

<p>District Court, Water Division 1, Colorado 901 9th Avenue P.O. Box 2038 Greeley, CO 80632</p>	<p>DATE FILED: December 16, 2013 3:31 PM CASE NUMBER: 2011CW186</p>
<p>Plaintiff: The Jim Hutton Educational Foundation, a Colorado non-profit corporation,</p> <p>v.</p> <p>Defendants: State of Colorado, Department of Natural Resources, Division of Water Resources, Dick Wolfe, P.E., in his capacity as the Colorado State Engineer; David Nettles, P.E. in his capacity as Division Engineer in and for Water Division No. 1; State of Colorado, Department of Natural Resources, Division of Parks and Wildlife; and the Republican River Water Conservation District.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No.: 2011CW186</p>
<p style="text-align: center;">FINDINGS OF FACT AND CONCLUSIONS OF LAW</p>	

This matter comes before the Court for ruling. A trial was held on this matter¹ from April 15, 2013 through April 19, 2013. Mr. Bushong and Ms. Henderson appeared for the Jim Hutton Educational Foundation (“Plaintiff”). Ms. Schultz and Mr. Hartman appeared for the State and Division Engineers (“Engineers”). Ms. Van Vurst appeared for Colorado Parks and Wildlife (“CPW”). Mr. Ampe and Mr. Montgomery appeared on behalf of the Republican River Water Conservation District (“RRWCD”).

This case involves a dispute between the Plaintiff – which claims a right to use water from the Hale Ditch water right decreed in 1938 to irrigate certain lands in Sections 11 and 12, Township 5 South, Range 43 West of the 6th Principal Meridian – and the Engineers, who have curtailed use of Hale Ditch water in Sections 11 and 12, based on their assertion that such use amounts to an unlawful expansion of the decreed right. The RRWCD and CPW take a position on this issue consistent with that of the Engineers. Plaintiff seeks an order from this Court directing the Engineers to provide Plaintiff with water under its claimed Hale Ditch right.

¹ This case and Case No. 12CW111, which involves different water rights of the Jim Hutton Educational Foundation, were tried during the same six-day period between April 15 and 22, 2013.

The Court has considered the evidence presented at trial and the written arguments tendered by the attorneys for the parties. The Court enters the following findings of fact and conclusions of law.

I. BACKGROUND

Plaintiff is a non-profit organization that offers financial subsidies to students who intend to provide medical services to patients in rural areas upon completing their nursing training. Plaintiff owns 200 acres of land consisting of lots 11, 12, 13, 14, 20, 21, 22, and 23 in Section 11, Township 5 South, Range 43 West, 6th P.M., Yuma County, Colorado (“Section 11 lands”), as well as land situated in Section 12. Plaintiff asserts that lands in Sections 11 and 12 have been historically irrigated using the Hale Ditch water right, which was decreed on September 8, 1938 in Kit Carson Case No. 2985, with appropriation priority number 38². The decree allows for a flow rate of not more than 23 cubic feet per second (“cfs”) to be diverted from the South Fork of the Republican River to the Hale Ditch, to be used for irrigation of “lands lying thereunder.” The decree is otherwise silent as to where the water is to be used and the decree does not specify the number of acres to be irrigated. The appropriation date for this water right is January 17, 1908.

The Hale Ditch and the lands historically irrigated with the water rights associated with that ditch are located a few miles west of the Colorado/Kansas border. In 1942, the states of Colorado, Kansas and Nebraska entered into the Republican River Compact to provide for the most efficient use of surface water in the Republican River basin and to establish an equitable division of said waters between these three states. *See* C.R.S. § 37-67-101, *et seq.* In 1999, Kansas filed an original action in the United States Supreme Court against Colorado and Nebraska alleging, *inter alia*, that removal of groundwater in the Republican River basin in Colorado expanded Colorado’s apportionment of Republican River water in violation of the Compact. A stipulation was reached between Kansas, Colorado and Nebraska in 2002, calling for the development of a groundwater model to enable the states to better determine the impact of groundwater removal on the three states’ rights and obligations under the Republican River Compact. The stipulation was approved by the United States Supreme Court in 2003. *Kansas v. Nebraska and Colorado*, 538 U.S. 720, 123 S.Ct. 1898, 155 L.Ed.2d 951 (2003).

