

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue  
Denver, Colorado 80203

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District Court, Water Division 1, State of Colorado  
The Honorable Todd Taylor  
Case No.: 15CW3026

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**Defendant-Appellant:**

K-LOW, LLC, a Louisiana Limited Liability Company;  
v.

**Defendant-Appellee:**

Faith Tabernacle Church, Inc., a Colorado Corporation  
v.

**Plaintiff-Appellee:**

Select Energy Services, LLC, a Delaware Limited  
Liability Company  
v.

**Third Party Defendant-Appellee:**

Raymond Carpio, an individual;  
v.

**Appellee:**

Division 1 Water Engineer

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*Attorneys for Defendant-Appellant K-LOW, LLC:*

David F. Askman, #44423  
Michael M. Frandina, # 42116  
The Askman Law Firm, LLC  
2533 W. 32<sup>nd</sup> Avenue, Denver, CO 80211  
Telephone: (720) 855-1533  
Email: [dave@askmanlaw.com](mailto:dave@askmanlaw.com);  
[michael@askmanlaw.com](mailto:michael@askmanlaw.com)

Robert J. Bruce, #17742  
RJB Lawyer, LLC  
1543 Champa St., Suite 400, Denver, CO 80202  
Telephone: (303) 573-5498  
Email: [bobbBruce@rjblawyerllc.com](mailto:bobbBruce@rjblawyerllc.com)

^ COURT USE ONLY ^

Case No.:

**NOTICE OF APPEAL**

In response to the March 10, 2016 Order on Select Energy’s Motion for Partial Summary Judgment (“March 10 Order”) in Water Division 1 District Court (“Court”), Case No. 15CW3026 (“Action”), Defendant-Appellant K-LOW, LLC (“K-LOW” or the “Appellant”), by and through its undersigned counsel, hereby submits the following as its Notice of Appeal.

### **I. NATURE OF THE CASE**

#### A. Statement Of The Controversy.

In 2014, Defendant-Appellee Faith Tabernacle Church, Inc. (“Faith Tabernacle”) purchased irrigable property in Weld County, Colorado, and the water rights associated with it, including the Sterling Drain and Seepage Ditch water right originally adjudicated on January 14, 1914, with an appropriate date of December 8, 1893 (“Water Right”). The Water Right took its water from three sources—from the South Platte, from another ditch, and from accretions.

Shortly after the purchase of the property and the Water Right, Faith Tabernacle applied for a simple change in its point of diversion on the South Platte River pursuant to C.R.S. § 37-92-305. It sought to change the diversion point for the river water taken from the headgate on the South Platte River.

On October 1, 2014, the Decree of the Water Court in Case No. 14CW3050 (the “2014 Decree”) was entered, allowing the change.

In February 2015, K-LOW purchased from Faith Tabernacle an easement to the irrigation ditch that had traditionally conveyed the Water Right (“Ditch”), which crossed several parcels of land including lands owned by Third Party Defendant-Appellee Raymond Carpio<sup>1</sup>. Plaintiff-Appellee Select Energy Services, LLC (“Select”) moved for a determination that the 2014 Decree consolidated all three sources of the Water Right and changed all three points of diversion to one, on the South Platte River, and thus that the Ditch could no longer be used to convey the Water Right. The motion was granted in the March 10 Order.

B. Order Being Appealed And Basis For Appellate Court Jurisdiction.

Appellants seek review and reversal of the March 10 Order and the March 28, 2016 Order: Stipulation for Dismissal of Certain Claims and Motion for Entry of Judgment (“March 28 Order of Dismissal”), which made the March 10 Order final.

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<sup>1</sup> Raymond Carpio reached a settlement with K-LOW and Faith Tabernacle regarding the third party claims, which are not a part of this Notice of Appeal.

Jurisdiction is proper in this Court pursuant to C.R.S. § 13-4-102(1)(d) and C.A.R. 1(a)(2) and (e).

C. Whether The Order Resolved All Pending Issues.

The March 28 Order resolved all issues pending before the trial court.

D. Whether The Judgment Was Made Final For Purposes Of Appeal Pursuant to C.R.C.P. 54(b).

C.R.C.P. 54(b) was not applied in the Action.

E. Date Of Judgment/Order.

The March 10 Order was entered on March 10, 2016 and was electronically transmitted to counsel on March 10, 2016. The March 28 Order of Dismissal was entered on March 28, 2016 and was electronically transmitted to counsel on March 28, 2016.

F. Whether There Were Any Extensions Granted To File Motions For Post-Trial Relief.

No extensions of time were requested or given to file motions for post-judgment relief.

