 30, 1949 to move the Tip Jack Ditch diversion point downstream of Bonny Dam, but still on the “north bank of the South Fork of the Republican River.” (2013 Order, p. 3, **Exhibit F**); (See Amended Map of the Tip Jack Ditch dated November 15, 1949, **Exhibit G**, hereinafter “1949 Map”). This quick response to the construction is consistent with this Court’s finding that the “Huttons were . . . keenly aware of the value of the water rights and importance of maintaining those rights.” (2013 Order, p.9, **Exhibit E**).
5. Before construction of Bonny Dam, the natural South Fork river channel was located where the spillway and river outlet structure were eventually constructed for the Dam.

(See Relevant excerpts of Bonny Reservoir Map and Statement of Claim, **Exhibit H**, showing the location of the river under the dam). This fact was recognized by the Engineers in Case No. 16CW3092. (Engineers' Motion, p.16, Exhibit E).

6. The Technical Record of Design and Construction for Bonny Dam prepared by the BOR in 1954 ("Technical Dam Report"), p.39, **Exhibit I**, states that a "temporary diversion channel" was created and the "river diverted through the channel" with a cofferdam to facilitate construction of the Dam. A picture of the diversion channel is shown on page 40 of the Technical Dam Report and is clear in the 1950 aerial photographs relied upon by the Engineers in Case No. 16CW3092, and attached hereto as **Exhibit J**. (See also Engineers' Motion, pp. 5-6, Exhibit E).
7. The South Fork was diverted into the diversion channel through the center of Bonny Dam until July 1950, when BOR's contractor "closed the diversion channel and began removing mud and wet fill from it." (*Technical Dam Report*, p. 39, Exhibit I). The stated intent was that: "Thereafter, the South Fork flowed through the outlet works of Bonny Dam." (*Id.*). (See also Engineers' Motion, p. 6, Exhibit E).
8. The Engineers maintained in Case No. 16CW3092 that even though the BOR closed the diversion channel through Bonny Dam, water continued to flow in that channel "separate from the outlet works since 1950" based upon their review of aerial photographs and toe drain measurements. (Engineers' Motion, pp. 6, 16, Exhibit E). The Engineers refer to the diversion channel as a "perennial" channel and the natural South Fork channel as an "intermittent" channel, (*Id.* pp. 6-7, 16-17), which "often will cease to flow and the water will pool and become a stagnant swap [sic] area." (Affidavit of Corey DeAngeles, attached as Exhibit 6 to Engineers' Motion, ¶ 17, **Exhibit K**). Although the Foundation

did not fully agree with that nomenclature, there is no dispute that the diversion channel continued to run with water after construction of the Dam and flows in the natural South Fork channel were accordingly reduced.

9. The Engineers maintained, and the Foundation acknowledged, that the new diversion channel joins the South Fork downstream of the Tip Jack diversion point shown in the 1949 Map and later identified in the W-8667 decree. (Engineers' Motion, p. 7, Exhibit E). (*See also Id.* p. 13) ("The Perennial South Fork Channel joins the Intermittent South Fork Channel from the Bonny Dam outlet to form the main stem of the South fork of the Republican River at a point downstream from the Tip Jack Decreed Diversion and upstream from the Hutton No. 2 Diversion").
10. Within a few years after construction of Bonny Dam was completed, Roscoe Hutton commenced work by survey on October 9, 1954 on the Roscoe Hutton Irrigation System, which allowed for a new way to divert the Tip Jack Ditch water right into the Tip Jack Ditch further downstream at the Hutton No. 1 and No. 2. (*See* Map and Filing Statement, **Exhibit L**, hereinafter "1954 Map"). This new diversion point is downstream of the confluence of the two channels of the South Fork created by construction of Bonny Dam.
11. In 1971, Roscoe Hutton wrote a letter to the State Engineer explaining that because of the construction of Bonny Dam and prior flooding, he had needed "to move the headgates for the Tip Jack water right to the Hutton #1 and Hutton #2 'in order to use water'" and that "he had been diverting the Tip Jack water right from the Hutton #1 and Hutton #2." (2015 Order, p.4, Exhibit A). Roscoe Hutton also stated in his letter that "I am sure you have that information" (*Id.*), likely referring to the 1954 Map.