In response to the litigation and stipulation, and to facilitate the conservation, use and development of water resources in the Republican River basin, the Colorado General Assembly created the Republican River Water Conservation District through legislation enacted in 2004. *See* C.R.S. § 37-50-101, *et seq.*

Although not germane to the issues to be decided in this action, Plaintiff contends that the Engineers motivation for curtailing its Hale Ditch water right is to free up additional water for Colorado to use to meet its Compact obligations.

² The original Hale Ditch claim was granted priority 38, and the Hale Ditch extension and enlargement were granted priorities 40 and 49, respectively.

A. The 1938 adjudicatory hearing and the Hale Ditch Decree.

The original claimants of the Hale Ditch water right were W.T. Crews, W.M. Hollowell, and the Sanders³ brothers. A survey of the Hale Ditch was commenced on January 17, 1908, and a map of the ditch was prepared and submitted by the original claimants. The original claimants included a statement on the Hale Ditch map that the water would be used to irrigate 1,200 acres of land in Yuma County, located “under said ditch in Sections 20, 21, 16, 15, 14, 13, T.5S., R.43 W. of the 6th P.M.” and “Section 18 T.5.S., R.42 W. of the 6th P.M.”

Although the original claimants prepared the statement of claim and Hale Ditch map in 1908, it wasn’t until 1935 when W.T. Crews, L.R. Crews, H.M. Merriam, and Myrtle Buraker sought adjudication of the water right in Water District 49 (Kit Carson County), Case No. 2985. The claim asserted that 1,280 acres were being irrigated with water from the Hale Ditch as of the date the claim was filed in 1935, and that the priority date for the water right was January 17, 1908. Further, the claim requested a diversion rate of 79.40 cfs of water, which was the purported carrying capacity of the Hale Ditch at the time of the claim.

An adjudicatory hearing was held on the claim in 1938. During the same proceeding, the court also considered a separate claim filed by W.T. Crews and L.R. Crews for expansion and enlargement of the Hale Ditch. W.M. Hollowell, L.R. Crews, W.T. Crews, Myrtle Buraker, G.A. Ostrander, and U.G. Radcliff testified at the hearing. H.M. Merriam did not testify.

Mr. Hollowell testified that he, Carl Sanders, and W.T. Crews were the original claimants for the Hale Ditch in 1908. Mr. Hollowell surveyed the ditch and oversaw the preparation of the map. Mr. Hollowell confirmed that the ditch as constructed was consistent with the map and the claim description.

L.R. Crews was one of the four persons who filed a claim to the Hale Ditch in 1935. He testified that he worked on the ditch from 1906 or 1907 until the ditch was completed in 1908, and he provided the court with the physical dimensions of the ditch. L.R. Crews was asked how many irrigable acres were under the Hale Ditch, and he responded “about twenty-two hundred acres under the ditch, most of which is irrigable.” He also testified that there were between twelve and thirteen hundred acres that were actually irrigated with Hale Ditch water, but not at all times because of the lack of water. He testified to the following uses of the Hale Ditch water: L.R. Crews irrigated 280 acres; W.T. Crews irrigated 355 acres; C.B. Crews – who was not a claimant, but leased water from one of the claimants – irrigated 100 acres; Myrtle Buraker irrigated 80 acres. L.R. Crews stated that Mr. Merriam had a one-third interest in the Hale Ditch and Mr. Merriam used the water on 200 acres at the upper end of the ditch, plus an additional 80 acres at “the old Standish place.”⁴ L.R. Crews said that Merriam “did as he pleased with the

³ The Sanders brothers are referred to as “Sanders” on the Hale Ditch map and the Abstract of Title documents, but listed as “Saunders” in the transcript from the 1938 hearing. The Court has selected the “Sanders” spelling because that appears to be the correct spelling of their last name.

⁴ There is no other reference to “Standish” in the records pertinent to this case. The parties agree that this could have been a reference to the “Sanders place” that was inaccurately transcribed.

water.” According to L.R. Crews, H.M. Merriam leased an additional 100 acres to Abbott Reinhold⁵ and Mr. Reinhold irrigated using Mr. Merriam’s water right for one or two years.

L.R. Crews also testified that the Hale Ditch was extended into Sections 8 and 17 in 1908 to irrigate lands belonging to L.R. Crews and W.T. Crews. L. R. Crews explained that the width of the Hale Ditch was expanded by two feet in 1932 and this allowed more water to flow through the ditch. L.R. Crews estimated that the total acreage irrigated with Hale Ditch water – which included the original stretch of the ditch, the ditch extension, and the ditch expansion – was 1,200 acres.

