

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO 901 9 th Avenue Greeley, CO 80631-1113	DATE FILED: December 24, 2018 11:16 AM CASE NUMBER: 2018CW3032
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: THE JIM HUTTON EDUCATIONAL FOUNDATION, A COLORADO NON-PROFIT CORPORATION IN YUMA COUNTY, COLORADO	▲ COURT USE ONLY ▲ Case No. 18CW3032
ORDER RE: APPLICANT’S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DETERMINATION OF QUESTION OF LAW & ENGINEERS’ CROSS-MOTION FOR SUMMARY JUDGMENT	

This matter comes before the Court on the Applicant Jim Hutton Educational Foundation’s (“Foundation”) Motion for Summary Judgment, or in the alternative for Determination of Question of Law, and on the State and Division Engineers’ (“Engineers”) Cross-Motion for Summary Judgment. The Foundation and Engineers filed responses and replies to the other’s motions, and the Foundation filed a supplemental response to the Engineers’ Cross-Motion. Opposers the Republican River Water Conservation District; the Arikaree Ground Water Management District; the Colorado Agriculture Preservation Association; Don, Myrna, and Nathan Andrews; and the Yuma County Water Authority Public Improvement District (“Certain Opposers”) filed a joint response to the Foundation’s Motion.

Having reviewed all pleadings and being otherwise fully advised, the Court finds that the Headgate Relocation Statute, C.R.S. § 37-86-111, does not apply to the Foundation’s attempt to relocate the Tip Jack Ditch headgate, and therefore, the Court enters summary judgment in favor of the Engineers’ and against the Foundation.

I. BACKGROUND

The Foundation is a non-profit entity that owns a four-thousand-acre ranch located north of the South Fork of the Republican River (South Fork) in Yuma County, Colorado. The Foundation holds decrees to four water rights to divert surface flow from

the South Fork to irrigate the land, which has historically been used to grow native grasses for pasture grazing.

One of these water rights – the right at issue in this matter – is the Tip Jack water right. It was decreed in 1893 for 2.0 cubic feet per second (cfs) and is one of the most senior water rights on the South Fork. Roscoe Hutton acquired the Tip Jack water right in 1948 through a land purchase. The original decreed diversion point for the Tip Jack water right and Tip Jack Ditch was at a point on the north side of the South Fork that was permanently destroyed by the construction of the Bonny Reservoir Dam, completed in 1952. The construction of the dam also divided the South Fork into two separate channels that rejoin a short distance downstream from the dam. In 1949, Roscoe Hutton began looking for alternative diversion points for the Tip Jack water right, and he ultimately filed a map and statement with the Office of the State Engineer proposing a new diversion point just below the dam’s spillway. The proposed new diversion point was a short distance downstream of the original diversion point and upstream of the point where the divided South Fork channels converge.

In 1954, Roscoe Hutton commenced work on a new irrigation system nearly two-and-half miles downstream from the Bonny Reservoir dam, namely the Hutton No. 1 and Hutton No. 2 ditches. Rather than divert the Tip Jack water right at his proposed location below the spillway, it appears that he began diverting it at the Hutton No. 2 Ditch as early as the 1950s without court approval. He used a pump and pipeline to carry the water to the final stretch of the Tip Jack Ditch and onto his land.

In 1977 – twenty-eight years after filing the map with the new proposed diversion point with the State Engineer – Mr. Hutton filed an application in Water Court for a change of the diversion point of the Tip Jack Ditch. Instead of requesting a change of the Tip Jack water right diversion point to the Hutton No. 2 headgate, the application specifically sought a change to the location just below the spillway that he proposed in his 1949 map and statement filed with the State Engineer. The Court approved the new diversion point in Case No. W-8667-77, noting in the decree that all other provisions of the original 1893 decree remained in effect and that no other changes to the Tip Jack water right were allowed without prior approval of the water court. At that time, the Court also decreed water rights for Hutton No. 1 and Hutton No. 2 at their respective points of diversion downstream from the decreed diversion point for the Tip Jack water right. However, even after the decree entered in 1978, it appears that Roscoe Hutton never diverted the Tip Jack water right at that newly decreed point of diversion, but instead continued to divert downstream at the Hutton No. 2 headgate without court authorization.

In 2010, the Engineers included the Tip Jack water right (as well as the Hutton No. 1 and No. 2) on the 2010 Revised Abandonment List for Water Division One. The Engineers alleged that the water rights had not been used for more than 10 years starting in 1985. The Foundation challenged this, and in Case No. 12CW111 this Court found that the Foundation rebutted the presumption of abandonment by presenting evidence that the Huttons and the Foundation never intended to abandon the Tip Jack water right. The Court ordered the Engineers to remove the Tip Jack water right from the abandonment list, but noted that “[n]othing 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.” Supplemental Order, p. 8 (Oct. 2, 2015).

