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DISTRICT COURT, WATER DIVISION NO. 1, COLORADO  
901 9th Avenue  
Greeley, CO 80631-1113

Plaintiffs:

DRAYTON DUNWODY and VERA DUNWODY

V.

Defendants:

WILL-O-WISP METROPOLITAN DISTRICT; NORTH  
FORK ASSOCIATES, LLC; and WOODSIDE, LTD.

Case No.: 07CW45

**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND  
DECREE OF THE WATER COURT**

This matter comes before the court upon the Complaint of Drayton Dunwody and Vera Dunwody, seeking to quiet title to the Glasmann Ditch water right. Will-O-Wisp Metropolitan District defended the quiet title action and filed a counterclaim based on adverse possession of the water right. The court held a three-day trial to the court from November 3, 2008 to November 5, 2008. Having reviewed and considered the pleadings, lay and expert testimony, documentary and other evidence, and the arguments of counsel, the court makes the following determinations:

**I. CASE AND PROCEDURAL HISTORY**

1. Plaintiffs, Drayton and Vera Dunwody, filed their complaint in this matter on March 15, 2007, to quiet title to a water right decree for 1 .0 c.f.s. to the Glasmann Ditch ("Glasmann Ditch water right"). Plaintiffs filed the complaint as an action to adjudicate the rights of the parties to real estate under C.R.C.P. 105. In the alternative, Plaintiffs sought an action for declaratory judgment under C.R.C.P. 57. Plaintiffs originally filed the complaint against Defendant, Will-O-Wisp Metropolitan District. Plaintiffs filed an amended and restated complaint on April 6, 2007 against additional Defendants, North Fork Associates, Inc., and Woodside, Ltd.
2. North Fork Associates, Inc. disclaimed any interest in the Glasmann Ditch right and requested to be removed as a named defendant in this case. On May 25, 2007, the court ordered that North Fork Associates, LLC would no longer be a named defendant in this action. Plaintiffs then moved for default judgment against Defendant Woodside Ltd. On July 9, 2007, the court granted the motion and entered the order of default judgment against Woodside.
3. The only remaining defendant, Will-O-Wisp Metropolitan District (hereinafter "Defendant"), filed an answer to the complaint on April 19, 2007, which asserted

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- several affirmative defenses, including abandonment, a counterclaim to quiet title in the Glasmann Ditch water right by adverse possession, and asserted the Plaintiffs' claims are barred by the doctrines of claim preclusion and issue preclusion as a result of a decree entered in Case No. 81CW144, Water Division No. 1. The decree in Case No. 81CW144 granted Defendant's application to change the use of the Glasmann Ditch water right from irrigation to replacement of evaporation in Woodside Reservoir. Defendant also filed a counterclaim to quiet title to the Glasmann Ditch water right.
4. The court has exclusive jurisdiction over this case as a water matter pursuant to § 37-92-203(1), C.R.S., as interpreted in *Archuleta v. Gomez*, 140 P.3d 281 (Cob. App. 2006). The court has ancillary jurisdiction over other matters in this case, including record title issues, under *Crystal Lakes Water and Sewer Ass'n v. Backlund*, 908 P.2d 534 (Cob. 1996).
  5. On May 1, 2008, Plaintiffs filed a Motion for Partial Summary Judgment seeking an order determining: (1) the decree in Case No. 81CW144 that purports to determine ownership of the Glasmann Ditch water right is void as against Plaintiffs; and (2) Plaintiffs' ownership claim is not barred by the doctrines of claim preclusion or issue preclusion. On June 19, 2008, the court granted Plaintiffs' motion, and held that the decree in Case No. 81 CW 144 is void against Plaintiffs and their predecessors in interest to the extent that it purports to determine ownership of the Glasmann Ditch water right. The court further ordered that Plaintiffs' claim of ownership in the Glasmann Ditch water right is not barred by the doctrines of claim or issue preclusion.
  6. On August 5, 2008, Defendant filed a motion for summary judgment. Defendant sought a determination based on the entry and operation of the decree in Case No. 81CW 144 that Defendant and its predecessors in interest had satisfied the elements of adverse possession of a water right as a matter of law. In the alternative, Defendant sought an order of partial summary judgment on several issues related to the decree in Case No. 81CW144. The court denied the motion on October 23, 2008, ruling that Defendant had "failed to meet its burden of showing that no genuine issues of material fact exist with respect to each element of adverse possession of the Glasmann Ditch water right." The court determined that to prevail on a claim of adverse possession of a water right, the claimant must show actual use of the water right. The change of water right decree from Case No. 81CW144 does not, by itself, satisfy the actual use requirement for adverse possession.

## II. STIPULATED FACTS

7. Before trial, the parties stipulated to a number of facts, which are recited in the Trial Management Order.
8. On May 22, 1913, the Park County District Court entered a decree in CA 1678 adjudicating, among other things, a water right for the Glasmann Ditch for 1 c.f.s. for irrigation purposes with a May 1, 1885, appropriation date. The water right