12. This Court concluded in 12CW112 based upon aerial photographs, the foregoing 1971 letter, testimony, and further evidence provided at trial in Case No. 12CW111, that “[t]he evidence shows Roscoe first diverted the Tip Jack water right from the Hutton #2 structure sometime prior to 1961.” (2015 Order, p. 4, Exhibit A); (*See also* 2013 Order, p. 6, Exhibit F).
13. After protesting inclusion of the Tip Jack Ditch water right in the 1974 abandonment list, Roscoe Hutton filed a formal claim in 1977 in Case No. W-8667-77 to change the Tip Jack Ditch water right but identified the location shown in the 1949 Map. (2015 Order, p. 5, Exhibit A). The decree in Case No. W-8667-77 was issued in 1978. (**Exhibit M**).
14. Despite the decree in W-8667-77, the weight of the evidence presented at trial in Case No. 12CW111 convinced this Court that “Roscoe and the successors to this right continued to use the Tip Jack water right from the Hutton #2 Ditch after 1978.” (2015 Order, p. 5, Exhibit A). Reasons for continuing this practice included “the sandy soil conditions and unfavorable ditch gradient.” and other problems with the location identified in the 1949 Map. (*Id.*).
15. A water right for Bonny Reservoir was sought in Case No. W-9135-77, and a decree dated August 30, 1984 was issued. (**Exhibit N**). The water right for Bonny Reservoir is junior to the Tip Jack Ditch water right.
16. There are no surface water rights or ditches that could potentially be physically interfered with by diverting the Tip Jack Ditch water right at the Hutton No. 2. (*See* Second Affidavit of Tom Hatton from Case No. 16CW3092, ¶ 10, **Exhibit O**). Other than the Foundation’s surface water rights, only one water right even exists downstream of Bonny Dam and before the Kansas state line and it is below the Hutton No. 2. (*Id.*)

III. LEGAL STANDARDS

A. Legal Standards of Review for Rule 56 Motions.

C.R.C.P. Rule 56 states that “[i]f there is no genuine issue of material fact necessary for a determination of the question of law, the court may enter an order deciding the question.” A material fact is one whose resolution will affect the outcome of the case. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). “A genuine issue of material fact cannot be established simply by allegations in pleadings or argument; rather, the opposing party must set forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial.” *People ex rel A.C.*, 170 P.3d 844, 846 (Colo. App. 2007). Rule 56(h) allows “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.” *In the Matter of Bd. of County Comm’rs*, 891 P.2d 952, 963 n.14 (Colo. 1995) (quoting Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985)). Resolution of such issues enhances “the ability of the parties to prepare for and realistically evaluate their cases . . . and allows the parties and the court to eliminate significant uncertainties on the basis of briefs and argument, and to do so at a time when the determination is thought to be desirable by the parties.” *Id.* (omission in original).

B. Legal Standards for Statutory Construction.

The general rule for construing statutes was described by the Colorado Supreme Court as follows:

When construing a statute, we effectuate the intent of the General Assembly; we look to the plain meaning of the statutory language and consider it within the context of the statute as a whole. We construe the entire statutory scheme to give consistent, harmonious, and sensible effect to all parts. If the statutory language is clear, we apply it. If the statutory language is ambiguous, we may use other tools of statutory interpretation to determine the General Assembly’s intent. We avoid interpretations that would lead to an absurd result.”

Southern Ute Indian Tribe v. King Consolidated Ditch Co., 250 P.3d 1226, 1232-1233 (Colo. 2011) (internal citations omitted). Further, “when examining a statute’s plain language, we give effect to every word . . . because we do not presume that the legislature used language ‘idly with no intent that meaning should be given to its language.’” *Colorado Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) (internal citations omitted).

IV. LEGAL ANALYSIS

A. Colorado Law Allows the Head of a Ditch to be Relocated to Respond to Changes in a Natural Stream Channel Without Filing a Change Application.

A statute originally enacted in 1881, and amended in 2014,¹ allows the owner of a ditch to legally relocate the head of a ditch to accommodate changes to the river without Water Court approval. Specifically, that statute provides in its entirety as follow:

(1) In case the channel of a natural stream becomes so cut out, lowered, turned aside, or otherwise changed from any cause as to prevent any ditch, canal, or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from the natural stream, the owners of the ditch, canal, or feeder have the right to relocate the head of the ditch, canal or feeder to such distance to the stream that supplies it as may be necessary for securing a sufficient flow of water into the ditch, canal or feeder. For that purpose they have the same right to maintain proceedings for condemnation of a right-of-way for the relocation as in the case of constructing a new ditch. The priority of right to take water from a stream through such ditch, canal, or feeder remains unaffected in any respect by reason of the relocation; but the relocation must not physically interfere with the complete use or enjoyment of any absolute or decreed conditional water right.