W.T. Crews owned land toward the lower end of the ditch and initially he was not able to irrigate after the ditch was completed because of the lack of water. He was eventually able to irrigate 125 acres from the Hale Ditch as more water became available. All of W.T. Crews’ land was irrigated with water from the Hale Ditch extension. He, too, estimated that a total of 1,200 acres were irrigated with Hale Ditch water. W.T. Crews was an initial appropriator listed on the 1908 map and he was also listed on the 1935 claim.

Myrtle Buraker testified that she owned “Merriam land” and that she irrigated 80 acres with Hale Ditch water. Ms. Buraker was one of the four claimants in 1935. She confirmed that Mr. Merriam owned 80 acres of land on the lower part of the ditch that were irrigated “all the time,” and he owned another 200-300 acres of hay land “up there” that he irrigated. There is nothing contained in the 1938 trial record to confirm the exact location of Merriam’s 200-300 acres of hay land.

Mr. U.G. Radcliff testified that the Hale Ditch ran through a portion of his property and water was transported through the ditch every year after it was completed. Mr. Radcliff did not testify to using water from the Hale Ditch.

Mr. Ostrander testified that he worked for L.R. and W.T. Crews on their land during the summer of 1911, and that he used water from the Hale Ditch to irrigate the Crewses’ land.

The court in 1938 issued the Hale Ditch Decree for up to 23 cfs of water, to be used for irrigation of “lands lying thereunder,” with a priority date of January 17, 1908.

Bonny Reservoir was completed in 1952, after the Hale Ditch water right was decreed. The original headgate for the Hale Ditch was under the reservoir waters after Bonny reservoir was filled, and diversions to the Hale Ditch thereafter were accomplished through an outlet in Bonny Dam.

II. ANALYSIS

A. Location of beneficial use as decreed in Case No. 2985.

⁵ The transcript from the 1938 trial refers to Reinhold as “Rhineland”; however, the records of land ownership during the relevant time period confirm that the person’s name was Abbott Reinhold.

The language pertinent to this Court's analysis is found in Section Eight of the Hale Ditch decree, which reads as follows:

That within a reasonable time after the construction thereof water use, and since that time has been, applied through and by means of said ditch for beneficial purposes for the irrigation of lands lying thereunder and that twenty-three (23) cubic feet of water per second of time have been actually applied and are necessary for the proper and beneficial irrigation of said land; that such application of water for irrigation use was made with such diligence and within such reasonable time after the commencement of the construction of said ditch as to entitle the appropriation therefor to relate back to the date of commencement of the ditch.

Under Colorado law an appropriation for irrigation water is made by and for use on specific land. *V Bar Ranch LLC v. Cotten*, 233 P.3d 1200 (Colo. 2010) (*citation omitted*). Water appropriated for use on one parcel of land cannot be applied to different lands without a decree from the water court allowing a change of use. *Id.* An appropriation of irrigation water "is limited to the acreage the appropriator intended to irrigate when the appropriation was made." *Burlington Ditch Company v. Metro Wastewater*, 256 P.3d 645, 662 (Colo. 2011). "An irrigation water right cannot be lawfully enlarged for application to acreage beyond that for which the appropriation is accomplished, despite the flow rate specified on the face of the decree, in the absence of an adjudicated priority for the enlargement." *Id.*

The decree allows for a flow rate not to exceed 23 cfs, but it is silent as to the specific locations where the water had been used. A flow rate in a decree is not the measure of a water right, but instead diversions are limited to the amount of water necessary for the beneficial use for which the appropriation was made. *Burlington Ditch Company*, 256 P.3d at 662. Moreover, when the decree is silent as to the number of acres to be irrigated, an implied condition exists limiting the use of the water to the acreage the appropriator intended to irrigate when the appropriation was made. *In re Water Rights of Central Colorado Water Conservancy District*, 147 P.3d 9, 16 (Colo. 2006); *Burlington Ditch Company*, 256 P.3d at 662.

