

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

The Foundation 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. The Foundation owns land to the north of the South Fork of the Republican River, which the Foundation asserts has been historically irrigated with water from the Tip Jack Ditch, and Hutton Ditches 1 and 2.²

The water rights to the Tip Jack Ditch date back to 1889, when Abner Spencer filed a Map and Filing Statement for the ditch with the state engineer. A decree entered on December 28, 1893, in Arapahoe District Court Case No. 18162, for a flow rate of 2.0 cubic feet per second (“cfs”) for irrigation. Roscoe Hutton acquired the Tip Jack Ditch water right in 1948. The original point of diversion for the Tip Jack Ditch was located at a point on the South Fork of the Republican River that was later covered when the Bonny Reservoir Dam was completed in 1952. Roscoe Hutton filed a Map and Filing Statement with the state engineer to move the diversion point below Bonny Reservoir in 1949, when work commenced on the reservoir; however, Roscoe Hutton did not file an application for a change of the diversion point until 1977, in Case No. W-8667-77. On May 24, 1978, the Water Court entered a decree approving the Tip Jack Ditch diversion point to the proposed location below Bonny Reservoir. The Water Court stated in the decree that all other provisions of the 1893 Tip Jack Ditch decree remained in effect, including the 2.0 cfs diversion rate. In addition, the Water Court ordered that no other changes to the Tip Jack Ditch water right could be done without prior approval of the water court.

The Water Court also decreed water rights for the Hutton Ditches 1 and 2 (“Hutton 1” and “Hutton 2”) in Case No. W-8667-77. Hutton 1 was decreed for 12.9 cfs, with a diversion point on the South Fork of the Republican River³ downstream from the diversion point for the Tip Jack Ditch. The diversion point for Hutton 2 is located on the South Fork of the Republican River, slightly upstream from the diversion point for Hutton 1 and downstream of the Tip Jack Ditch diversion point. The flow rate for Hutton 2 is decreed at 4.92 cfs. The water rights for Hutton 1 and 2 are decreed for irrigation and are administered using the 1977 date the applications were filed with the court.

The Engineers included the Tip Jack, Hutton 1 and Hutton 2 water rights on the 2010 Revised Abandonment List for Water Division One, claiming that these water rights were not used by Jim Hutton for more than ten years, beginning in 1985. The Foundation argues that each of these three water rights was used during the relevant period of non-use claimed by the Engineers, and as a result the Engineers have failed to establish the requisite period of non-use to

² The Foundation also owns land to the south of the South Fork of the Republican River that is irrigated with water from the Hale Ditch, which was the subject of Case No. 11CW186.

³ The W-8667-77 refers to the diversion point for Hutton Ditches 1 and 2 as being located on the Republican River, but it is clear from the evidence presented in this case that the diversion points are on the South Fork of the Republican River.

raise a presumption of abandonment. In the alternative, the Foundation argues that it has rebutted any presumption of intent to abandon by offering evidence of acts taken by the Huttons during the relevant time period to show that the Huttons did not intend to abandon these rights.

II. LEGAL STANDARD

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). The general assembly has established a period of ten years or more of non-use of a water right as giving rise to a rebuttable presumption that the water right has been abandoned. C.R.S. § 37-92-402(11). In an abandonment proceeding, the court determines whether the water right does or does not exist. *Middle Park Water*, 925 P.2d 286. 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. Fazio*, 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.*

III. ANALYSIS

The Tip Jack Ditch water right was decreed for 2.0 cfs in 1893 to Abner Spencer. Roscoe Hutton acquired this water right in 1948, in conjunction with a purchase of land from Walter and Ruth Ryan. The original diversion point was located on the South Fork of the Republican River at a location that is now covered by the Bonny Reservoir Dam. The original length of the Tip Jack Ditch, based on Abner Spencer’s claim, was 3.8 miles. Due to the construction of Bonny Reservoir, Roscoe Hutton filed a Map and Statement of Claim with the state engineer in 1949 and an Amended Map and Statement in 1950, to relocate the point of diversion approximately 800 feet downstream from the original diversion point. Roscoe Hutton also proposed constructing a new stretch of the ditch from the relocated diversion point for a distance of 4,197.8 feet, where the new ditch would connect with the original Tip Jack Ditch.