The Tip Jack water right next landed before this Court in Case No. 16CW3092, when the Foundation sought to change the Tip Jack diversion point to the Hutton No. 2 headgate pursuant to either the Simple Change Statute (C.R.S. § 37-92-305(3.5)) or the Headgate Relocation Statute (C.R.S. § 37-86-111). The Court rejected both requests finding that the Simple Change Statute could not be applied because the two channels, while caused by humans during the construction of Bonny Dam, still met the definition of “tributary surface stream.” The second channel constituted an inflow from a tributary surface stream entering the stream between the decreed diversion point and the proposed new diversion point, and thus, the Simple Change Statute did not apply. C.R.S. § 37-92-305(3.5)(a)(II) (“‘Simple change in a surface point of diversion’ means a change in the point of diversion from a decreed surface diversion point to a new surface diversion point ... for which there is ... no inflow between the new point of diversion and the diversion point from which a change is being made.”). The Court further concluded that it did not have jurisdiction to decide whether the Headgate Relocation Statute applied because the Foundation’s resume failed to put other water users on notice that it would be seeking an advisory opinion from the Court on the applicability of that statute to a proposed change of diversion point.

The Foundation, having rectified the notice deficiency in the present matter by filing an application for the determination of water right in February 2018, now properly presents the Court with the question of whether the Tip Jack water right may lawfully be diverted under the Headgate Relocation Statute. The Foundation argues that the diversion of the Tip Jack water right at the Hutton No. 2 headgate satisfies all necessary statutory criteria. The Engineers, along with Certain Opposers, argue that the Headgate Relocation Statute does not apply, and instead, the Foundation must pursue a new diversion point by filing for a change of use, pursuant to C.R.S. § 37-92-302(1)(a).

II. LEGAL STANDARD

A. Summary Judgment and Determination of a Question of Law

The Foundation and Engineers filed their motions for summary judgment pursuant to Colorado Rule of Civil Procedure (C.R.C.P.) 56, and the Foundation's motion for determination of question of law was filed pursuant to C.R.C.P. 56(h). Summary judgment is proper "when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law." *West Elk Ranch, L.L.C. v. U.S.*, 65 P.3d 479, 481 (Colo. 2002); *See* C.R.C.P. 56(c). A genuine issue of material fact "is one which, if resolved, will affect the outcome of the case." *City of Aurora v. ACJ Partnership*, 209 P.3d 1076, 1082 (Colo. 2009). "The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *West Elk Ranch*, 65 P.3d at 481. But "once this initial burden of production is met, the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact." *Aurora*, 209 P.3d at 1082. The opposing party is required to "adequately demonstrate by relevant and specific facts that a real controversy exists. A litigant cannot avoid a summary disposition of his case by merely asserting a fact without evidence to support it." *Id.* (internal citations omitted).

Colorado Rule of Civil Procedure 56(h) allows the Court to address questions of law not warranting summary judgment because they are not dispositive of a claim, "but which nonetheless will have a significant impact upon the manner in which the litigation proceeds." *Bd. of Cnty. Comm'rs of Cnty. of Arapahoe 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); *see also Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011). To determine whether a genuine issue of material fact exists, courts apply the summary judgment standard. *In re Estate of McCreath*, 240 P.3d 413, 417 (Colo. App. 2009). Additionally, "the nonmoving party is entitled to all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Coffman v. Williamson*, 348 P.3d 929. (Colo. 2015).

B. Statutory construction

In construing a statute, a court is to ascertain and effectuate the General Assembly's intent by looking to the plain meaning of the statutory language and considering it within the context of the statute as a whole, "to give consistent, harmonious, and sensible effect to all parts." *Southern Ute Indian Tribe v. King Consolidated Ditch Co.*, 250 P.3d 1226, 1232-33 (Colo. 2011). If the statutory language is clear, the court applies it. *Id.*, see also *Colorado Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) ("when examining a statute's plain language, we give effect to every word and render none superfluous because we do not presume that the legislature used language idly and with no intent that meaning should be given to its language.") (internal citations and quotations omitted). "Words and phrases are read in context and construed literally according to common usage." *Upper Gunnison*, 109 P.3d at 597. Similarly, "[s]trained or forced statutory interpretations are disfavored" and courts should "decline to read language into the statute that simply does not exist." *Ceja v. Lemire*, 154 P.3d 1064, 1067 (Colo. 2007).