(2) If an owner of a water right relocates a surface diversion structure to a new surface point of diversion in compliance with subsection (1) of this section, the owner does not need to file a change of water right application for the new surface point of diversion.

C.R.S. § 37-86-111(1). This statutory provision, as amended in 2014, “applies to changes in points of diversion made before, on, or after the effective date of this act.” HB 14-1005; Laws 2014, Ch. 198 § 3, attached as **Exhibit P**.

¹ See Colorado General Assembly - Session Laws, pp. 161-162, Adjudication Act of 1881, codified as G.S. § 1719, and House Bill 14-1005.

B. The Changes that Occurred to the South Fork Channel Allowed the Head of the Tip Jack Ditch to be Relocated Under C.R.S. § 37-86-111.

Applying the undisputed facts already ruled upon or agreed to in prior litigation to the plain language of the Headgate Relocation Statute supports the relocation of the headgate of the Tip Jack Ditch to the Hutton No. 2 as described below.

1. *The South Fork Was Changed by Bonny Dam in a Way that Prevented the Tip Jack Ditch Headgate from Receiving the Water to which It Was Entitled.*

Roscoe Hutton relocated the diversion point of the Tip Jack Ditch twice to address the impacts that the construction of Bonny Dam had on his ability to divert. The first time, as this Court stated in Case No. 12CW111, was “[i]n response to the prospect of losing the diversion point for the Tip Jack water right under thousands of tons of concrete, [when] Roscoe filed [the 1949 Map] . . . requesting a change of the diversion point to a location eight hundred feet downstream.” (2015 Order, p. 3). However, that first relocated diversion point would have been plagued with problems, including low gradient and sandy soils. (2015 Order, p.5) (Roscoe Hutton “faced the sandy soil conditions and unfavorable ditch gradient if he had attempted to move water from the relocated diversion point to his land”).

Moreover, as became apparent in Case No. 16CW3092, the first relocated diversion point on the 1949 Map suffered from another problem. Construction of Bonny Dam also resulted in splitting the South Fork into two channels, with the new channel circumventing the relocated headgate. In short, the temporary diversion channel used during construction of Bonny Dam continued to flow with water after it was filled and after the construction was completed. That diversion channel joins the original South Fork channel downstream of the first relocated diversion point. Indeed, the impact was so great that the Engineers consider the existing natural channel of the South Fork an intermittent stream, and the new channel a perennial stream. As a result of the bifurcated river channel, the waters flowing down the new channel are unavailable to the first relocated headgate.

Sometime shortly after the construction of Bonny Dam, Roscoe Hutton relocated the diversion point for the Tip Jack Ditch further downstream in order to divert the water right. This Court concluded in Case No. 12CW111 that the second relocation occurred prior to 1961. This Court also recognized “that the combination of a flood on the river in 1935 and construction of the Bonny Reservoir dam in 1952 caused [Roscoe Hutton] to move the headgates for the Tip Jack water right to the Hutton #1 and Hutton #2 ‘in order to use water.’” (2015 Order, p.4, Exhibit E).

Applying these undisputed facts to the plain language of the Headgate Relocation Statute, it is clear the changes to the South Fork channel caused by Bonny Dam satisfies the statutory requirement for relocation of the Tip Jack Ditch headgate. That is because the right to relocate a headgate exists when “the channel of a natural stream becomes so cut out, lowered, turned aside, or otherwise changed from any cause as to prevent any ditch ... from receiving the proper inflow of water to which it may be entitled from the natural stream...” C.R.S. § 37-86-111(1) (emphasis added). In this instance, the changes to the channel wrought by Bonny Dam would have prevented the Tip Jack Ditch “from receiving the proper inflow.” Further, since the first relocation was not successful in addressing the problem caused by Bonny Dam, the second relocation was “necessary for securing a sufficient flow of water into the ditch . . .” *Id.*