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- diverts water from Elk Creek, a tributary of the North Fork of the South Platte River.
9. The testimony given in support of the Glasmann Ditch water right claim in CA 1678 by Theodore B. Meanea states that the Glasmann Ditch was constructed by Antone Glasmann, Mr. Meanea's father-in-law.
  10. The testimony given in support of the Glasmann Ditch water right claim in CA 1678 by one Mr. Powless, apparently a surveyor hired by the court in that case, states that the lands irrigated from the Glasmann Ditch water right were portions of the NW ¼ of the SE ¼, the SW ¼ of the NE ¼, and the SE ¼ of the NE ¼ of Section 25, T6S, R72W, of the 6th P.M., Park County, Colorado. These lands are shown on a map labeled as Exhibit A attached to Mr. Powless's testimony.
  11. The decreed point of diversion of the Glasmann Ditch water right is in the E ½ of the SW ¼ of Section 25, at T6S, R72W of the 6th P.M, at a point whence the West quarter corner of Section 26, T6S, R72W of the 6th P.M. bears North 52 Degrees, 44 Minutes West, 2030 feet.
  12. Antone Glasmann never owned any lands in the E ½ of the SW ¼ of Section 26, T6S, R72W, of the 6th P.M. The Glasmann Ditch headgate as originally decreed was not located on land owned by Antone Glasmann.
  13. At the time of the adjudication of the Glasmann Ditch water right, the ditch headgate was located on lands owned by Chas. A. Stockdale in the NE ¼ of the SW ¼, Section 26, T6S, R72W, 6th P.M.
  14. Neither Plaintiffs nor their predecessors in interest have ever owned any lands in the E ½ of the SW ¼ of Section 26, T6S, R72W of the 6th P.M.
  15. Neither Defendant nor its predecessors in interest have ever owned any lands in the NW ¼ of the SE ¼, the SW ¼ of the NE ¼, and the SE ¼ of the NE ¼ of Section 26, T6S, R72W, of the 6th P.M.
  16. The E ½ of the SW ¼ of Section 26, T6S, R72W of the 6th P.M. was a portion of the former "Schott Ranch."
  17. Plaintiffs currently own the Elk Falls Ranch Property, located as described in a deed dated January 21, 2008, and recorded at reception number 648812 on January 23, 2008 ("Elk Falls Ranch Property"). The Elk Falls Ranch Property is adjacent to, and east of, the Schott Ranch property. The Elk Falls Ranch Property includes the NW ¼ of the SE ¼, the SW ¼ of the NE ¼, and SE ¼ of the NE ¼ of Section 26, T6S, R72W, of the 6th P.M. The District, and its predecessors in interest, have never had an ownership interest in the Elk Falls Ranch Property.
  18. Plaintiffs also own the Dunwody Property, located as described in a deed dated October 23, 2005, and recorded at reception 633864 on October 24, 2006. The Dunwody Property is adjacent to, and east of, the Elk Falls Ranch Property.
  19. Plaintiffs have no ownership interest in Woodside Reservoir, or any right to store water in, or release waters from, said Reservoir. Similarly, Plaintiffs have no ownership interest in the lands on which Woodside Reservoir will be constructed.

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- Woodside Reservoir has a conditional water storage right adjudicated in Case No. W-8771 -77., Water Division No. 1, dated December 7, 1978. Woodside Reservoir has not been constructed.
20. Neither Defendant nor its predecessors in interest have ever had an ownership interest in the Elk Falls Ranch Property or the Dunwody Property.
  21. There are no known State of Colorado records of water diversion under the Glasmann Ditch water right before 1970. There are no State of Colorado records of water diversion under the Glasmann Ditch water right after 1981.
  22. There are no known records of administration of water rights by the State of Colorado on Elk Creek before 1970.
  23. There is no known record of any conveyance of the Glasmann Ditch water right from John C. Jensen or his predecessors or successors in title to the Glasmann Ditch water right, to Bernhard Schott, or his predecessors or successors in title to the Schott Ranch.
  24. There is no decreed water right for the ponds located on the Elk Falls Ranch or the Dunwody Property.
  25. From 1948 to 1960, water was diverted from Elk Creek by Richard Beye, son of the Elk Falls Ranch foreman, near the west edge of the NW ¼ of the SE ¼, the NE ¼ of the SE ¼ and the SE ¼ of the NE ¼, T6S, R72W, of the 6th P.M.
  26. Neither Plaintiffs nor their predecessors in interest have made diversions of water at the point of diversion decreed to the Glasmann Ditch water right since at least 1948 to the present.
  27. In August 1981, Will-O-Wisp, North Fork Associates, LLC, and Mountain Mutual Reservoir Company filed a second amended application in Case No. 81CW 144, Water Division No. I to change the use of the Glasmann Ditch water right. Notice by publication of the application as required by § 37-92-302(3)(b), C.R.S. was given. Personal service pursuant to C.R.C.P. 4, or in any other manner, of the filing of the second amended application was not provided to any person or entity, including the Dunwodys and their predecessors in interest.
  28. In the decree dated June 9, 1983, entered in Case No. 81CW144, the water court stated in paragraph 22, p. 10, among other findings, that the Glasmann Ditch has historically irrigated eight acres of hay meadow in the South V2, Section 26, T6S, R72W of the 6th P.M., Jefferson County, Colorado. The water court also quantified the historical consumptive use of the Glasmann Ditch water right as 6 acre feet.
  29. Paragraph 4, p. 14 of the decree entered in Case No. 81 CW 144 states, 'the 6.0 acre feet of the historical consumptive use attributable to the 1.0 c.f.s. Glasmann Ditch water right is hereby changed to allow utilization [sic] as a credit to Woodside Reservoir's annual evaporation losses. . . ." In paragraph 7, p. 16, the decree states, 'eight acres of land lying under the Glasmann Ditch, which has historically been irrigated with the 1.0 c.f.s. of said right, shall be permanently

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- removed from irrigation by water from the Glasmann Ditch, its laterals and underflows. The land thus removed from irrigation is located within the South V2 of Section 26, Township 6 South, Range 72 West of the 6th P.M., Park County, Colorado."
30. The decree in Case No. 81 CW 144 has been on record with the Park County Clerk and Records Office since June 28, 1983.
  31. Defendant is the owner of the conditional water rights decreed to the Glasmann Ditch No. 2 (not the Glasmann Ditch water right at issue in this case) and Woodside Reservoir.
  32. Since 1983, Defendant and others have incorporated Woodside Reservoir in various augmentation plan applications, which would use the Glasmann Ditch water right as source water to replace evaporation from the Woodside Reservoir, and decrees were entered for those applications. Notice by publication of the applications as required by § 37-92-302(3)(b), C.R.S., was given.
  33. Diligence applications have been filed for the conditional water rights decreed to Woodside Reservoir, and decrees have been entered in all but the most recent of those applications. Notice by publication of the applications as required by § 37-92-302(3)(b), C.R.S., was given. Other than the currently pending diligence application, personal service pursuant to C.R.C.P. 4, or in any other manner, of the filing of the diligence applications was not provided to any person or entity, including the Dunwodys and their predecessors in interest.

### III. EVIDENCE PRESENTED

#### A. Plaintiffs' Evidence

34. Plaintiffs claim ownership of the Glasmann Ditch water right through a series of conveyances beginning with the original appropriator and claimants of the Glasmann Ditch right.
35. Plaintiff Vera Dunwody testified as a lay witness regarding the Plaintiffs' chain of title and the documents evidencing the chain of title. The documents in Plaintiffs' chain of title are as follows:
  - a. Patent, Certificate No. 263, Anton Glasmann, Dated August 27, 1892.
  - b. Statement of Claim and Transcript of Testimony in Civil Action 1678, Park County District Court, Referee's No. 36 Theodore E. Meanea, Carrie L Underwood and Frances Roberts, Petitioners and Claimants, filed Oct. 24, 1911.
  - c. Glasmann Ditch Decree, Civil Action 1678, Park County District Court, dated May 22, 1913.
  - d. Deed, Meanea, Underwood, & Roberts, Grantors, to John C. Jensen Grantee, conveying Glasmann Homestead including Grantors' interest in Glasmann Ditch Right, April 29, 1920.