G. Date Any Motion For Post-Trial Relief Was Filed.

No motions for post-trial relief were filed.

H. Date Any Motion For Post-Trial Relief Was Denied Under C.R.C.P. 59(j).

No motions for post-trial relief were filed.

I. Whether There Were Any Extensions Granted To File Any Notice(s) Of Appeal.

No extensions were requested or granted to file a notice of appeal.

**II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL**

A. Whether the trial court erred in holding that the Water Right could no longer be conveyed through the Ditch.

B. Whether the trial court erred in holding that all three sources for the Water Right were consolidated into one source by way of the simple change procedure in C.R.S. § 37-92-305.

C. Whether the trial court erred in holding that all three diversion points for the Water Right were consolidated and moved by way of the simple change procedure in C.R.S. § 37-92-305.

**III. TRANSCRIPT**

The trial court did not take any evidence at hearing in connection with ruling on the motion and thus no transcripts of argument before the trial court will be necessary to resolve the issues raised on appeal.

**IV. PRE-ARGUMENT CONFERENCE**

No pre-argument conference is requested at this time.

## V. NAMES OF COUNSEL FOR THE PARTIES

### *Counsel for Plaintiff-Appellant K-LOW, LLC:*

Robert J. Bruce, #17742  
RJB Lawyer, LLC  
1543 Champa St., Suite 400  
Denver, CO 80202  
(303) 573-5498  
bobbruce@rjblawyerllc.com

David F. Askman, # 44423  
Michael M. Frandina, #42116  
The Askman Law Firm, LLC  
2533 W. 32<sup>nd</sup> Avenue  
Denver, CO 80211  
(720) 855-1533  
dave@askmanlaw.com  
michael@askmanlaw.com

### *Counsel for Plaintiff-Appellee Faith Tabernacle Church, Inc.:*

Kim R. Lawrence  
David P. Jones  
Lawrence Jones Custer Grasmick LLC  
5245 Ronald Reagan Blvd., Suite 1  
Johnstown, CO 80534  
970.622.8181  
kim@ljcglaw.com  
david@ljcglaw.com

### *Counsel for Plaintiff-Appellee Select Energy Services, LLC*

John J. Cyran  
John J. Cyran, Attorney at Law LLC  
1600 Broadway, Suite 900  
Denver, CO 80203  
303-746-3802  
john@jjcyranlaw.com

Marjorie L. Sant, No. 35851  
Panorama Law Practice, LLC  
P.O. Box 4986  
Boulder, CO 80306-4986  
(303) 323-1931  
sant@panoramalaw.com

*Counsel for Third Party Defendant-Appellee Raymond Carpio*

Mark D. Detsky, # 35276  
Gabriella Stockmayer, #43770  
Dietze and Davis, P.C.  
2060 Broadway, Suite 400  
Boulder, CO 80302  
303 447-1375  
mdetsky@dietzedavis.com  
gstockmayer@dietzedavis.com

*Division Engineer*

Division 1 Water Engineer  
810 9th Street, Suite 200  
Greeley, CO 80631  
(970) 352-8712

## **VI. APPENDIX**

Copies of the March 10 Order and the March 28 Order of Dismissal are attached hereto as Exhibits

Respectfully submitted this 13<sup>th</sup> day of May, 2016.

/s/ Michael M. Frandina  
David F. Askman, # 44423  
Michael M. Frandina, #42116  
The Askman Law Firm, LLC  
2533 W. 32nd Avenue  
Denver, CO 80211  
(720) 855-1533

/s/  
Robert J. Bruce, #17742  
RJB Lawyer, LLC  
1543 Champa St., Suite 400  
Denver, CO 80202  
Telephone: (303) 573-5498

*ATTORNEYS FOR DEFENDANT-  
APPELLANT K-LOW, LLC*



**CERTIFICATE OF SERVICE**

This is to certify that on the 13<sup>th</sup> day of May, 2016 the foregoing was filed with the trial court and that, in accordance with C.R.C.P. 121(c), § 1-26, on the 13<sup>th</sup> or 16<sup>th</sup> day of May, 2016 was served via electronic service or mail on the following:

*Counsel for Defendant-Appellee Faith Tabernacle Church, Inc.:*

Kim R. Lawrence  
David P. Jones  
Lawrence Jones Custer Grasmick LLC  
5245 Ronald Reagan Blvd., Suite 1  
Johnstown, CO 80534  
970.622.8181  
kim@ljcglaw.com  
david@ljcglaw.com