However, if the statutory language is ambiguous the court may use other tools of statutory interpretation to determine the General Assembly's intent. *Southern Ute Indian Tribe*, 250 P.3d at 1232-33. Statutory language is ambiguous when it "is susceptible to more than one reasonable interpretation." *Carson v. Reiner*, 370 P.3d 1137, 1140 (Colo. 2016). Among the tools available for interpreting the intent of the General Assembly for ambiguous statutory language, a court may consider, "[t]he object sought to be attained; [t]he circumstances under which the statute was enacted; [t]he legislative history, if any; [t]he common law or former statutory provisions, including laws upon the same or similar subjects; [t]he consequences of a particular construction; [t]he administrative construction of the statute; [t]he legislative declaration or purpose." C.R.S. § 2-4-203 (2018). Regardless, a court in considering these tools, must avoid interpretations that would lead to an absurd result. See *Southern Ute Indian Tribe*, 250 P.3d at 1232-33.

III. ANALYSIS

The Foundation's motion asks this Court to determine as matters of law that the Tip Jack Ditch diversion point¹ was lawfully relocated, pursuant to the Headgate

¹ The Court is not called upon, as part of its analysis of the present motions, to determine what amount, if any, of water attributable to the Tip Jack right that Roscoe Hutton or his successors in interest diverted at the Hutton No. 2 diversion point, as the Court does not have the evidence before it to make such a finding. However, the Court will assume, solely for the purpose of addressing the current motions, that at least a portion of the Tip Jack water right was diverted at the Hutton No. 2 diversion point.

Relocation Statute, C.R.S. § 37-86-111, to the existing point of diversion for the Hutton No. 2 Ditch, and that the Engineers must administer the Tip Jack water right at that location without requiring the Foundation to obtain a decreed change in point of diversion. The Engineers argue that the relocation of the Tip Jack Ditch headgate was not lawful because it does not meet the statutory criteria, either under the version of the Headgate Relocation Statute in effect at the time the change was made or under the current version.

On cross-motion, the Engineers request the Court to determine that neither version of the statute applies to the Foundation's changed diversion point and that the Engineers need not administer the Tip Jack water right's priority without a decreed change in point of diversion

A. The 2014 amended version of the Headgate Relocation Statute, not the pre-2014 version, applies.

The Headgate Relocation Statute was first enacted in 1881 and remained unchanged until 2014. The first version of the statute allowed the owner of a ditch to extend the headgate upstream if changes to the stream prevented diversions at the headgate. In 2014, the General Assembly enacted House Bill 14-1005, which amended language in the statute to specify that a water right owner could relocate the ditch headgate pursuant to the 1881 version of the statute without filing for a change of water right under the Water Right Determination and Administration Act of 1969 ("1969 Act"), provided the relocation did not physically interfere with other water rights. Concerning Clarification of the Requirements Applicable to a Change of Point of Water Diversion, H.B. 14-1005, 69th Gen. Assembly, 2nd. Reg. Sess. (Colo. 2014). Notably, the amendment also included several changes in terminology. For example, the words "extend" and "extension" were uniformly replaced with "relocate" and "relocation." Additionally, the General Assembly rephrased the direction the headgate could be moved from the direction-specific "up the stream" to the more generalized "to the stream."²

Thus, the initial task before the Court is to determine which version of the Headgate Relocation Statute applies. If the original version of the statute controls, then the analysis would be straightforward and the question easily resolved in favor of the

² Compare, C.R.S. § 37-86-111 (2013) ("the owners of such ditch, canal, or feeder have the right to *extend* the head of such ditch, canal, or feeder to such distance *up the stream* which supplies the same as may be necessary for securing a sufficient flow of water.") with C.R.S. § 37-86-111 (2014) ("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) (emphasis added).

Engineers. An attempt to relocate the Tip Jack Ditch diversion point downstream to the Hutton No. 2 headgate structure would not be authorized by the original version of the statute because that version only allowed extensions “up the stream.” However, if the 2014 amended version applies, then a more detailed analysis is necessary to determine whether the Foundation has satisfied all required statutory elements to employ the Headgate Relocation Statute to change the diversion point.

The Foundation argues throughout its pleadings that the 2014 amended version of the Headgate Relocation Statute controls because, by its plain language, the statute applies even to diversions made before the amendment was enacted. The Engineers, on the other hand, argue that the 2014 amended version cannot be applied to the Tip Jack Ditch right because doing so results in an unconstitutionally retrospective application of law, and therefore, the Foundation must be bound by the requirements of the version of the statute in effect at the time the relocation occurred.

The Colorado General Assembly is prohibited from enacting laws that are retrospective in operation. COLO. CONST. ART. II, § 11. However, it may enact laws that are retroactive, provided the effect is procedural or remedial. *Kuhn v. State*, 924 P.2d 1053, 1056-57 (Colo. 1996). When distinguishing legislation that is retroactive as opposed to retrospective, the Colorado Supreme Court has used the term “retrospective’ only in regard to legislation that impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006) (internal quotations omitted). The Supreme Court has developed a two-step inquiry to determine whether a law operates retroactively. *Id.* First, a court must look to the legislative intent “to determine whether the law is intended to operate retroactively” in order to “overcome the presumption of prospectivity.” *Id.* Second, a court can determine a law to be retroactive only if it neither “(1) impairs a vested right, [nor] (2) creates a new obligation, imposes a new duty, or attaches a new disability.” *Id.* (quoting *In re Estate of DeWitt*, 54 P.3d 849, 855 (Colo. 2002)).