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- e. Last Will & Testament of John C. Jensen, dated May 19, 1922, filed in Park County, March 21, 1924.
  - f. Order Admitting Will to Probate and Record regarding the Last Will & Testament of John C. Jensen, Deceased, Park County Court, July 5, 1922.
  - g. Deed from Norman Jensen, Pearl Jensen McCoy, Stella Jensen Severs, and Alice Berg, Grantors, to Elmer Berg, Grantee, May 29, 1934.
  - h. Last Will & Testament of Elmer C. Berg, deceased, dated April 7, 1959, book 1 84, page 1 53, Park County Real Property Records.
  - i. Order admitting Last Will & Testament of Elmer C. Berg to probate, January 21, 1963, County Court, City and County of Denver, No. P-29208.
  - j. Letters appointing Alice E. Berg as Executrix of the Estate of Elmer C. Berg, January 21, 1963, County Court, City and County of Denver, No. P-29208.
  - k. Petition and Order dated August, 11, 1964, County Court, City and County of Denver, No. P-29208, changing name of estate to, 'In the Matter of the Estate of Elmer C. Berg, Also known as Elmer Berg.'
  - l. Release of Inheritance Tax Lien, Estate of Elmer C. Berg, deceased, dated August 17, 1964.
  - m. Deed dated December 20, 1966, Alice E. Berg, Grantor, to Elk Falls Ranch Development Co., Grantee.
  - n. Deed dated October 30, 2006, from Elk Falls Ranch Development Co.. Grantor to Vera & Drayton Dunwody, Grantee, Glasmann Ditch Right.
  - o. Deed, dated January 21, 2008, from Elk Falls Ranch Development Co., Grantor to Vera & Drayton Dunwody, Grantee, Elk Falls Ranch property.
36. The court admitted into evidence the statement of claim and the 1913 Decree, as well as the deeds and other documents evidencing Plaintiffs' chain of title. The Glasmann Ditch water right was originally diverted on the south side of Elk Creek in the NE  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  of Section 26. The ditch proceeded easterly onto the Elk Falls Ranch property. The headgate of the Glasmann Ditch was located on lands that later became known as the Schott Ranch.
37. Ms. Dunwody testified regarding the history of the Elk Falls Ranch, the location of the ditch that Plaintiffs claim is the Glasmann Ditch, and recent efforts by the Plaintiffs to clean and operate a ditch on the Elk Falls Ranch property. In the summer of 2005, Woodside Subdivision hired Ms. Dunwody to research the chain of title of the Glasmann Ditch. Mrs. Dunwody found the testimony given in CA 1678 in support of the 1913 Decree for the Glasmann Ditch water right in the basement of the Park County District Court. Upon obtaining this information, Plaintiffs entered into an agreement with the Elk Falls Ranch Development Company to accept a quit claim deed for the Glasmann Ditch water right for \$10.00 in 2006. Plaintiffs then filed the present action. They obtained title to the Elk Falls Ranch property on January 21, 2008.

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38. In September 2008, Ms. Dunwody and her husband spent approximately 18 hours working on a ditch with a backhoe and then diverted water into the ditch. The Dunwodys made these diversions from Elk Creek at a point on the Elk Falls Ranch property, and not at the headgate located on the Schott Ranch property. Ms. Dunwody testified that the historical headgate for the Glasmann Ditch was upstream on the Schott Ranch property.
39. Plaintiffs presented two other lay witnesses at trial, Wendell Williams and Richard Beye. Mr. Williams is the former president of the Elk Falls Ranch Development Co., the entity from which the Plaintiffs purchased the Elk Falls Ranch and their claimed interest in the Glasmann Ditch water right. Mr. Williams served on the board of directors of Elk Falls Ranch Development Co. from 1991 to 2008 and has served as president of the company from October 2006 to the present. Mr. Williams testified about the time he spent on the Elk Falls Ranch beginning in the 1950s, and actions that the Elk Falls Ranch Development Co. recently took with respect to the Glasmann Ditch water right. In 1966, Elk Falls Ranch Development Co., made up of about 25 people, purchased the Elk Falls Ranch from Alice Berg, widow of Elmer Berg. The 25 people who formed the Elk Falls Ranch Development Co. and purchased the land from Alice Berg sought to preserve the land as a fishing club. They then "developed it, and sold off just enough to pay Alice Berg off the debt and then keep it running as a sportsmen's club with cabins and horseback riding and fishing." Mr. Williams' father was one of the original 25 people who formed the Elk Falls Ranch Development Co. Though Mr. Williams remembers cows grazing on the lower ranch in the very early 1960s, he had never heard of the Glasmann Ditch water right until October 2006, when he attended a meeting where Ms. Dunwody presented information regarding the Glasmann Ditch water right. At that time, the board of directors of Elk Falls Ranch Development Co. "voted to do a quit claim deed to the Dunwodys to represent the water rights, if there were any, in order to preserve them."
40. Mr. Richard Beye moved to the Elk Falls Ranch as a child with his parents in 1948 or 1949. His father, Andy Beye, was a ranch foreman on the Elk Falls Ranch until his death in 1986, and his mother, Bessie Beye, worked in the dining room. When the Beye family arrived in the late 1940s, the owner of the Elk Falls Ranch property was Mr. Elmer Berg. During the 1950s, Richard Beye performed ranch work and worked on irrigation ditches on the Elk Falls Ranch. He testified to using an Elk Creek irrigation ditch to irrigate portions of the Elk Falls Ranch on the south side of Elk Creek during this time period. He had not heard of the Glasmann Ditch by name until 2006. He did not know whether Mr. Elmer Berg owned water rights. He never knew of any diversions from the Schott Ranch to the Elk Falls Ranch. Diversions from Elk Creek were made on the Elk Falls Ranch property using a "granite rock that curves right into river, and the water would back up behind that, and we would lay a plastic pipe in there. . . . That was the spot where it would run into the irrigation ditch.' The rock was located approximately 25 to 30 feet downstream of the Schott property line. Mr. Richard Beye also remembers irrigating the meadow south of Elk Creek during the 1950s

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using a tractor and power take-off which "was a lot easier than digging out the irrigation ditch." This was accomplished by putting a "[power take-off] on the tractor, one end in the water, sucked the water out and let it run wherever you have to."