Roscoe Hutton did not file an application to change the diversion point contemporaneously with the filing of the two Maps and Statements of Claim.

In 1974, the state engineer included the Tip Jack water right on the decennial abandonment list. In response, Roscoe Hutton protested inclusion of the water right on the abandonment list and he subsequently filed an application for a change of water right. The application to change the water right was not filed until 1977. The water court entered a decree in 1978, Case No. W-8667-77, and the diversion point was changed to the location described on Roscoe Hutton's 1950 Amended Map and Statement of Claim. The relocated Tip Jack Ditch diversion point is in Section 15 and the course of the ditch extends northeast into Section 10, then east through Section 11 and into Section 12. No other portion of the original Tip Jack decree issued in 1893 was changed by the water court in the 1978 decree. The water court specifically ordered as part of the 1978 decree that no other changes to the Tip Jack water right were permitted without prior approval of the water court.

Roscoe Hutton also filed claims for diversions from Hutton 1 and Hutton 2 in Case No. W-8667-77. The water court decreed an absolute right to divert 12.9 cfs from the Hutton 1 and 4.92 cfs from Hutton 2, with the water to be used for irrigation of all land in Section 12.⁴ The date of appropriation for the two Hutton ditches is July 5, 1954, with a priority date of 1977, which was the year the application was filed.

Roscoe Hutton transferred the land along with the water rights 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 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 includes the Hutton's land in Section 12. The Huttons expressly reserved the right to continue agricultural operations on the property and to use all of the water rights previously decreed to them.

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

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

John Cure met Jim Hutton in 2000, and in either 2000 or 2001 Mr. Cure entered into a written agreement with Jim Hutton to lease 3,587 acres of the Hutton Ranch. Jim Hutton included his water rights in the lease and Mr. Cure agreed to pay a higher lease payment on the

⁴ Roscoe Hutton also filed a claim for the Roscoe K. Hutton Well in Case No. W-8667-77, but this claim was dismissed by the water court because of a lack of jurisdiction due to location of the well being within the Northern High Plains Groundwater Basin.

land because water rights were included. Mr. Cure began ranching operations on the Hutton Ranch in 2001; however, he did not use any of Hutton's water rights. Mr. Cure never discussed the historical use of the water on the Hutton Ranch with Jim Hutton, but there was a provision included in the lease by Hutton that he "used the flood water in severe drought, but it will take some work on the ditches." Mr. Cure recorded this lease with the Yuma County Clerk and Recorder on April 2, 2002. After Jim Hutton died in 2002, Mr. Cure contacted the Foundation and asked the Foundation to resolve the water rights dispute with the Engineers. The personal representative of Jim Hutton's estate conveyed the water rights to the Foundation in 2004.

The Engineers take the position that the Tip Jack, Hutton 1 and Hutton 2 water rights were not put to beneficial use after 1985 for a period of ten years or more, during which period of non-use water was available for diversion under these rights, thereby raising the rebuttable presumption that the rights were abandoned. C.R.S. § 37-92-402(11). These three water rights were included on the 2010 decennial abandonment list. The Engineers present several arguments in support of their position of abandonment: 1) the dilapidated condition of the ditches is evidence that the ditches have not been used for many years; 2) there were no recorded diversions from these three ditches from before 1985 through 2008; 3) electricity to the pump used to divert water from the Hutton 2 ditch to the Hutton 2 laterals and the Tip Jack Ditch was turned off by the electric company in 1985 and electrical service has never been restored; 4) Jim Hutton did not identify these three water rights by name in any of the legal documents he signed between 1991 and 2001 (the conservation easement in 1991, the 1995 deed of trust, the paperwork creating the Foundation in 2000, and the lease with Mr. Cure in 2000 or 2001). The Court will address each of Engineers' arguments in turn.