2. Only the Head of the Tip Jack Ditch Was Relocated.

Consistent with the Headgate Relocation Statute, only the “head of the ditch” was relocated for “securing a sufficient flow of water into the ditch.” C.R.S. § 37-86-111(1). As this Court recognized in Case No. 12CW111, the Hutton No. 2 diversion point was used to divert the Tip Jack Ditch water right from the South Fork into the *original* Tip Jack Ditch, “which continued to be maintained and used east of the Hale Road.” (2015 Order, p.5, Exh. A); (*see also, Id.* p. 4) (“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”). In summary, once the water was

diverted into the original Tip Jack Ditch structure east of Hale Road, the Tip Jack Ditch water right was used for irrigation as it had been prior to the construction of Bonny Reservoir.

3. The Relocated Tip Jack Does Not Physically Interfere with Other Water Rights.

As indicated above, there are no intervening water rights between the first and second relocated point of diversion for the Tip Jack Ditch. Indeed, other than the Foundation’s water rights, only one surface water right even remains downstream of Bonny Dam and before the Kansas state line, and it is downstream of the Hutton No. 2 and not in use. (Exhibit O, ¶ 10). That right is junior to the Tip Jack Ditch, junior to the Foundation’s Hale Ditch water rights which are water-short, and junior to Bonny Reservoir, which was drained for Compact compliance and is under continuous curtailment. (*Id.*) Accordingly, the relocation pursuant to C.R.S. § 37-86-111 cannot and does “not physically interfere with the complete use or enjoyment of any absolute or decreed conditional water right.”²

C. The Decree in W-8667-77 Does Not Modify the Relocation that Occurred.

The decree in Case No. W-8667-77 does not modify the relocation that occurred as was argued in Case No. 16CW3092. The right to relocate a headgate granted by § 37-86-111 is not conditioned upon or diminished by the date of a later decree. Instead, the Headgate Relocation Statute simply grants a ditch owner the right to relocate the head of a ditch in response to a loss of water caused by changes in the river channel. No one can plausibly argue that constructing a dam on top of a natural channel and splitting the natural channel into two channels is not a change of a natural channel under § 37-86-111. The right to relocate the headgate is a physical

²As this Court noted previously in this case, “the question of injury under the Headgate Relocation Statute is limited to whether there will be physical interference while an injury analysis under a change of use proceeding to move the headgate may involve not only potential physical interference, but also any other type of injury to other water rights.” (Order Re: Engineers’ Motion to Dismiss and Applicant’s Motion to Consolidate, p. 6). The Headgate Relocation Statute was modified in 2014 to include the “physically interfere” language cited by this Court and was modified at the same time to clarify that no change of water right was required for a headgate relocation by adding subsection 37-86-111(2) and by modifying the definition of “change of water right” set forth at § 37-92-103(5). See HB 14-1005, Exhibit P. Accordingly, case law discussing the pre-2014 Headgate Relocation Statute in the context of a change of water rights is not germane to the existing statutory language. See *Burlington Ditch Reservoir and Land Co. v. Metro Wastewater*, 256 P.3d 645, 674 (Colo. 2011).

solution to such a water supply problem. Whether or not Roscoe Hutton knew of such statutory rights, the fact is he exercised them by relocating his headgate. Nothing in the original decree in CA-18162, nor in the decree in W-8667-77, modify the statutory right of relocation.

A headgate relocation is also separate and distinct from a change of water rights. C.R.S. § 37-92-103(5)(a) (a change of water right includes “a change in the point of diversion except as specified in section 37-86-111(2)”); C.R.S. § 37-86-111(2) (“the owner does not need to file a change of water right application for a new surface point of diversion” obtained under the Headgate Relocation Statute). Accordingly, the later decree in W-8667-77 did not change the fact that the Tip Jack Ditch headgate had been relocated to address changes to the South Fork river channel. This Court discussed the timing of these issues in its rulings in Case No. 12CW111 and concluded as follows: “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. . . . 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.” (2015 Order, p. 5, Exhibit A). *See also Id. at 4* (“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”).