41. Mr. Beye testified that cattle operations on the Elk Falls Ranch were phased out prior to Elmer Berg's death in 1962. At Mr. Berg's death, his widow, Alice Berg, took over ownership of the Elk Falls Ranch. Mr. Richard Beye entered military service in 1963 and no longer lived or worked on the Elk Falls Ranch. After he was released from the service, he would visit his parents at the Elk Falls Ranch at least once a week until they passed away.

**B. Defendant's Evidence**

42. Defendant claims ownership of the Glasmann Ditch water right through a chain of conveyances beginning with William F. Schott. Defendant claims that the Glasmann Ditch water right was historically used on what was referred to in trial as the "Schott Ranch," and therefore Mr. Schott and his successors gained ownership of the water right by adverse possession. In the alternative, Defendant claims that Plaintiffs' predecessors in title abandoned the Glasmann Ditch water right. The deeds in Defendant's chain of title were presented and entered into evidence. These deeds include the following:
- a. Charles Stockdale to Simon and Anna Lochner (undivided half interest), November 16, 1915, Book 74, Page 472.
  - b. Charles Stockdale to Bernhard Schott (undivided half interest), November 16, 1915, Book 74, Page 473.
  - c. Simon and Anna Lochner to Bernhard Schott (their undivided one-half interest), September 27, 1916, Book 88, Page 8.
  - d. William F. Schott, acting as trust created in the will of Bernhard Schott to Kenneth Cumming and George M. Hurst (all interest), August 2, 1971, Book 213, Page 179.
  - e. George M. Hurst to Kenneth Cumming (his undivided one-half interest), August 2, 1971, Book 213, Page 483.
  - f. Kenneth Cumming to Park Associates, August 2, 1971, Book 219, Page 850.
  - g. Park Associates to Progress Realty, April 26, 1972, Book 218, Page 850.
  - h. Progress Realty to Borg-Warner Equities Corporation, November 22, 1974, Book 242, Page 290.
  - i. Borg-Warner Equities Corporation to Woodside, Ltd., November 13, 1975. Book 249, Page 324.
  - j. Woodside, Ltd. to North Fork Associates, December 12, 1980, Reception No. 295255.
  - k. North Fork Associates to Will-O-Wisp Metropolitan District. June 29, 2001. Reception No. 569190.

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- I. North Fork Associates to Will-O-Wisp Metropolitan District, June 29, 2001. Reception No. 569191.
43. This chain of title demonstrates that the Schott family owned the Schott Ranch property from 1916 to 1971.
44. Defendant presented several lay witnesses at trial. Richard Angelica, president of the Will-O-Wisp Metropolitan District Board of Directors, testified about general operations of the District, the deeds in Defendant's chain of title, and the decree obtained by Defendant in Case No. 81CW144 changing the Glasmann Ditch water right from use for irrigation to conditional right for evaporation credits. Mr. Angelica identified the various components of Defendant's water supply system. Since the entry of the decree in Case No. 81CW144, Defendant's augmentation plan has been used on a daily basis to provide water service to its customers. The District has maintained diligence on the Glasmann Ditch water right as a conditional water right to be stored in Woodside Reservoir, which was adjudicated in Case No. W-8771-77, for evaporation credit as part of Defendant's plan for augmentation, decreed in Case No. 81CW144. The District has maintained diligence on the Woodside Reservoir conditional water storage right adjudicated in Case No. W-8771-77.
45. Mr. Angelica also testified regarding Defendant's chain of title to the Glasmann Ditch water right. Mr. Angelica testified that until Ms. Dunwody asserted a claim of ownership in 2006, there had never been any challenge to the District's possession of the Glasmann Ditch water right.
46. Defendant also called Ken Salser, who worked for the State of Colorado administering water rights on Elk Creek from 1975 through 1990, first as Deputy Water Commissioner and then as Water Commissioner. His predecessor, Joe Clayton, helped him to become familiar with the water rights, ditches and headgates diverting water from Elk Creek. During his tenure as Water Commissioner and Deputy Water Commissioner on Elk Creek, he contacted Bill Schott and later George Hurst regarding questions or concerns related to the diversion of the Glasmann Ditch water right. Mr. Salser testified that irrigation of the Glasmann Ditch water right during the 1970s occurred on eight acres of land generally located in the E 1/2 of the SW 1/4 of Section 26, T6S, R72W of the 6th P.M. These lands are on the Schott Ranch. Mr. Salser never personally witnessed any irrigation or beneficial use of the Glasmann Ditch water right anywhere other than on the Schott Ranch. His understanding was that Mr. William F. Schott owned the Glasmann Ditch, and he was never contacted by anyone from Elk Falls Ranch Development Co. concerning the Glasmann Ditch or diversion of the Glasmann Ditch water right.
47. Mr. Salser set forth his prior and current understanding of the sole location of the Glasmann Ditch headgate. This location is at the western edge of the Schott Ranch property. During his tenure as Deputy Water Commissioner or Water Commissioner, he was not aware of any alternate point of diversion for the Glasmann Ditch water right. Furthermore, he never authorized any diversions of the Glasmann Ditch water right at undecreed points of diversion. He was not