A. The physical condition of the three ditches.

The evidence presented is convincing that water was never diverted into the Tip Jack Ditch from the relocated diversion point. The flow rate was only 2.0 cfs, which all of the expert witnesses involved with the case agree was insufficient to move water down to Section 12 lands. This is due to the length of the ditch, the porous nature of the soil in the ditch that would result in high ditch losses, and the gradient of the ditch. In addition to the physical impossibility to transport 2.0 cfs of water through the length of the ditch, other facts were presented to support the conclusion that water was never diverted from the relocated diversion point. Mr. Keeler walked the entire length of the Tip Jack Ditch and observed that very few remnants of the ditch remain west of the Hale Road (which is a county road running north and south). Moreover, he could not locate any diversion structure on the South Fork of the Republican River at the decreed relocated diversion point. Because the elevation of the river is much lower than the surrounding land in the area of the relocated diversion point, it appears that a pump would have been required to move the water from the river to the ditch, and there is no evidence that a pump was ever installed or used in this area. Further, there is no culvert under the Hale Road making it physically impossible for water to travel east in the Tip Jack Ditch from the relocated diversion point decreed in 1978 to the Hutton Ranch. Photographs of the property offered into evidence confirm that what was once the Tip Jack Ditch west of the Hale Road had not been used for decades prior to the date the photos were taken.

The Engineers have provided photographs taken in 2010 which show Russian olive trees over ten feet in height were growing at the Hutton 1 diversion point and in the Hutton 1 ditch. Mr. Keller did a site visit to Hutton 1 and Hutton 2 in 2008 and observed what he considered to be only remnants of the Hutton 1 and Hutton 2 ditches.

The Foundation contends that Roscoe Hutton, and later Jim Hutton, diverted the Tip Jack Ditch water right from the Hutton No. 2 diversion point and not the Tip Jack relocated diversion point. The Foundation's theory is that the Huttons diverted both the Tip Jack water right (2.0 cfs) and the Hutton 2 water right (4.92 cfs) from the Hutton 2 diversion point, where the water was then pumped into the Tip Jack Ditch and the Hutton 2 laterals and used on the Huttons' Section 12 lands. Although there was no evidence presented at trial confirming the distance between the Tip Jack relocated diversion point and the Hutton 2 diversion point, a review of the claim maps reflects that the distance between these two points is perhaps a mile or slightly longer, based on the assumption that the sections of land are one square mile in area (the length and width of the section each being one mile in distance). The Foundation points to the aerial photographs taken over the years to support their position that the Tip Jack Ditch east of the Hale Road was maintained and used to transport water, and therefore the Engineers' presentation of evidence regarding the condition of the Tip Jack Ditch west of the Hale Road as an attempt to prove abandonment is misplaced.

The Court finds that there is ample evidence to show that the Tip Jack Ditch east of Hale Road was maintained by Jim Hutton during the period the Engineers claim non-use of the Tip Jack water right. The Tip Jack Ditch east of Hale Road can be readily observed in the aerial photographs taken in 1961, 1970, 1980, 1988, 1993, and 1998. In those same photographs the Tip Jack Ditch cannot be seen west of the Hale Road. With the exception of the aerial photograph taken on October 12, 1988, the other five aerial photographs show what appears to be water in the Hutton 2 Ditch extending up to the pump house. Further evidence that the Tip Jack Ditch east of Hale Road was maintained by Jim Hutton came from the testimony of Mr. Patten, who on several occasions between 1993 and 1999 operated a backhoe to assist Mr. Hutton repair and ready the ditch to run irrigation water.