Applying the two-step process laid out above, the amended version of the statute is retroactive in nature and not retrospective. First, the General Assembly included express language specifying the legislative intent of retroactivity in Section 3, where it says, “[t]his act applies to changes in points of diversion made before, on, or after the effective date of this act.” Colo. H.B. 14-1005 § 3. This plain and unambiguous statement of intent clearly overcomes any presumption of prospectivity. Next, both versions of the

statute include the same language preventing interference with existing water rights.³ Given that the statute specifically precludes a relocation (or extension) that would injure another water right, there is no conceivable application of this law that would impair a vested right. Indeed, the Engineers concede in their response and cross-motion that relocation of the Tip Jack water right diversion point would likely not cause interference to another water right. Finally, application of the amended version of the statute does not impose new obligations, duties, or disabilities with respect to past transactions or considerations. Rather, the amendment merely clarifies the relationship between the statute and the 1969 Act, as well as to the process and the elements required for the relocation of a headgate not requiring a change decree.

Next, the Engineers argue that H.B. 14-1005 would retroactively apply to relocations completed prior to 2014 only if the relocation satisfied all statutory criteria in place when the relocation occurred. The Engineers cite Section 2 of the amended statute in support of this argument, adding emphasis to specific wording:

(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.

Engineers' Reply in Support of Cross Motion, p.8. The Engineers conclude from this reading of the statute, together with Section 3 of H.B. 14-1005, that the intended effect of the legislation is to clarify that only "changes made in compliance with [the statute] before the effective date of the act would not need to file an application for change of water right." Engineers' Reply p.8. And therefore, because the version of the statute in effect at the time of the relocation allowed only upstream extensions, the downstream relocation of Tip Jack Ditch should be considered unlawful under both versions of the statute.

The Court disagrees with this argument and finds it is contrary to the legislative intent cited elsewhere by the Engineers. Furthermore, the plain language of Section 2 quoted above requires merely that the relocation be "in compliance with *subsection (1) of this section*." Colo. H.B. 14-1005 (emphasis added). Because the original version of the statute did not contain subsections, the inclusion of a specific reference to subsection (1)

³ Compare, COLO. REV. STAT. § 37-86-111 (2013) ("... but no such extension shall interfere with the complete use or enjoyment of any ditch, canal, or feeder.") with COLO. REV. STAT. § 37-86-111 (2014) ("...but the relocation must not physically interfere with the complete use or enjoyment of any absolute or decreed conditional water right).

confirms the General Assembly requires compliance with the new, amended version, and not the original version. Moreover, it would be illogical for the General Assembly to expressly state that the statute applies retroactively, yet require full compliance with the previous law without any mention of such a limitation in the new law. Instead, the General Assembly intended what they plainly said: the amended version of the bill is retroactive – not retrospective – and that it applies to headgate relocations made before the effective date of H.B. 14-1005. As such, this Court finds that the 2014 amended version of the Headgate Relocation Statute controls.

B. The proposed Tip Jack Ditch relocation cannot satisfy the express language of the Headgate Relocation Statute.

Having now resolved which version of the Headgate Relocation Statute applies, the central question is whether the Tip Jack Ditch was lawfully relocated pursuant to the statute. In the various pleadings, the parties outline four principal requirements in this statute for a relocation to be lawful. First, there must be some change to a channel of a natural stream (by any cause) that prevents a ditch from receiving the proper inflow of water to which it may be entitled. Second, the head of the ditch must be relocated. Third, the relocation may not be more than “such distance to the stream that supplies it as may be necessary for securing a sufficient flow of water into the ditch.” Finally, the relocation “must not physically interfere with the complete use or enjoyment of any absolute or decreed conditional water right.”

For the Tip Jack Ditch relocation to be lawful, all four criteria must be met. The parties disagree as to whether the Foundation has met the first three criteria, but all parties agree that no other water user’s right would be impaired through relocation of the headgate.

1) Changes to the stream channel.

To qualify for relocation under the Headgate Relocation Statute, the water user must first establish that there has been a change in the stream channel that prevents the proper inflow of water to the ditch. C.R.S. § 37-86-111(1) (2018) (“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.”).