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- aware of anyone other than North Fork Associates, Mountain Mutual Reservoir Company, William F. Schott, or George Hurst ever using the Glasmann Ditch water right during his tenure as Water Commissioner or Deputy Water Commissioner, nor was he aware of any use of the Glasmann Ditch water right anywhere other than on the Schott Ranch property.
48. Joe Tom Wood, a water resources engineer, testified about his investigations of the Glasmann Ditch right in connection with the change of water right application in Case No. 81CW144. Mr. Wood's investigations in the early 1980s included a field visit to look at the ditch and its irrigated area, use of aerial photography to calculate the irrigated area, and discussions with Mr. Salser. Mr. Wood was employed by Blatchley and Associates at that time. Mr. Wood testified that he understood the location of the Glasmann Ditch headgate to be near the boundary fence between what is now known as the Magness Ranch and the Schott Ranch. He determined that the ditch returned to Elk Creek at the approximate boundary between the Schott Ranch and the Elk Falls Ranch.
49. Mr. Wood also testified concerning diversion records for the Glasmann Ditch in 1970, 1971, and 1972. These diversion records specifically identify Mr. Schott as the owner of the Glasmann Ditch. Mr. Wood testified concerning his calculation as to the historical consumptive use of the Glasmann Ditch water right in Case No. 81CW 144. He calculated it to be a little over 9 acre feet per year, but the parties stipulated to 6 acre feet per year in Case No. 81CW144. Mr. Wood testified to his belief that the decree in Case No. 81CW144 quantified the historical consumptive use of the Glasmann Ditch water right as 6 acre feet and that the decree dedicated it exclusively to the evaporation from the proposed Woodside Reservoir. Mr. Wood indicated that he considered the possibility of sub-irrigation when he calculated a consumptive use analysis for the Glasmann Ditch water right. Mr. Wood testified that in Case No. 81CW144, he identified 8 acres of land historically irrigated by the Glasmann Ditch water right, all of which were entirely on the Schott Ranch property. Mr. Wood recalls no ditch that left the Schott Ranch and went to the Elk Falls Ranch. Mr. Wood compared the aerial photograph with a 1975 aerial photograph and a 1956 aerial photograph, and found the course of the ditch was generally the same. Mr. Wood recalls no question ever arising as to the ownership of the Glasmann water right during the course of his investigations. He also never found any evidence of irrigation from the Glasmann Ditch on the Elk Falls Ranch property.
50. Roger Mlodzik, current Water Commissioner for District 80, testified about his knowledge of the Glasmann Ditch. Mr. Mlodzik has worked on Elk Creek since the spring of 1989. In the spring and summer of 1989, Mr. Mlodzik accompanied Mr. Salser to the properties and became familiar with the ditches and priorities in District 80, including the Glasmann Ditch. During Mr. Mlodzik's tenure as water commissioner, he has never been aware of any use of the Glasmann Ditch water right on the Elk Falls Ranch property. To his knowledge there is no decreed point of diversion of the Glasmann Ditch water right anywhere on the Elk Falls Ranch property. According to Mr. Mlodzik, the Glasmann Ditch water right can no

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- longer he used for irrigation purposes. During the irrigation season of 2008, Mr. Mlodzik walked the meadow south of Elk Creek on the Elk Falls Ranch property and found no functioning irrigation ditch on the property. Mr. Mlodzik testified that he understood the Glasmann Ditch water right to be part of Defendant's augmentation plan from Case No. 81CW144.
51. Defendant then presented the testimony of Roger Huser. Mr. Huser first visited the Elk Falls Ranch property during a vacation in the summer of 1963. He continued to vacation on the property from the late 1960s through the mid 1970s. On June 1, 1988, he was hired by the Elk Falls Ranch Development Co. as the ranch manager and held that position until February 2008. As ranch manager, Mr. Huser was responsible for all water-related activities on the property, including managing water levels in the lakes located on the property. While he was Ranch Manager, neither Mr. Huser nor anyone on behalf of Elk Falls Ranch Development Company irrigated any property on Elk Falls Ranch, nor did they operate a headgate on the Schott Ranch. Mr. Huser testified that during his visits in the 1960s and 1970s, he never witnessed any irrigation of any portion of the Elk Falls Ranch property.
52. James Maler, another Defense witness, was a wrangler at the Elk Falls Ranch from 1950 to 1957, and testified about his observations of operations on Elk Falls Ranch during that time. Mr. Maler's aunt and uncle were Andy and Bessie Beye, the former caretakers of the Elk Falls Ranch. Mr. Maler worked on the property during the summer months and weekends from the first of April through Thanksgiving. As a wrangler, he would lead groups of horseback riders around the Elk Falls Ranch on both the north and south sides of Elk Creek on the Elk Ranch Property. Mr. Maler continued to visit the Elk Falls Ranch regularly up until 1995. After 1995, he visited the property only once a year. Mr. Maler testified that he never saw any indication of irrigation or the raising of hay along Elk Creek on the Elk Falls Ranch property during his visits to the ranch.
53. Tom Berrien testified about his memories of haying operations on the Schott Ranch. Mr. Berrien was learned to irrigate and cut hay from Bill Schott. He testified the Schotts always had a need for hay for their cattle operation and they always irrigated what meadows they could on their ranch. Before graduating from high school in 1967, Mr. Berrien helped Mr. Schott with haying operations along Elk Creek. He specifically recalls a ditch in the lower part of the meadow on the Schott Ranch property because they would have to cross it with the hay wagon while haying. He also recalls a "little old lady" driving the hay wagon. Although he never personally irrigated the meadow, he recalls Bill Schott and his brother in the meadow irrigating with shovels years ago. He testified that Mr. Schott's irrigation practices remained unchanged through the 1950s and 1960s. Mr. Berrien testified that he never saw Mr. Beye or anybody from Elk Falls enter the Schott Ranch to operate a headgate.
54. The Defendant's witness, Ron Blatchley, a water resources engineer with Blatchley and Associates, testified as to his investigations of the Glasmann Ditch water right, the application in Case No. 81CW144, and augmentation plans using