*Counsel for Plaintiff-Appellee Select Energy Services, LLC*

John J. Cyran	Marjorie L. Sant, No. 35851
John J. Cyran, Attorney at Law LLC	Panorama Law Practice, LLC
1600 Broadway, Suite 900	P.O. Box 4986
Denver, CO 80203	Boulder, Colorado 80306-4986
303-746-3802	(303) 323-1931
john@jjcyranlaw.com	sant@panoramalaw.com

*Counsel for Third Party Defendant-Appellee Raymond Carpio*

Mark D. Detsky, # 35276  
Gabriella Stockmayer, #43770  
Dietze and Davis, P.C.  
2060 Broadway, Suite 400  
Boulder, CO 80302  
303 447-1375  
mdetsky@dietzedavis.com  
gstockmayer@dietzedavis.com

*Division Engineer as Appellee*

Division 1 Water Engineer  
810 9th Street, Suite 200  
Greeley, CO 80631

Colorado Division of Water Resources  
1313 Sherman St., Ste. 821  
Denver, CO 80203

/s/ Michael M. Frandina

DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 915 10th Street, Greeley, CO, 80632	DATE FILED: 2016 Mar 27 9:59 AM DATE FILED: 2016 Mar 27 9:59 AM CASE NUMBER: 2015CW3026  <p style="text-align: center;"><b>△ COURT USE ONLY △</b></p>
In the Interest of: SELECT ENERGY SERVICES LLC	
<p style="text-align: center;"><b>Order: Stipulation for Dismissal of Certain Claims and Motion for Entry of Judgment</b></p>	

Case Number: 2015CW3026  
 Division: 4                      Courtroom:

The Stipulation filed March 27 by Select and K-Low is approved and hereby made an order of the court.

Consistent with the Order on Select Energy's Motion for Partial Summary Judgment entered March 10, final judgment on Select's First, Second, and Third claims for relief hereby enters under C.R.C.P. 54(b) and 58(a), in favor of Select and against K-Low, subject to all rights of appeal. Final judgment also enters on K-Low's counterclaim for trespass, against K-Low and in favor of Select, subject to the terms of the parties' settlement agreement and contingent upon final resolution of any appeal of the March 10 Order brought by K-Low.

SO ORDERED.

Issue Date: 3/28/2016



TODD L TAYLOR  
 District Court Judge

DISTRICT COURT, WATER DIVISION 1, COLORADO 901 9 <sup>th</sup> Avenue, P.O. Box 2038, Greeley, CO 80632	
<i>Plaintiff: Select Energy Services, LLC</i>  <i>v.</i>  <i>Defendants: K-Low, LLC and Faith Tabernacle Church, Inc.</i>  <i>v.</i>  <i>Third-Party Defendant: Raymond Carpio</i>	DATE FILED: May 11, 2016 TIME FILED: 11:05:20 AM CASE NUMBER: 2015CW3026  ▲ COURT USE ONLY ▲  Case No. 2015 CW 3026  Division 4
<b>Order on          Select Energy's Motion for Partial Summary Judgment</b>	

Plaintiff Select Energy seeks partial summary judgment in the form of a determination of law. Defendant Faith Tabernacle Church obtained a decree in case no. 2014CW3050, Water Division 1, that changed the point of diversion for the entire water right established in 1914 through case no. 2142. The 1914 decree established the right to divert water from the South Platte River into the Sterling Drain and Seepage Ditch for irrigation purposes. Select seeks a ruling that any water associated with the 1914 right can now be diverted only from the new diversion point, located downstream from the ditch's headgate, and not through the ditch.

After obtaining the 2014 decree, Defendant Faith conveyed an easement to use the ditch to Defendant K-Low. K-Low contends that this easement also gives it the right to use water from sources other than the South Platte River if non-river water finds its way into the ditch. But because the new diversion point is downstream from both the original headgate and the ditch itself, Select seeks a determination that K-Low has no right to use water in the ditch, regardless of its source.

K-Low opposes these requests. K-Low argues that because Faith believed that it still owned water in the ditch from sources other than the

South Platte River, Faith could validly convey the right to use that water by granting the ditch easement to K-Low. Absent this belief, K-Low says it would not have acquired the easement from Faith. But Faith's and K-Low's intent in entering their agreement is not the issue here. And because K-Low's argument that the 2014 decree did not change the "entire water right" to a new point of diversion is unconvincing, I grant Select's motion.

## **1. Standards for Determining a Question of Law**

Summary judgment is appropriate when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. C.R.C.P. 56(c); *W. Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002).

Under C.R.C.P. 56(h), if there is no genuine issue of any material fact necessary for the determination of a question of law, the court may enter an order deciding the question. The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *W. Elk Ranch*, 65 P.3d at 481.