In support of its argument that this first element exists, the Foundation points to the changes in stream conditions that occurred during the construction of the Bonny Dam and the splitting of the South Fork into two channels, all of which occurred

between 1948 and 1952. The dam was built on or adjacent to the original Tip Jack Ditch headgate, rendering it unusable for diverting the Tip Jack water right. In response, Roscoe Hutton identified a new location 800 feet downstream from the original diversion point and filed a statement and map with the State Engineer in 1949, prior to completion of the Bonny Reservoir dam. Mr. Hutton, however, did not file an application with the Court for a changed diversion point until 1977. That change was decreed in 1978 in Case No. W-8667-77. Mr. Hutton never used the new point of diversion after it was decreed by the Court. Diversion of the Tip Jack water right apparently occurred further downstream at the Hutton No. 2 Ditch, both before and after the Court issued the 1978 decree.

The Engineers and Certain Opposers argue that the Foundation cannot point to changes to the stream channel that predated Mr. Hutton's 1977 application for a new Tip Jack Ditch diversion point, given that Mr. Hutton was fully aware of the then-existing stream conditions and he specifically selected this point of diversion. Those parties assert that for the statute to apply, the Foundation must show some change to the stream that occurred after the 1978 decree entered that prevented Mr. Hutton from diverting water at the decreed diversion point. The Foundation counters that the express language of the statute does not preclude a subsequent relocation after a decree enters, and that the construction of the Bonny Dam, which made diversion at the original Tip Jack Ditch diversion point impossible, is sufficient to meet the terms of the statute.

The Court rejects the Foundation's interpretation of the statute. The Foundation cannot rely on decades-old changes to stream conditions that occurred before a diversion point was decreed to justify its attempt to now relocate the Tip Jack Ditch headgate. While it is undisputed that construction of Bonny Dam changed the channel of the stream, it is also undisputed that construction of the dam was completed and its effects on stream conditions were obvious for 27 years before Roscoe Hutton took legal action in 1977 to have the Tip Jack Ditch diversion point legally changed to a location that neither he nor his successors in interest ever used.

When Roscoe Hutton filed an application for a change of Tip Jack diversion point in 1977, he selected the location on the already-divided South Fork where he would divert water to the Tip Jack Ditch. It is again important to note that Roscoe Hutton was aware of the stream conditions when he filed for the new diversion point. Moreover, it was in this same application that Mr. Hutton sought approval to divert the Hutton No. 2 water right at the Hutton No. 2 structure. When approving the changed diversion site, the Court expressly informed him of the precise location where he was legally allowed

to divert the Tip Jack water right. It is equally important to note that the Court explicitly instructed Mr. Hutton in the W-8667-77 Decree that “no other changes to [the Tip Jack] water right shall be done without prior approval of the Water Court.”

Mr. Hutton very well may have been diverting the Tip Jack water right out of the Hutton No. 2 ditch structure for many years prior to filing the application in 1977, but by 1978 he had a decree and there was water available at the new Tip Jack diversion point. He simply elected not to divert water at that location. Thus, his continued diversion at the Hutton No. 2 following the issuance of the decree effectively constituted a second relocation (the changed diversion point in the 1978 Decree being the first), which was done without court approval. In its October 2, 2015 supplemental order entered in Case No. 12CW2011, this Court found that, “[q]uite clearly, Roscoe acted without permission from the water court when he unilaterally elected to divert the Tip Jack water from Hutton No. 2 during the 1960s and 70s” and “[b]ecause 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.” Supplemental Order, 5.

Furthermore, the language of the statute itself suggests that changes to a stream channel should be recent or current. The statute authorizes relocation when “the channel *becomes* so . . . changed.” C.R.S. § 37-92-111(1) (emphasis added). Had the drafters meant to include changes that occurred years prior to the date the decree establishing a diversion point is entered, they could have easily done so by using a different tense of “become” or a different verb altogether. It would be a strain to imagine that the General Assembly had any intention of allowing water right owners to use a decades-old and well-known changes in stream conditions to justify a sudden headgate relocation. Indeed, the hearing transcript provided in Certain Opposers' Response, clearly shows that not to be the case. In her conversation with Tom Morris of the Office of Legislative Legal Services, State Representative Lori Saine sought to clarify that the Bill would not lead to this result:

Saine: . . . the reason this bill is brought forth because of the floods and the river completely changed course in some areas and so, from what I understand, this is not the musical headgates bill, right? *They're not changing every time they think they need to change a headgate, this is because the river has changed course . . .* I mean it's not every time somebody gets the whim to change a headgate?

Morris: . . . Representative Saine yes...there are conditions that *the stream has to physically change to be the trigger to authorize* . . . a change under the statute.

Certain opposers' Response, at 7 (quoting Transcript of Legislative Hearing on Colorado House Bill 14-1005 attached as Exhibit A to State and Division Engineers' Response in Opposition to Motion for Leave to Amend the Application, Case No. 2016CW3092, Water Division 1, December 1, 2017, at PDF p. 12: 2-1.) (emphasis retained).