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- Mountain Mutual Reservoir Company water rights. Mr. Blatchley analyzed the water supply on the Schott Ranch for George Hurst in the 1970s. He prepared a report for Mr. Hurst and Woodside Park, Ltd., in September 1977 concerning the water rights associated with the Schott Ranch. The report specifically lists the Glasmann Ditch as one of the water rights associated with the Schott Ranch. Mr. Blatchley interviewed Mr. Schott and George Hurst; investigated the State Engineer's records; and, observed the ditch itself and the field that it irrigated. In his review of the Glasmann Ditch, Mr. Blatchley was able to establish the area that was being irrigated, interviewed the rancher as to how much hay he produced, and provided an indication as to the type of irrigation that those lands had received. Based on discussion with Mr. Schott, Mr. Blatchley confirmed that the crop yield for the meadow irrigated by the Glasmann Ditch on the Schott Ranch property was 2.1 tons of hay per acre. He therefore concluded that the water supply was good. Mr. Blatchley also used aerial photos of the irrigated land to determine that there were 8 acres of land historically irrigated by the Glasmann Ditch. He located the headgate of the Glasmann Ditch himself from the description in the decree. In determining that 8 acres of land was historically irrigated by the Glasmann Ditch water right, Mr. Blatchley took into account lands irrigated by the Rocky Mountain Fuel Ditch and sub-irrigation of the irrigated area. He separately accounted for lands irrigated by the Rocky Mountain Fuel Ditch in his report. Those lands are not included in the 8 acres irrigated he determined were irrigated by the Glasmann Ditch water right.
55. Defendant's final witness at trial was Mr. George Hurst, a real estate developer. Mr. Hurst purchased the Schott Ranch property in 1971 and, over the next decade, created the Woodside development, which was completed in six development units. Units I through 5 of the Woodside development were constructed on lands purchased from Mr. Schott. A "portion of Schott Ranch" was ultimately developed into Unit 5 of the Woodside development. Unit 5 was platted in December of 1979.
56. In 1971, Mr. Hurst and Mr. Schott began to negotiate sale of the Schott Ranch. In August 1971, Mr. Hurst and his partner Mr. Cumming purchased 1600 acres of land from Mr. Schott. In connection with the deed from Mr. Schott to Hurst and Cumming, Mr. Hurst understood that he was purchasing all the water rights, including the Glasmann Ditch. As part of the terms of the transaction with Mr. Schott, Mr. Hurst allowed Bill Schott to continue living in the house on the property and irrigating and cutting hay on the ranch until such time as he developed the various units and built the roads. As a result, Mr. Schott continued to irrigate the meadow on the Schott Ranch in the 1970s. Mr. Hurst testified that the Glasmann Ditch continued irrigating the meadow on the Schott Ranch property after the 1971 conveyance. Mr. Schott continued to hay the property for several years. Mr. Hurst recalled being instructed by the water commissioner to install a Parshall flume in the Glasmann Ditch. He did so in the mid 1970s. Mr. Hurst testified that no tax liens were ever placed on the Schott Ranch property from 1971 through 1980. When the plat was filed for Woodside Unit 5 in 1979, all property taxes were current and paid. He further testified regarding the

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conveyance documents and the chain of title from his purchase of the Schott Ranch property in 1971 to the sale of the Glasmann Ditch water right to North Fork Associates in 1980. He testified as to his intent and understanding that the Glasmann Ditch water right was conveyed in each transaction. All of the deeds in the Defendant's chain of title testified to by Mr. Hurst were recorded in Park County.

### IV. ANALYSIS

#### A. Dunwody Paper Title

57. Plaintiffs have the burden of proof of their quiet title claim. *Huison v. Ag. Ditch & Reservoir Co.*, 723 P.2d 736, 738 (Cob. 1986). "In an action seeking to quiet title, the plaintiff must rely on the strength of his own title rather than on the weakness in or lack of title in defendants." *Id.* (citations omitted). See also *Fastenau v. Engel*, 270 P.2d 1019 (1954).
58. A water right is created under Colorado law when a person appropriates unappropriated water of a natural stream of the state. The appropriator's water right vests when the appropriation has been completed through the application of water to beneficial use. *Shima v. Turkey Canon Ranch LLC*, 937 P.2d 739, 748 (Cob. 1997). A decree for water rights does not confer a right, but confirms an existing right. *Id.* When the decree is silent as to the location and extent of the lands irrigated by the water right, the statements of claim and transcripts of testimony in the adjudication are admissible evidence regarding construction and interpretation of the decree. *Central Cob. Water Conservancy Dist. v. City of Greeley*, 147 P.3d 9, 16 (Cob. 2006).
59. The decree from CA 1678 is silent as to the location and area of the lands to be irrigated by the Glasmann Ditch water right; however, the transcript of testimony of the claimant, Theodore Meanea, indicates that the Glasmann Ditch was originally constructed by Antone Glasmann for irrigation of the Glasmann lands. The Glasmann Ditch water right was originally appropriated for irrigation of the Glasmann lands, and claimants in CA 1678, Theodore E. Meanea, Carrie L. Underwood, and Francis Roberts, as heirs of Louise Meanea, were the owners of the Glasmann Ditch water right at the time of the adjudication in CA 1678.
60. There is no dispute that Plaintiffs currently own the Glasmann lands. Defendants and their predecessors in interest have never owned the Glasmann lands. The question for the court to determine is whether the Glasmann Ditch water right passed to the Dunwodys through their chain of title as an appurtenance to the Glasmann lands.
61. "Whether water rights are appurtenant to land and whether, on sale or transfer of land, water rights pass as appurtenances are generally questions of fact." *Travelers Ins. Co. v. Janitell Farms, Inc.*, 609 P.2d 1116 (1980). Whether a water right passes by deed, conveying lands without specific mention of the water right, depends on the grantors intention, which must be gathered from the express terms of the deed, or if the deed is silent, from presumptions arising from the

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- circumstances surrounding the transaction. *Denver Joint Stock Land Bank v. Markham*, 107 P.2d 313,316 (Cob. 1940).
62. As Defendants assert, until the October 2006 quit claim deed conveying the Glasmann Ditch water right to the Dunwodys, the only mention of the Glasmann Ditch water rights in the Plaintiffs' chain of title is a deed dated April 29, 1920, from Theodore Meanea, Carrie Underwood, and Francis Roberts, the claimants in CA 1678, to John C. Jenson. Plaintiffs claim that title to the Glasmann Ditch water right passes through the general appurtenance clause of all other instruments in their chain of title.
63. The court has reviewed the deeds and testimony regarding Plaintiffs' chain of title to the Glasmann Ditch water right. Because the instruments are silent as to the Glasmann Ditch water right, the court must base its findings on the nature of the deeds and the circumstances surrounding transfer of the Glasmann lands. Based on the nature of the conveyances and the use of water for irrigation of the Glasmann lands until the early 1960s, the Glasmann Ditch water right was appurtenant to the Glasmann lands. Title to the Glasmann Ditch water right passed with the Glasmann lands through the Dunwodys' claimed chain of title. The Glasmann Ditch water right was used for irrigation of the Glasmann lands and was required for the beneficial use of those lands. Richard Beye, son of the Elk Falls Ranch foreman, testified that he diverted water from Elk Creek through the early 1960s. Additionally, there is no record of any conveyance of the Glasmann Ditch water right by any of Plaintiffs' predecessors in title to any grantee outside of Plaintiffs' chain of title.
64. Therefore, the documents of record in Plaintiffs' chain of title, which evidence the transfer of the Glasmann lands together with all appurtenances, are sufficient to transfer ownership of the Glasmann Ditch water right as an appurtenance. Plaintiffs have presented an unbroken record chain of title for the Glasmann lands and Glasmann Ditch water right from the original appropriator and claimants of the Glasmann Ditch water right to Plaintiffs. Accordingly, Plaintiffs have established their record title to the Glasmann Ditch water right however, Plaintiffs' record title does not necessarily refute Defendant's claims of abandonment and adverse possession.