In 1908, anyone constructing a ditch was required to prepare a map showing the location of the ditch and the legal subdivisions of land upon which the ditch was to be built. C.S.A. Ch. 69, § 2265a (1903). In addition, a statement was required to be filed with or included on the map describing the location of the headgate; the depth, width, grade and length of the ditch; the carrying capacity of the ditch; the date work was commenced on the ditch or performed on the survey of the ditch; and the estimated cost of the project. C.S.A. Ch. 69, § 2265b (1903). The claimant was required to file one copy of the map with the state engineer and another copy with the clerk and recorder for the county where the proposed headgate was located. C.S.A. Ch. 69, § 2265e (1903). The map and statement filed with the state engineer could later be used in court as *prima facie* evidence of the intent to appropriate. *Id.* However, the failure to file a map and statement by an appropriator did not prevent the adjudication of a water right in accordance with existing laws governing such adjudications, because a water right was not based on the filing of the map and statement. *DeHaas v. Benesch*, 116 Colo. 344, 351 (1947).

The Court is called upon to determine, seventy-five years after the decree was entered, on which properties the Hale Ditch water right was beneficially used as contemplated by the decree entered in Case No. 2985. The court in 1938 found that water was used under this right “within a reasonable time after construction” of the ditch, so this Court must also determine what the court in 1938 found to be a reasonable period of time after construction of the ditch. To do this, the Court will review the ownership of the land and the use of the Hale Ditch water rights over time. The Court previously ruled, in response to a pretrial motion for determination of a question of law, that the Hale Ditch water right, as decreed in 1938, was limited to irrigation of 1,200 acres.

In 1908, the Sanders brothers owned 67.67 acres under the Hale Ditch, W.M. Hollowell owned 103.22 acres, and W.T. Crews owned 215.9 acres, for a total of 386.38 acres. Because the statement of claim on the Hale Ditch map was for irrigation of 1,200 acres, the logical inferences are that the original appropriators intended to acquire more land to irrigate with this right or to have other land owners along the ditch join the case as the ditch was constructed, or both.

Additional acreage was acquired by the original appropriators between 1908 and 1916, with the Sanders brothers coming to own 174.16 acres, W.M. Hollowell 174 acres, and W.T. and Phoebe Crews 437.25 acres, for a total of 785.41 acres. In addition, L.R. Crews owned 237.78 acres and Orlando Hollowell owned 25.51 acres, which increased the total to 1,048.70 acres. By 1931 there were 200 additional acres irrigated through leases from Merriam to Charles Crews and Abbott Reinhold, each of whom irrigated 100 acres. The evidence confirms that 1,248.70 acres were being irrigated with Hale Ditch water by 1931, which was four years before the application was filed in Case No. 2985.

The court issuing the decree did not articulate which of the actions taken after the original statement of claim and map were filed in 1908 were done “within a reasonable period of time” after work commenced on the ditch; however, the court included in its order that water had been applied to beneficial use in irrigating lands lying under the ditch. The court heard testimony that water had been used between 1908 and 1931 to irrigate approximately 1,200 acres. This estimate of irrigated acreage was remarkably close to the 1,248.70 acres that were actually irrigated with Hale Ditch water by 1931. Because the court did not exclude any of the beneficial uses testified to at the hearing in the decree, this Court concludes that the phrase “within a reasonable time after construction” included all of the lands irrigated through 1931. These uses included the lease of water from Merriam to Reinhold in 1931 to irrigate 100 acres of land.

The Court will now address Plaintiff’s interest in the Hale Ditch water right, which relates back first to the rights of the Sanders brothers and later those of H.M Merriam, and where the water was beneficially used as decreed in Case No. 2985.

By 1914, the Sanders brothers and Mr. Reinhold owned all the land in Section 11 presently owned by the Plaintiff. The Sanders brothers conveyed their land in Section 11 to James Hartley in 1918, and Hartley conveyed the Section 11 lands to H.M Merriam in 1920. Hartley conveyed his 1/3 interest in the Hale Ditch to Merriam in 1926. By 1920, Merriam

owned the land in Section 11 now owned by Plaintiff. Merriam also owned land under the Hale Ditch in Sections 14 and 15.

Testimony from the hearing in 1938 showed that Reinhold leased water from Merriam to irrigate 100 acres of land. Reinhold owned land in Sections 11 and 12 at that time and Reinhold's land was contiguous to Merriam's Section 11 land.

Merriam leased 3,694.43 acres to Roscoe Hutton for farming and ranching in 1942, and this lease included all of Merriam's Section 11 lands. Roscoe Hutton purchased all of Merriam's Section 11 lands in 1948, and Hutton also purchased Reinhold's Section 11 and 12 lands. Roscoe Hutton was deeded Merriam's 1/3 interest in the Hale Ditch water right in 1949.