Today, the Foundation relies on changes to the stream channel that occurred nearly 70 years ago to justify a relocation of a headgate, the location of which was decreed after changes to the stream channel occurred and were fully known to Mr. Hutton. This—even in conjunction to passing references in the Foundation's pleadings to “increased groundwater pumping”—is insufficient to show there has been any change to the stream channel to meet the first requirement of the statute. The Foundation must show some change to the channel of the stream that occurred after the 1978 decreed change of the Tip Jack Ditch diversion point. For this reason, the Court finds that the Foundation's application fails to satisfy the first element of the Headgate Relocation Statute.

The Foundation further misconstrues subsection 2 of the statute to contend that a change of water right does not invalidate a headgate relocation. The relevant part of that subsection says only that a water right owner whose relocation is made properly “*does not need to file a change of water right application*” (emphasis added). The language of this subsection does not prohibit a water right owner who properly relocates a headgate from subsequently changing a diversion point, nor does it limit the legal effect a newly decreed change of diversion point would have on a previously relocated headgate.

Although the determination that the Foundation cannot meet the first element of the Headgate Relocation Statute supports summary judgment in favor of the Engineers and further discussion would not be necessary, the Court nevertheless elects to address the other statutory criteria and the arguments of the parties.

2) *The meaning of “relocation.”*

Next, the Court will consider whether diverting the Tip Jack water right at the Hutton No. 2 constitutes a “relocation” as contemplated by the statute. Embedded within this inquiry are two separate questions raised by the parties: the first is whether

a downstream move, such as the relocation at issue here, is even permitted under the statute; and the second is whether this represents not merely a relocation, but rather a change in the diversion point of water.

Certain Opposers and the Engineers contend that when the General Assembly changed the statutory language from "a right to extend . . .to such distance up the stream" to "a right to relocate. . .to such distance to the stream," legislators only contemplated allowing lateral or upstream relocations, but not downstream relocations. Certain Opposers argue that the statute says nothing about moving a headgate downstream, and the Engineers argue that downstream relocations were not included because they involve more of a risk of diverting new or different sources of water not available at the original location. And to the extent the statutory language is ambiguous, Engineers and Certain Opposers point to multiple instances of committee testimony where legislators discussed the proposed amendment and the need to allow for lateral moves.

This Court is not persuaded by the Opposers arguments and finds the text of the statute is unambiguous. The term "relocate" does not inherently contain in its definition, either in its popular usage or in the definition provided by the Engineers, any limitations on direction. Read in the context of "to the stream," the word "relocate" logically includes downstream moves as easily as it includes upstream or lateral moves. This Court decline[s] to read language into the statute that simply does not exist," *Ceja v. Lemire*, 154 P.3d 1064, 1067 (Colo. 2007); as such, the Court cannot constrain the word "relocate" to mean only upstream or lateral moves. If the General Assembly had specifically intended to exclude downstream from "relocate", it could have easily said so directly, or by including the words "upstream" and "laterally" while omitting the word "downstream."

Even if the statute were ambiguous as to which directions the term "relocate" applies, this Court is not persuaded by Opposers' arguments pointing to the committee hearing testimony. The evidence offered of committee testimony referencing lateral moves indeed shows that the General Assembly contemplated allowing lateral moves with the bill, but nothing offered by Opposers shows that the General Assembly wanted to preclude downstream relocations. As such, the Court finds that a water right owner may properly relocate a headgate downstream of its original location pursuant to this statute, provided the other necessary statutory criteria are also met.

The next question, raised by the Engineers, is whether diversion of the Tip Jack water right out of the Hutton No. 2 is truly a relocation of the head of the Tip Jack

Ditch. The Foundation contends that this diversion is a “relocation” as contemplated by the statute because the Tip Jack water right is diverted there and then transported via the Hutton No. 2 into the portion of the Tip Jack Ditch to the east of Hale Road. The Engineers counter that this is not just a headgate relocation, but something more than what the statute allows. In support, the Engineers attempt to distinguish between a relocation of the head of a ditch and a completely new change in point of a diversion, and they argue the statute “does not allow the point of diversion for a water right decreed to the ditch to be changed to a completely different ditch.”