**B. Abandonment**

65. Defendants have asserted as an affirmative defense that Plaintiffs and their predecessors in interest have abandoned the Glasmann Ditch water right.
66. Colorado statute defines abandonment of a water right as, "the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder." § 37-92-103(2), C.R.S. Abandonment of water rights occurs when there is nonuse coupled with an intention to abandon. See, e.g., *Consol. Home Supply v. Town of Berthoud*, 896 P.2d 260 (Cob. 1995). The critical element of abandonment is intent. See *East Twin Lakes Ditches & Water Works, Inc. v. Bd. of Comm'rs of Lake County*, 76 P.3d 918, 921 (Cob. 2003) (detailing a

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- comprehensive look at Colorado's law regarding abandonment of a water right); Haystack Ranch, LLC v. Fazzio, 997 P.2d 548, 552 (Cob. 2000); SE. Cob. Water Conservancy Disi. v. Twin Lakes Ass'n Inc., 770 P.2d 1231, 1237 (Cob. 1989); Farmers Reservoir & Irrigation Co. v. Fulion Irrigating Ditch Co., 120 P.2d 196, 199 (1941). One claiming abandonment must prove it by a preponderance of the evidence. East Twin Lakes, 76 P.3d at 921.
67. Continued and unexplained nonuse of a water right for an unreasonable period creates a rebuttable presumption that there was an intention to abandon water rights. Denver v. Snake River Water Dist., 788 P.2d 772, 776 (Cob. 1990). The amount of time considered unreasonable necessarily varies with the facts of each case. Id. This presumption shifts the burden to the owner of the water right to introduce evidence excusing abandonment. Id. "To rebut the presumption of abandonment arising from a long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse." Id. (quotations omitted).
68. Colorado courts have considered a variety of factors indicative of an owner's intent to retain (and not to abandon) the owner's water right: (1) repair and maintenance of diversion structures; (2) attempt to put the water to beneficial use; (3) active diversion records and non-appearance of the water right on the State Engineer's abandonment list; (4) diligent efforts to sell the water right; (5) filing documents to protect, change, or preserve the right (6) leasing the water right; and (7) economic or legal obstacles to exercising the water right. East Twin Lakes, 76 P.3d at 922. Though none of these factors is necessarily determinative, the water court can assess their cumulative weight based on the facts to evaluate whether the owner has rebutted the presumption of abandonment. Id. Only when evidence of these factors is insufficient or non-existent may failure to put water to beneficial use by itself sustain a finding of abandonment. Id.
69. The parties dispute whether Plaintiffs' predecessors in interest diverted the Glasmann Ditch water right for use after 1948. Richard Beye testified that he irrigated portions of the Elk Falls Ranch property, which the Dunwodys now own, from 1948 to 1960. He testified that he did not use the headgate decreed to the Glasmann Ditch water right in CA 1678, instead diverting through a pipe in Elk Creek or a pump and tractor with a hose. Ms. Dunwody's testimony established that the headgate originally decreed as the point of diversion for the Glasmann Ditch water right washed out at some point after the decree was entered due to changes in the Elk Creek channel. Use of an undecreed change in point of diversion shows an intent not to abandon. Lengel v. Davis, 347 P.2d 142, 146 (Cob. 1959). Therefore, the Dunwodys' predecessors had continued to use the Glasmann Ditch water right until at least 1962. During the period before 1962, diversions were made for irrigation on the Elk Falls Ranch property. Mr. Beye testified that Elmer Berg's heirs began to phase out cattle and horse operations after December 1962 when Mr. Berg died.
70. There is little or no evidence of irrigation after 1962 when Elmer Berg died. Even if the court accepts Beye's testimony that irrigation continued for several years

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after Elmer Berg's death as the cattle and horse operations were phased out, the evidence shows that no irrigation using the Glasmann Ditch water right took place after 1966 when Alice Berg conveyed the property to Elk Falls Ranch Development Co. Plaintiffs presented no evidence that Elk Falls Ranch Development Co. used or had any intention of using the water right until Ms. Dunwody discovered the possibility that the property had water rights appurtenant to it in 2006. The next evidence of any intention to use the Glasmann Ditch water right appears in 2006 when Elk Falls Ranch Development Co. quit-claimed the water right to the Dunwodys. Therefore, for at least 40 years, from 1966 to 2006, the Dunwodys and their predecessors in interest did not use the Glasmann Ditch water right.

71. Plaintiffs presented no evidence of any excuse that would justify such a long period of nonuse. Rather, the evidence shows that none of the factors demonstrating an intent not to abandon the water right exist in this case. The use of the Elk Falls Ranch property changed from grazing and agriculture to a recreational fishing camp. At that time, the Glasmann Ditch water right was no longer needed for the owner's preferred use of the land. Plaintiffs and their predecessors in interest abandoned the Glasmann Ditch water right after 1966.
72. "If in fact the original decreed water rights have been abandoned, the water originally decreed belongs to the stream and is available for subsequent appropriators who would otherwise have been junior in point of time." *Rocky Mm. Power Co. v. White River Liec. Ass'n*, 376 P.2d 158, 161 (Cob. 1962). Once a water right has been abandoned, it is extinguished and not available for transfer or to become the subject of a change case. *Id.* Defendant argues that Plaintiffs and their predecessors in interest have abandoned the Glasmann Ditch water right "to the benefit of Defendant and/or Defendant's predecessors in interest." Though the water right was abandoned, the case law contradicts this assertion. A water right is not abandoned to the benefit of another user; rather, the water right is extinguished and the water "belongs to the stream," becoming available for appropriation by another appropriator. Therefore, the abandonment of the Glasmann Ditch water right by Plaintiffs' predecessors in interest conferred no benefit on Defendant or its predecessors in interest.

#### C. Adverse Possession

73. Defendants claim they have adversely possessed the Glasmann Ditch water right. Adverse possession of a water right can be accomplished under two statutes, §t 38-41-101 and 38-41-108, C.R.S. However, since the court has found that Plaintiffs' predecessors in interest abandoned the right after 1966, Defendant cannot have adversely possessed the water right. An abandoned water right is extinguished and returns to the stream for appropriation by those who file a new claim for a water right. Since the Glasmann Ditch water right no longer existed after 1966, Defendant and its predecessors in interest could not have adversely possessed it. Even if Plaintiffs' predecessors in interest had not abandoned the water right, Defendant has not proven that it and its predecessors in interest have adversely possessed the Glasmann Ditch water right.