Roscoe Hutton transferred the land and the Hale Ditch water right to his wife, Hazel, and his son, Jim, prior to Roscoe's death in 1983. Hazel Hutton transferred her interests in the land and the Hale Ditch water rights to Jim Hutton and Jim's wife, Thelma, in 1986.

Jim and Thelma Hutton leased their land to the Colorado Department of Natural Resources for a public hunting and fishing easement in 1991. This lease included the Hutton's land in Sections 11 and 12. The Huttons expressly reserved the right to continue agricultural operations on the property and to use all of the water rights decreed to them.

Thelma Hutton died in 1994 without a will and her interest in the property passed through intestate succession to Jim Hutton. Jim Hutton created the Jim Hutton Educational Foundation in 2000, using the Hutton Ranch property to fund the Foundation, to provide low interest loans to high school and college students from Kit Carson and Yuma Counties committed to a career in nursing. Jim Hutton died in 2002, and the personal representative of the estate conveyed the Hale Ditch water rights to the Foundation in 2004.

The evidence presented in this case establishes that the Sanders brothers intended to irrigate land in addition to the 67.67 acres they owned between the Hale Ditch and the South Fork of the Republican River in 1908. By 1916, they owned 174.16 acres lying under the ditch, the majority of which was located in Section 11. Reinhold owned the other lands in Section 11 now owned by Plaintiff. The Plaintiff has shown a clear line of title for the Section 11 lands to Plaintiff from time the original statement of claim was filed in 1908. Moreover, Plaintiff has also shown transfer of the 1/3 interest in the Hale Ditch water rights from the Sanders brothers, to Hartley, then to Merriam, then to various members of the Hutton family, and finally to the Plaintiff.

Plaintiff has not only proven that the Sanders brothers had the intent in 1908 to irrigate the Section 11 lands they later acquired, but Plaintiff has also proven that Hale Ditch water was used to irrigate the land in Section 11 at issue in this case prior to 1931, which is the operative time period under the decree. Ms. Buraker owned the land in Section 14 directly south of Merriam's land in Section 11 (now owned by Plaintiff), and she testified in 1938 that Merriam irrigated 200-300 acres of hay land "up there." This testimony, coupled with other trial testimony that Merriam irrigated land on the upper section of the ditch, leads to the conclusion that Merriam was irrigating his land in Section 11, which was previously owned by the Sanders

brothers. Merriam also owned land in Sections 14, 15, and 16; however, the Court is not convinced that Merriam used the Hale Ditch water right to irrigate land in Sections 14, 15 or 16. Noteworthy is the fact that Merriam did not transfer any interest in the Hale Ditch water right when he sold his land in Sections 14, 15, and 16. Instead, he conveyed his entire 1/3 interest to Roscoe Hutton after Hutton purchased the Section 11 land.

In addition, aerial photographs show a lateral ditch extending north from the Hale Ditch from Section 14 into Section 11. The oldest aerial photograph tendered to the Court was taken in 1938 and the most recent was taken in 2011. The Court has received several aerial photographs taken between 1938 and 2011, and the Hutton lateral can be seen in each of these aerial photographs. Although the earliest aerial photograph submitted to the Court was taken in 1938, which was three years after the decree entered in 1935, logic dictates that the lateral existed well before the decree entered. The lateral is the only way to transport water from the Hale Ditch north to land in Section 11. In addition to evidence presented at the 1938 trial that Merriam irrigated land located “up there” from Buraker’s land to the south, there was evidence that Merriam leased water to Reinhold to irrigate 100 acres of land. Reinhold owned land in Sections 11 and 12 contiguous to Merriam’s Section 11 land, and the only way to transport water to Reinhold would have been through this lateral.

The Court holds that water associated with the Hale Ditch water right was beneficially applied to land located in Sections 11 and 12, Township 5 South, Range 43 West, 6th P.M., Yuma County, Colorado, as decreed in Kit Carson Case No. 2985.

B. Expansion of use based on the change of river course.

The Engineers assert that the South Fork of the Republican River changed course between 1908 when the original appropriators filed the first statement of claim and ditch map, and 1938 when the decree entered, due to a flood. The Engineers contend that the river channel moved north after the flood, which increased the land area between the Hale Ditch and the South Fork of the Republican River in Section 11. The Engineers argue that Plaintiff would be expanding the water right if it is permitted to irrigate this additional area of land. The Court is not persuaded by the Engineers argument.