## **2. Undisputed Material Facts**

The water right at issue here was established by Asa Sterling<sup>1</sup> in case no. 2142, through a decree entered in January 1914. That decree created the "Sterling Drain and Seepage Ditch" right and granted 28.0 c.f.s., absolute,

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<sup>1</sup> Asa Sterling was a member of the Union Colony of Colorado, which would eventually become Greeley: "Among the men who have made money in stock-raising in connection with farming, and made their home in Greeley, none better deserves mention than Asa Sterling. He has a large farm principally devoted to producing alfalfa hay, some ten miles down the Platte. He is chiefly engaged in raising horses, and has made money in the business, and is also a heavy stockholder in the First National bank. For a man of close business habits he is liberal and public-spirited." David Boyd, *A History: Greeley and the Union Colorado of Colorado* 417 (Greeley Tribune Press, 1890).

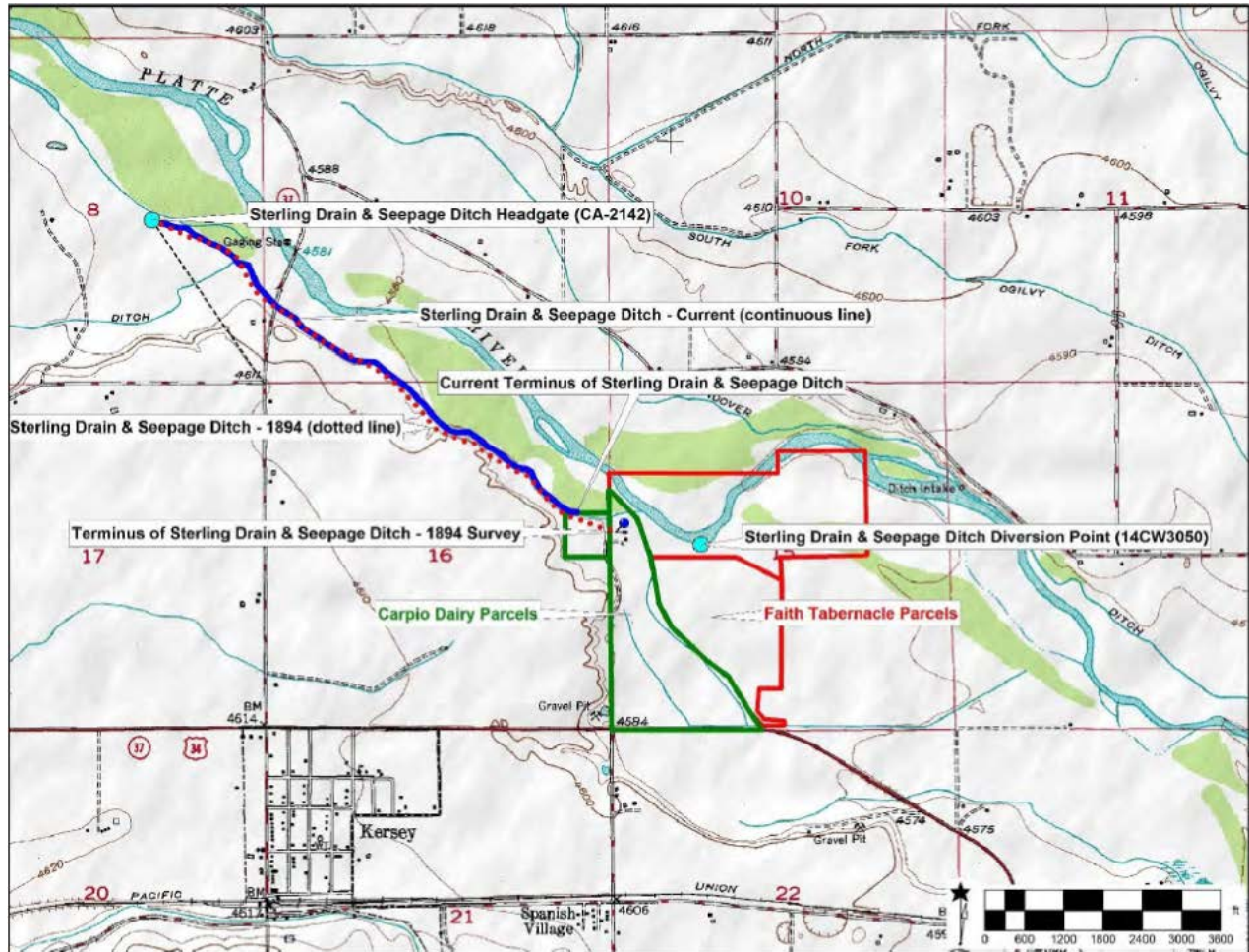
with an appropriation date of December 8, 1893, “for irrigation of 300 acres of land and no more.”