This Court is not persuaded by the Engineers' attempt to distinguish between a headgate relocation and a change in diversion point in this instance. The drafters of H.B. 14-1005 used the two terms somewhat interchangeably throughout: First, the title of HB 14-1005 is "Concerning clarification of the requirements applicable to a *change of point of water diversion*" (emphasis added) while the bill itself primarily refers to headgate relocations. Second, the bill summary explains that the 1969 Act "requires changes of water rights, including changes of points of diversion, to be adjudicated. The 1969 Act does not exempt changes [e.g. headgate relocations] authorized by the 1881 act." Use of "changes" in the second sentence of the bill summary suggests that the General Assembly was referring to a headgate relocation as one type of change in point of diversion. And finally, the text of C.R.S. § 37-92-103 as amended by H.B. 14-1005 defines "Change of water right" to mean "a change in the type, place, or time of use, a change in point of diversion EXCEPT AS SPECIFIED IN SECTION 37-86-111(2)" (emphasis in original). These examples, when read in conjunction, suggest that the General Assembly did not contemplate distinguishing between a headgate relocation and a change in point of diversion to the degree argued by the Engineers. Rather, these examples suggest that a headgate relocation, in the context of the 1969 Act, is but one type of a change in point of diversion, although one not requiring a change decree. This interpretation is also consistent with prior Colorado Supreme Court decisions interpreting this statute. *See e.g., Harvey v. Davis*, 655 P.2d 418, 422 (Colo. 1982) ("Although the point of diversion may be changed in some instances, section 37-86-111, C.R.S. 1973, the statute provides an exclusive remedy, and the change must be accomplished without harm to other appropriators.").

Furthermore, the Court finds that—to the extent the Hutton No. 2 carried water from the Tip Jack water right into the Tip Jack Ditch east of Hale Road—this constitutes a relocation of the Tip Jack Ditch headgate pursuant to this second requirement of the statute. The Foundation’s claim would not fail simply because they stopped using the portion of the ditch to the west of Hale Road. Even though the Hutton No. 2 was used

to divert the Tip Jack water right, that water ultimately went through a portion of the same Tip Jack Ditch that has been in use since the right was first decreed in 1893. Had Mr. Hutton or his successors carried the Tip Jack water right directly to its place of use via the Hutton No. 2 and never used any portion of the Tip Jack Ditch, then the Foundation might fail on this requirement as well. In light of the discussion above about the allowed direction of a relocation, the right to relocate a headgate downstream necessarily results in discontinuation of use of part of the original ditch located above the newly relocated headgate. It would be incongruous, and often physically impossible, to relocate a headgate and still require that the entire original ditch be used to transport the water right.

3) The distance necessary for securing a sufficient flow of water

The third statutory requirement limits headgate relocation “to such distance to the stream that supplies it as may be necessary for securing a sufficient flow of water.” C.R.S. § 37-86-111(1) (2018). The Foundation and the Engineers disagree as to whether the Tip Jack headgate relocation exceeds what was contemplated in the phrase “to the distance necessary.” The Engineers contend that the relocated head of the Tip Jack Ditch is beyond that limit because: (1) it is more than two and a half miles downstream from the decreed location, and (2) the Foundation has not presented evidence as to why no other location closer to the decreed diversion point would suffice. The Foundation counters that the statutory language does not contain a fixed limit as to the distance and easily could have if the drafters intended one. The Foundation also contends that the move to the current location was done for commonsense and practical reasons and is therefore proper under the statute.

The Court sees no reason to parse the precise meaning of the statutory language to determine what specific limit the General Assembly intended. It is sufficient from the plain language to see that it intended at least some limit as to how far a headgate could be relocated and that this distance—while not fixed precisely, as the Foundation notes—is nevertheless bound on its outer edge by a notion of necessity. It would be a strain to read this statute as allowing a move beyond that which is necessary to provide a sufficient flow of water to feed the ditch.

After the Court issued the 1978 decree instructing, and limiting, where Mr. Hutton could lawfully divert water into the Tip Jack Ditch, he chose to continue diverting downstream out of the Hutton No. 2. As conceded by the Foundation, this was done not out of necessity, but out of convenience and practicality. There were many reasons why diverting at the decreed point of diversion, even though there is

sufficient flow at this location to satisfy the Tip Jack water right, would be problematic: the divided channels of the South Fork, the sandy soil, the lack of gradient, the need to pump water up in elevation from the stream to the Tip Jack Ditch, etc. These are the very same challenges, however, that Mr. Hutton faced when he specifically requested this location to be decreed as the new point of diversion for the Tip Jack Ditch.

The Foundation further acknowledges that several feasible alternatives existed in the two-and-a-half-mile reach between the decreed point of diversion and the Hutton No. 2 that would have allowed Mr. Hutton to divert farther upstream and closer to the decreed diversion point. For one, he could have used a pump at the decreed diversion point and lined the Tip Jack Ditch or piped the water to the place of use. Alternatively, Mr. Hutton could have moved the relocation point a shorter distance downstream below the confluence of the two channels. These alternatives may have been more inconvenient or expensive than diverting at the Hutton No. 2 headgate, but they were nevertheless still options.

The existence of such alternatives at the diversion point or slightly downstream establishes that diverting at Hutton No. 2 was not a necessity. The Foundation, neither in its application nor its pleadings, have shown why relocation to the Hutton No. 2 was the distance to the stream necessary to secure a sufficient flow into the Tip Jack Ditch, when several other alternatives have always been and continue to be available. Moreover, there was a sufficient flow of water available at the 1978 decreed Tip Jack headgate, but there simply was never the attempt to divert water at that location.