The Engineers contend that the river changed course after a flood in 1935. The Engineers rely on the location of the river as shown on the 1889 Government Land Office map as compared to the course of the river shown in aerial photographs taken from 1938 through 2011. The testimony at trial is that small rivers such as this are subject to changing course over time, and even a cursory comparison of the aerial photographs confirm that there have been slight changes in the river course between 1938 and 2011. The Engineers did not provide any evidence to the Court as to whether any events occurred between 1889 and 1908, when the original claim was filed, which could have shifted the course of the river. More importantly, the Engineers did not provide any evidence of the location of the river between 1908 and 1931, which was the time period the Kit Carson County court held Hale Ditch water was beneficially used by Merriam to irrigate what this Court has found were lands located in Section 11. It would require speculation for this Court to conclude that the river significantly changed course after Hale Ditch water was

beneficially used on Section 11 lands and the Court will not impose a condition that Plaintiff limit its application of water to those lands lying south of the river as shown on the 1889 map.

C. Plaintiff's interest in the Hale Ditch water right.

The Plaintiff argues that it owns an undivided 1/3 interest in the Hale Ditch water right. While the Court agrees that Plaintiff has proven it owns a 1/3 interest in the water right, the Court is not persuaded by the Plaintiff's argument that it owns an undivided 1/3 interest in the Hale Ditch water right as a tenant in common with the owners of the other 2/3 interest in the water right.

The original appropriators stated in their ditch contract that the ditch water would be divided into three equal shares. There was no reference to owning this water as tenants in common. In addition, the testimony presented at the trial in 1938 was that the water users, and specifically Merriam, did what they pleased with their individual shares of the water. There was no testimony presented at the trial in 1938 that either the appropriators or the four persons filing the claim in 1935 intended to share the water as tenants in common. Although the Plaintiff has tendered deeds transferring the water rights containing language describing the right as an "undivided 1/3 interest in the Hale Ditch" water right, Plaintiff has not provided any written document showing that all of the owners of this water right agreed to share the right as tenants in common. The Court is also not persuaded by Plaintiff's argument that tenancy in common has been established through the practice of the water users allowing other right holders to use Hale Ditch water when it was not needed by another right holder. While this may show a spirit of cooperation and agreement between neighboring water users, it does not establish legal ownership of a water right as a tenant in common. *See e.g. Archuleta v. Gomez*, 200 P.3d 333, 345 (Colo. 2009).

The Court concludes that Plaintiff's interest in the Hale Ditch water right is a 1/3 divided interest, which is separate and distinct from the 2/3 interest in the water right belonging to others.

D. Abandonment of Water Right

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 intent to abandon the 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.* A continued, unexplained non-use of the water right for an unreasonable period of time leads to a rebuttable presumption of the intent to abandon the right. *Denver v. Middle Park Water Conservancy Dist.*, 925 P.2d 283, 286 (Colo. 1996). In an abandonment proceeding, the court determines whether the water right does or does not exist. *Id.* If the court determines that a water right has been abandoned the water will be retired or lost to the stream. *Id.*

To rebut the presumption of an 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.

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.*

The Engineers assert that the Hale Ditch water right was not used between 1985 and 2002, which the Engineers argue that is an unreasonable period of non-use. The Engineers rely on site visits by Water Commissioner David Keeler, who observed that the Hutton lateral and headgate were in disrepair and overgrown with vegetation; their claim that aerial photographs taken between 1938 and 2011 do not show the type of vegetative growth consistent with irrigated fields; a statement from a witness living nearby that she did not see any irrigation occurring on the land between the 1980’s and 2009; and a neighbor running water through the Hale Ditch for 13 consecutive days which did not result in water making it to the Hale Road upstream from their headgate.

Plaintiff argues that sufficient evidence was presented to show that the water was used during this period of time and therefore the Engineers have failed to prove intent to abandon the right.

The Court has considered the totality of the evidence presented at trial and concludes that the Engineers have not proven by a preponderance of the evidence an unreasonable period of nonuse, and therefore a presumption of intent to abandon the water right has not been established.