Moreover, the W-8667-77 decree was not intended to change the legal water supply for the Tip Jack Ditch. That supply was originally decreed as the South Fork of the Republican River in CA-18162, and that source was not changed by the W-8667-77 decree. In fact, the W-8667-77 decree states that all other aspects of the 1893 decree remain unchanged. (Exhibit M, p. 2). (*See also* 2015 Order, p. 4, Exhibit A) (“No other portion of the original Tip Jack decree issued in 1893 was changed by the water court in the 1978 decree”). Therefore, the W-8667-77 decree was not intended to deprive the Tip Jack Ditch of its source of supply. A change in the course of a natural river channel should not permanently limit the Tip Jack Ditch to an intermittent flow in contradiction to the relocation rights created by § 37-86-111.

Further, the headgate relocation statute provides a just result in this instance. The law recognizes that “one does not lose his possessory property rights in water by diverting the water at a point or points other than those decreed to him.” *Means v. Pratt*, 331 P.2d 805, 808-09 (Colo. 1958); *see also Wolfe v. Jim Hutton Educational Found.*, 344 P.3d 855, 861 (Colo. 2015) (quoting the same language from *Means*). Similarly, “the unauthorized, unprotested change of point of diversion is not evidence of abandonment, on the other hand, it is evidence of nonabandonment.” *Lengel v. Davis*, 347 P.2d 142, 146 (Colo. 1959); *see also Jim Hutton Educational Found.*, 344 P.3d at 861 (“use of a water right at an undecreed point of diversion does not evidence intent to abandon”). However, the law stated in those cases is of little value to the owner of such a water right if to change the water right to the actual point of diversion, one must quantify the historical use under the *decreed* diversion point that was not in use. To address that concern, the General Assembly has adopted numerous exceptions, including the Headgate Relocation Statute. Given the “resourceful,” “self-sufficient” and “hard work[ing]” nature of the Huttons, (2013 Order, p. 8, Exhibit F), it is not surprising that they took it upon themselves to change the point of diversion of their Tip Jack Ditch water right to protect it from the impacts of Bonny Dam. The Tip Jack Ditch water right should not be further impacted by foreclosing statutory methods that allow the change to be recognized without re-quantification.

V. CONCLUSION

Based on the undisputed facts and prior rulings of this Court cited herein, the Foundation requests a ruling that the Tip Jack Ditch diversion point was lawfully relocated to the existing point of diversion for the Hutton No. 2 Ditch pursuant to C.R.S. § 37-86-111 as a matter of law, and that the Engineers should administer the Tip Jack Ditch water right at that location without the need for a change application. Alternatively, if the Court does not grant summary judgment in favor of the Foundation, the Foundation alternatively seeks determinations on the questions of law raised herein to provide the parties with direction for trial and for any expert disclosures.

Respectfully submitted this 27TH day of September, 2018.

PORZAK BROWNING & BUSHONG LLP

A handwritten signature in black ink, appearing to read 'SJB', written over a horizontal line.

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Attorneys for the Jim Hutton Educational Foundation

CERTIFICATE OF SERVICE

I certify that on this 27th day of September, 2018, a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF QUESTION OF LAW** was filed and served via the Colorado Courts E-Filing system to the following:

Party Name	Party Type	Attorney Name
Arikaree Ground Water Management District	Opposer	Alan E Curtis (White & Jankowski, LLP) David C Taussig (White & Jankowski, LLP)
CO Division of Parks and Wildlife	Opposer	Heather Annette Warren (CO Attorney General) Timothy John Monahan (CO Attorney General)
Colorado Agriculture Preservation Assoc	Opposer	Bradley Charles Grasmick (Lawrence Jones Custer Grasmick LLP)
Division 1 Engineer	Division Engineer	Division 1 Water Engineer (State of Colorado DWR Division 1)
Don Myrna and Nathan Andrews	Opposer	Geoffrey M Williamson (Vranesh and Raisch) Stuart B Corbridge (Vranesh and Raisch)
Republican River Water Conservation Dist	Opposer	David W Robbins (Hill and Robbins PC) Peter J Ampe (Hill and Robbins PC)
State Engineer	State Engineer	Colorado Division of Water Resources (State of Colorado - Division of Water Resources)
State Engineer and Water Div 1 Engineer	Opposer	Ema I.G. Schultz (CO Attorney General) Paul Louis Benington (CO Attorney General)
Yuma Cty Water Auth Pub Improvement District	Opposer	Dulcinea Zdunska Hanuschak (Brownstein Hyatt Farber Schreck LLP) Steven Owen Sims (Brownstein Hyatt Farber Schreck LLP)

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