The Court finds that the Foundation's claim does not satisfy the third requirement of the Headgate Relocation Statute.

C. Diversion of the Tip Jack Water Right at the Hutton No. 2 headgate is illegal.

The Foundation's claims fail to meet two of the four necessary requirements of the Headgate Relocation Statute, and therefore the statute cannot be applied to the relocation of the Tip Jack Ditch diversion point to the Hutton No. 2. Additionally, in Case No. 16CW3092, this Court ruled that the Foundation is precluded from utilizing the Simple Change Statute, C.R.S. § 37-92-305(3.5), to relocate the Tip Jack Ditch diversion to the Hutton No. 2.

Because the Foundation is precluded from relying these two procedural avenues, the Foundation must apply for a change of use pursuant to the 1969 Act if it expects the Engineers to administer the priority of the Tip Jack water right at the Hutton No. 2. *See Trail's End Ranch, L.L.C. v. Colo. Div. of Water Resources*, 91 P.3d 1058, 1062 (Colo. 2004)

("[D]iverting water from a natural stream at a point other than one decreed to an existing water right, at least in the absence of a specific statutory exception, constitutes an out-of-priority diversion."). And while this Court has recognized that the Tip Jack water right was not abandoned in Case No. 12CW111, a finding that there was no intent to abandon the Tip Jack water right does not justify an unauthorized diversion. *See Wolfe v. Jim Hutton Educational Foundation*, 344 P.3d 855, 861 n. 5 (Colo. 2015) ("Even if a water court finds that the owner of a water right rebutted the presumption of abandonment with use of the water through an undecreed point of diversion, such use counts as a zero year in a change of water right case when calculating the historical beneficial consumptive use amount allocated to the right.")

The evidence presented here and in prior proceedings indicates that it is indeed highly likely that Roscoe Hutton diverted the Tip Jack water right at Hutton No. 2 for many decades. Assuming unauthorized diversions occurred, it is not known how much of the water diverted at Hutton No. 2 over the years the Foundation may later claim is attributable to the Hutton No. 2 decreed water right and how much is ascribed to the Tip Jack water right, although the years the Tip Jack water right was diverted at an unauthorized location must count as zero in any historical consumptive use analysis.⁴ *Id.*

Going forward, the Court cannot approve of the continued unauthorized diversion of the Tip Jack water right at Hutton No. 2 because to do so would require the Court to ignore the legal requirements necessary for adjudicated water rights in Colorado. Granted, in the fifty-plus years of the Tip Jack water right's probable diversion, there has likely been no injury to any other surface water user, but the Court still must require the Foundation to go through a change of use proceeding before the Tip Jack water right may lawfully be diverted anywhere other than at its decreed location. Part of this analysis involves the Foundation proving the amount of Tip Jack water right it has lawfully placed to beneficial use over time.

⁴ This Court hinted at the difficulty of this task – although for very different reasons – in its October 2, 2015 supplemental order in Case No. 12CW111:

"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 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 record was kept by the Engineers. Therefore, there is no way for the Court, or the Engineers for that matter, to calculate how much of the water is attributable to the Tip Jack water right and Hutton #2 water right at any given time. Supplemental Order, p. 7.

While the Court recognizes the difficulty the Foundation now faces, it simply cannot ignore the fact that Roscoe Hutton and his successors in interest are – and have perpetually been – in violation of the Court's decree since it was first issued in 1978. Nor can the Court reward a water user for an illegal diversion, regardless of its supposed non-injury and half-century of use. The facts are clear that Mr. Hutton had a decree and he had water available at that the Tip Jack diversion point for that water right, yet he chose not to divert it there. The Foundation has the choice to either begin diverting the Tip Jack water right at its decreed location, or it can take the necessary steps to lawfully change the diversion point.

As such, the Court finds that any diversion of the Tip Jack water right at the Hutton No. 2 – from when the 1978 decree was first issued onward – represents an unlawful diversion, and the Engineers need not administer its priority unless the Foundation either diverts from the existing decreed headgate location or lawfully changes its point of diversion in a water court proceeding.

IV. CONCLUSION AND ORDER

The Court denies the Foundation's Motion for Summary Judgement and Determination of Question of Law.

The Court grants the Engineer's Cross Motion for Summary Judgement and finds that the Tip Jack Ditch was not lawfully relocated pursuant to section 37-86-111, C.R.S., to the diversion point for the Hutton No. 2 Ditch. As such, the Court also finds that the Engineers are not required to administer the Tip Jack water right's priority at the Hutton No. 2 Ditch unless the Foundation obtains a decreed change in point of diversion.

The Foundation's application is dismissed and all future court dates are vacated.

Dated: December 24, 2018

BY THE COURT



James F. Hartmann
Water Judge, Division One