Plaintiff produced evidence from Mr. Sneddon, who is the great-grandson of Ms. Buraker (one of the claimants from 1935). The Hutton lateral passed through the Buraker/Sneddon family farm and he regularly observed water flowing in the lateral and he also witnessed irrigation on the Hutton Ranch in Sections 11 and 12 between 1950 and 1966, when he visited the farm as a child and young man, and again between 1972 until 1985 when Sneddon ran the farm. Mr. Sneddon installed a center pivot sprinkler on his land and he placed culverts in the Hutton lateral to allow the water to flow across his property to the Hutton’s when Sneddon was using his sprinklers. Mr. Sneddon did not use Hale Ditch water to irrigate his farm. Mr. Sneddon leased his farm to Mr. Andrews in 1989, after which Mr. Sneddon did not pay close attention to use of the Hale Ditch water. The Court finds Mr. Sneddon’s testimony regarding the Hutton family’s historical use of Hale Ditch water to be very credible.

Mr. Patton has been a neighbor of the Hutton Ranch since the late 1970’s. Mr. Patten observed Hale Ditch water running in the laterals and being applied on the Section 11 and 12 lands, and he could not recall a time when water was not used on the Hutton Ranch prior to Jim Hutton’s death in 2002. Jim Hutton purchased a backhoe in 1993 which Hutton used on the

ranch to clean the laterals. Mr. Patton assisted the Huttons from time to time run water on the ranch, including during the years of 1998 and 2002. The Court also finds Mr. Patton's testimony to be credible.

The state diversion records for the Hale Ditch show diversions occurred for Hale Ditch Priority 38 between 1974 and 2011, with an average diversion amount of 1,923 acre feet per year. There were several years during this thirty-seven year period when only a small amount of water was diverted through the Hale Ditch. The last written recording of Mr. Hutton calling for water in the Bureau of Reclamations records was in 1975. However, between 1977 and 2000 there were no records kept as to whom was calling for the water in the Hale Ditch; yet, thousands of acre feet were diverted into the Hale Ditch during those twenty-three years. One plausible explanation for the lack of information regarding the calling right holder in the records is that the Engineers did not monitor the Hale Ditch water rights as closely as other rights, prior to the lawsuit initiated by Kansas against Colorado, because they were among the last water rights on the system before the water traveled out of Colorado into Kansas. The commissioner admitted that once water was in the Hale Ditch there would be nothing to prevent a right holder from taking their pro rata share of that water, including Mr. Hutton.

The parties have offered differing opinions as to what is shown in the aerial photographs taken between 1938 and 2011. The Engineers argue that these aerial photographs do not provide proof that Sections 11 and 12 were irrigated from the Hutton lateral. Plaintiff asserts that the darker areas in the photograph show increased vegetative growth, thereby proving that irrigation occurred.

The Court finds that the photographs are of limited benefit in this case and only to the degree that the photographs do not show a significant difference in shading over the course of time. The areas that appear darker in the photographs are consistent over time and this includes the photographs taken in 1987, 1994, 1996, 1998, which is within the period of time the Engineers claim Jim Hutton did not use the Hale Ditch water right. However, these photographs show similar areas of shading as those taken prior to 1985, which is when Mr. Sneddon observed water being used on the Hutton Ranch on a yearly basis. If irrigation stopped in 1985, as asserted by the Engineers, it would be expected that the aerial photographs would show a distinct difference in shading to account for the cessation of irrigation water being applied to the land. On the contrary, the inference from the consistent shading shown in aerial photographs over time is that irrigation was occurring throughout the period of time the Engineers claim non-use.

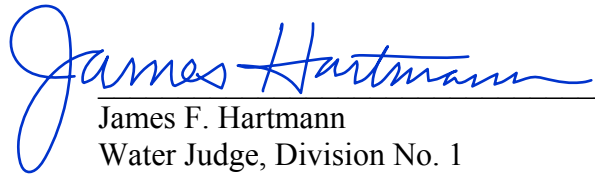
III. ORDER

- A. The Plaintiff owns a 1/3 divided interest in the Hale Ditch water right, Priority 38, decreed in Kit Carson County Case No. 2985;
- B. The water right decreed in Case No. 2985 included irrigation of lands located south of the South Fork of the Republican River in Sections 11 and 12, Township 5 South, Range 43 West of the 6th Principal Meridian, now owned by Plaintiff;

- C. The evidence presented did not prove that Plaintiff's predecessor in interest abandoned the Hale Ditch water right.
- D. The Engineers are ordered to provide Plaintiff with its 1/3 interest in the Hale Ditch water right, when Plaintiff's right is in priority.

Dated: December 16, 2013.

BY THE COURT:



James F. Hartmann
Water Judge, Division No. 1