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### 1. 18-Year Adverse Possession

74. Claimants may base a claim for adverse possession of water rights on § 38-4 1-101, C.R.S. See Matter of Water Rights of V-Heart Ranch, Inc., 690 P.2d 1271, 1273 (Cob. 1984) ("Ownership of water rights may be deemed ownership of real property for purposes of adverse possession claims.").

No person shall commence or maintain an action for the recovery of the title or possession or to enforce or establish any right or interest of or to real property or make an entry thereon unless commenced within eighteen years after the right to bring such action or make such entry has first accrued or within eighteen years after he or those from, by, or under whom he claims have been seized or possessed of the premises. Eighteen years' adverse possession of any land shall be conclusive evidence of absolute ownership.

§ 38-41-101, C.R.S. A party claiming ownership of property by adverse possession has the burden of showing that such possession was actual, adverse, hostile and under claim of right, open and notorious, exclusive, and continuous for the 18-year statutory period. *Id.*, citing *Loshbaugh v. Benzel*, 133 Cob. 49, 291 P.2d 1064 (1956); *Rominger v. Squires*, 9 Cob. 327, 12 P.213(1886).

75. Actual use of the water right at issue is the first element of a claim for adverse possession of a water right. *V-Heart Ranch*, 690 P.2d at 1273. Actual use is central to a claim for adverse possession of a water right because use defines possession for a usufructuary right. Cf *Shirola v. Turkey Cañon Ranch LLC*, 937 P.2d 739, 748 (Cob. 1997) ("Due to the usufructuary nature (of a water right), the property rights the right to use water.").

76. Defendant claims its predecessors in interest have used the Glasmann Ditch water right on the Schott Ranch since at least 1948. The court has held that there is evidence that Plaintiffs' predecessors in interest used the Glasmann Ditch water right until 1966, when Alice Berg sold the lands to Elk Falls Ranch Development Co. Therefore, before 1966, the Schotts could not have exclusively used the Glasmann Ditch water right.

77. Tom Berrien testified about a haying operation on the Schott Ranch that continued through the 1960s; however, the first actual evidence of use of the Glasmann Ditch water right for irrigation on the Schott Ranch appears in 1970. Defendant presented diversion records showing diversions of the Glasmann Ditch water right for use on the Schott Ranch for the years 1970 to 1972, 1975, and 1977 to 1980. Even assuming diversions occurred in the years for which Defendant did not present diversion records, the evidence shows that Defendant and its predecessors in interest used the Glasmann Ditch water right for only 11 years.

78. As the court held in its October 23, 2008 Order, the mere entry of a decree for a conditional water right is not evidence of actual use. "A conditional water right is the 'right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.'" *Rocky Mtn. Power Co. v. Cob. River Water Conservation Dist.*, 646

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P.2d 383, 387 (Cob. 1982) (quoting § 37-92-103(6), C.R.S. 1973). "The purpose of a conditional water right has always been to allow an ultimate appropriation of water to relate back to the time of the first step toward that appropriation." *Id.* (citations omitted). The decree and diligence evidencing a conditional water right do not constitute actual beneficial use, merely the formation and overt manifestation of Defendant's intention to put water to beneficial use. *Id.* Defendant cannot show actual use during the period after Case No. 81CW144 was filed for a conditional storage right.

79. Defendant has not established adverse possession of the Glasmann Ditch water right because Defendant has not proven that it and its predecessors in interest have actually used the Glasmann Ditch water right continuously for the 18-year period required by statute.
80. Defendant cannot rely on § 38-41-103, C.R.S., to establish prima facie evidence of adverse possession because Defendant has not actually used the water right since 1983.

If the records in the office of the county clerk and recorder of the county wherein the real property is situate [sic] show by conveyance or other instrument that the party in possession or his predecessors or grantors, through descent, conveyance, or otherwise, have asserted a continuous claim of ownership to the real property adverse to the record owners thereof for a period of eighteen years, then the record shall be deemed prima facie evidence of adverse possession during said period and compliance with the requirements of sections 38-41-101 and 38-41-102.

§ 38-41-103, C.R.S. Though the decree from Case No. 81CW144 and the deed to North Fork Associates has been on record in the Park County Clerk and Recorder's Office since June 28, 1983, Defendant cannot establish possession—actual use in the water rights context—and therefore cannot rely on this statute to establish prima fade adverse possession.

### 2. 7-Year, Color of Title

81. Defendant also claims adverse possession of the Glasmann Ditch water right under § 38-41-108, C.R.S., which says:

Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, who for seven successive years continues in such possession and also during said time pays all taxes legally assessed on such lands or tenements shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title.

Courts have recognized the applicability of this section to adverse possession of water rights. *Bowers v. McFadzean*, 257 P. 361, 365-366 (Cob. 1927). To obtain title under § 38-41-108, C.R.S., a person must demonstrate color of title, possession, and payment of taxes for the full seven-year period. *Id.* For color of title to exist, the recorded instrument must contain "express description" of the water rights. *Id.*

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82. The recorded deeds conveying the Schott ranch do not contain an express description of the Glasmann Ditch water right until 1981; rather, they contain the general grant, "together with any an all water rights appurtenant thereto." Therefore, Defendant's deeds prior to the December 12, 1980 Woodside Ltd. deed do not satisfy the color of title requirement. Additionally, as discussed above, Defendant failed to demonstrate actual use of the Glasmann Ditch water right after 1980. Therefore, Defendant's adverse possession claim under § 38-41 - 108, C.R.S., fails.

**V. ORDER**

Based on the foregoing, the court orders:

83. Any interest held by the Plaintiffs Drayton Dunwody and Vera Dunwody in the Glasmann Ditch water right has been abandoned. Plaintiffs Drayton Dunwody and Vera Dunwody have no right or title to, or interest in, the Glasmann Ditch water right. Plaintiff's claims are dismissed with prejudice.
84. Defendant Will-O-Wisp Metropolitan District's counterclaim of adverse possession of the Glasmann Ditch water right is denied. Defendant Will-O-Wisp Metropolitan District has no right or title to, or interest in, the Glasmann Ditch water right. Defendants' claims are dismissed with prejudice.
85. The parties shall pay their own costs.

Dated: April 3, 2009.

By the court:

Roger A. Klein  
Water Judge  
Water District 1