The Court also concludes that evidence was presented that the Hutton 1 and Hutton 2 ditches were maintained between 1985 and 2009. The aerial photograph from 1993 does not show any trees growing at the diversion point for Hutton 1 or in the Hutton 1 ditch. Although it is difficult to tell with certainty, it appears from the 1998 aerial photo that there is a tree at or very near the diversion point, and several other trees either in or along the Hutton 1 ditch. As mentioned in the previous section of this order, what appears to be water is observed in Hutton 2 in the 1993 and 1998 aerial photographs. Mr. Patten testified that he worked on the ditches with a backhoe on several occasions between 1993 and 1999, to assist Jim Hutton to ready the ditches for running irrigation water. The Foundation attempted to divert water from Hutton 2 in 2008, but due to miscommunication between the water commissioner and Mr. Patten regarding the need to obtain a federal permit the Foundation did not use the water. Mr. Patten testified that his intent in 2008 was to first divert water from Hutton 2 into the Tip Jack Ditch and then work on repairing Hutton 1 to run water in that ditch, too; however, after he spoke with the water commissioner, Mr. Patten did not attempt to divert water into Hutton 1 in 2008.

B. Lack of diversion records for the ditches.

The Engineers point to the lack of diversion records for the three ditches as evidence that these water rights were not beneficially used between 1985 and 2008. The Foundation counters that the Engineer did not supervise or administer the water rights in this district and therefore the lack of diversion records is not an accurate method of determining whether or not a water right was being used. The Court agrees with the Foundation.

These three ditches 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.*

There are approximately 60 water rights in this district, yet diversion records between 1985 and the early 2000's exist for only a handful of these rights. It appears that the Engineers did not monitor the water rights in this water district as closely as other water districts, which is understandable because there would be very few downstream Colorado senior water users requesting that a call be placed on the river. In essence, for many years this stretch of the South Fork of the Republican River was operated somewhat akin to a free river status, due to a lack of calls from downstream Colorado senior water users. Administration in this area changed dramatically in 2008, when the Engineers placed a Compact call on the river.

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 ("RRWCD") through legislation enacted in 2004. *See* C.R.S. § 37-50-101, *et seq.* The Foundation believes the Engineers and RRWCD intend to apply the Foundation's Tip Jack, Hutton 1, and Hutton 2 water rights toward Colorado's Compact obligation, if the Court finds abandonment.

The Court is not persuaded by the Engineers argument that the lack of diversion records for these three water rights is proof that water was not diverted and placed to beneficial use after 1985. To the contrary, it is the lack of any diversion records before and after 1985 that convinces the Court that relying on the lack of diversion records as evidence of non-use is problematic. The infrared aerial photograph taken in 1980 convincingly establishes that significant irrigation occurred under the Tip Jack, Hutton 1 and Hutton 2 ditches that year. Yet, the Engineers have no diversion records for those ditches in 1980. Likewise, Mr. Patten testified

that in 1985 he helped Jim Hutton pump water from the Hutton 2 ditch to the Tip Jack Ditch using a tractor to operate the pump. There is no diversion record for the Hutton 2 from 1985, either. The aerial photographs from 1993 and 1998 are not infrared, but the areas under the three ditches are a noticeably darker shade than surrounding areas and it appears that there is water in the three ditches, which leads to an inference that irrigation occurred in those areas. These two photographs lend credence to Mr. Patten's testimony that he worked on the ditches between 1993 and 1999, to enable Jim Hutton to run irrigation water. There are no diversion records for 1993 or 1998, but the evidence suggests that water was diverted to the Hutton 1, Hutton 2 and Tip Jack ditches those years.

The Engineers point out that if the Huttons did, in fact, divert water during the period the Engineers claim non-use, the Huttons did not notify the water commissioner of that water was being diverted and therefore the lack of diversion records is also the fault of the Huttons. It is likely true that the Huttons and the majority of other water users in this area did not notify the commissioner when water was being diverted, due in large part to the relatively informal administration occurring in this area prior to resolution of the 1999 lawsuit by Kansas against Colorado. As discussed previously, the lack of diversion records, whether the result of inaction by the water commissioners, the water appropriators, or both, does not prove that diversions were not occurring because other evidence offered shows diversions to the Hutton ditches did occur between 1985 and 2008.

C. Lack of electricity to the Hutton 2 pump station after 1985.

Roscoe Hutton began using water from the Hutton 2 ditch in approximately 1954, but he did not install electricity to the pump house until 1963. The aerial photograph from 1961 shows water in the Hutton 2 ditch, which leads to a conclusion that Roscoe Hutton was able to transfer water from Hutton 2 to the Hutton 2 laterals and the Tip Jack Ditch. Whether that was through use of a portable pump or some other method is unknown.

Between 1963 and 1985 electricity existed at the pump house. A large pump is located at the pump house. In 1985, after the electrical service was terminated, Mr. Patten assisted Jim Hutton transport water from Hutton 2 by using a belt connecting the pump to a flywheel on a tractor. The aerial photographs taken in 1988, 1993 and 1998 show what appears to be water in the Tip Jack Ditch and the Hutton 2 lateral, and the water leads back to Hutton 2. Although it is not known how Jim Hutton transported the water from Hutton 2 to the Tip Jack and Hutton 2 laterals those three years, the evidence shows that water was moved from the Hutton 2 during those years.

For these reasons the Court is not persuaded that the lack of electricity to the Hutton 2 pump house after 1985 prevented water from being transported from Hutton 2 to the Tip Jack and Hutton 2 laterals.

D. Lack of specificity by Jim Hutton when referring to his water rights in legal documents.

Those who knew Jim Hutton describe him as a resourceful, self-sufficient man. His father, Roscoe, developed the Hutton Ranch through years of hard work and dedication. The

ranch was more than a parcel of land to these two men; it was part of their very being. These appear to be men whose word was their bond and a handshake was all that was necessary to seal many a deal. An important component of the ranching operation was the water rights. The Huttons were also keenly aware of the value of the water rights and the importance of maintaining those rights. When Jim and Thelma Hutton leased their land to the Colorado Department of Natural Resources in 1991, the Huttons reserved all of their water rights for continued use in ranching operations. In 1995, when Jim Hutton secured a loan, he pledged the land and all of his water rights as collateral. As part of a lease to Mr. Cure in 2000 or 2001, Jim Hutton included his water rights, thereby obtaining a higher lease payment from Mr. Cure. In each of these instances, it was clear to those with whom Jim Hutton was dealing that Mr. Hutton was retaining ownership of his water rights. Perhaps if Jim Hutton had sold his land and the accompanying water rights, a more detailed description of the water right would have been drafted.

The Court does not believe that Jim Hutton's lack of specificity when describing his water rights in the above-described legal documents shows his intent to abandon these water rights.

E. Evidence of intent not to abandon the water rights.

The Court agrees with the Foundation's position that even if the Engineers showed a ten-year period of non-use, ample evidence exists to rebut a presumption of an intent to abandon these water rights. As discussed in other sections of this order, such evidence includes Jim Hutton's maintenance of the ditches over the years; reserving use of the water rights in the 1991 conservation easement between the Huttons and the state of Colorado; pledging the water rights as collateral for a loan in 1995; creating the Foundation in 2000, which included the water rights; and leasing the land and water rights to Mr. Cure in 2000 or 2001.

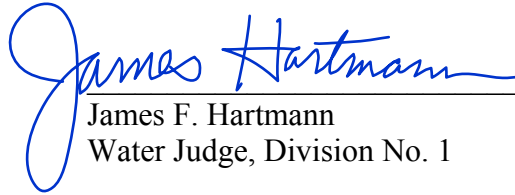
IV. CONCLUSION AND ORDER

For the reasons articulated in this order, the Court finds that the Engineers have not established by a preponderance of the evidence that Jim Hutton abandoned the Tip Jack, Hutton 1 and Hutton 2 water rights. The Engineers are ordered to remove these three water rights from the 2010 Decennial Abandonment List for Water Division One.

However, by issuing this order, the Court is not authorizing the Foundation to continue diverting the Tip Jack Ditch water right, as decreed in Case Numbers 18162 and W-8667-77, from the Hutton 2 Ditch, as the present action pertained only to whether the Tip Jack Ditch water right was abandoned and the case did not involve an application for a change of the diversion point.

Dated: December 16, 2013

BY THE COURT:



James F. Hartmann
Water Judge, Division No. 1