The decree specified the diversion point as “on the south bank of the South Platte river at a point whence the common corner of sections 8, 9, 16, 17, township 5 north, range 64 west of the 6th p.m., bears south 34 deg. 30’ east 3020 feet.” Besides drawing water from the South Platte River, the decree recognized that the ditch took water “from seepage and waste waters coming ... from the Plumb drain ditch and other accretions along its course.”

Faith obtained this water right from Asa Sterling’s successors at some point. The affidavit from Rodney Guerrieri submitted by K-Low indicates that Faith purchased the property in 2014. Presumably, Faith obtained the water right as part of the property purchase.

In April 2014, Faith filed an application in case no. 2014CW3050 to change the location of the diversion point. Faith requested a decree to move the point further downstream, to its property located in the NW¼ Section 15, T5N, R64W of the 6th PM, Weld County. Faith also indicated that “the ditch headgate and much of the ditch are destroyed.” Faith represented that no other decreed water rights had a point of diversion located between the original decreed point of diversion and the new proposed location.

The map on the next page (from an expert report prepared for Third-Party Defendant Raymond Carpio, but submitted by Select as *Exhibit A*, 1/28/16, p. 20) shows the approximate location of the original point of diversion, near the upper left corner of the map, and the new point of diversion, near the center. The downstream flow of the South Platte River is from left to right, up to down, on the map. According to the expert’s report, the new diversion point is located approximately two miles downstream from the original point of diversion. K-Low does not contest these facts.



Map: Sterling Drain & Seepage Ditch

Faith’s application made clear that no groundwater would be diverted as part of the requested change. Faith further clarified that the “decree[,] if granted[, would] not requantify the water right.” Faith made no request for an alternate point of diversion or for a source besides the South Platte River.

As part of his statutory duties, the Division One Engineer submitted a Summary of Consultation Report. The Division Engineer raised a concern that Faith was seeking to change only a portion of the water right, noting that a partial change is not permissible under the simple change statute that Faith had invoked, § 37-92-305, C.R.S.

In response, Faith confirmed for the water court that it was “changing the point of diversion for the *entire* water right not just a part of the water right.” (Emphasis added.)

Based on this record, the water referee approved Faith’s application and this court later confirmed that decision, entering a final decree in October 2014. The 2014 decree moved Faith’s diversion point down the South Platte River to Faith’s property and provided that Faith could not divert more than 28.0 c.f.s., absolute. The decree specified that the source for Faith’s water right is surface water from the South Platte River.

While the decree made a reference to adjudicating “the Plumb Drain Ditch and other accretions as sources of supply” for Faith’s water right, the original 1914 decree did not specify an amount from these sources. Faith also did not specify that it was requesting to adjudicate any amounts from these sources in its 2014 change application. And the 2014 decree granted no amounts from these sources to Faith.

### **3. Applying the Determination of Law Standards**

Based on the undisputed material facts, Select asks for a determination that the decree issued in case no. 2014CW3050 changed the entire water right acquired by Faith to a new diversion point on the South Platte River downstream of the ditch that had been historically used to transport water from the South Platte River to Faith’s land, meaning that K-Low could not later acquire the right from Faith to use water in the ditch.

The determination of this question is straightforward: Faith made clear when it applied to change the diversion point that it was seeking to move the original, single diversion point to another single diversion point further downriver. Faith made clear that it was seeking to adjudicate the *entire* water right. Neither Faith’s application nor this court’s decree in 14CW3050 contains any ambiguity as to these points.

And not only did Faith never acquire the right to use a specific amount of seepage or waste water, by adjudicating the entire water right in 14CW3050, Faith necessarily included water from any source—whether river, seepage, or waste water—and changed the diversion point for that water to the new diversion point located on its property downstream from the historical ditch.

K-Low argues that it acquired Faith’s right to use seepage or waste water when it obtained Faith’s easement to use the ditch. But this argument misunderstands the distinction between a ditch easement and a water right. K-Low does not claim to possess its own right to divert water from the South Platte River and does not seek to use the ditch easement for that purpose.

An owner of a water right is entitled to a right-of-way easement through the lands that lie between the diversion point and the point of use, for the purpose of transporting water in accordance with the water right. *See* § 37-86-102, C.R.S. But the law requires that the person or entity claiming a ditch easement must first own a valid water right before an easement to transport that water is enforceable; in other words, obtaining someone else’s ditch easement does not create a water right that did not already exist.

The right to use water guaranteed under the Colorado Constitution is to the appropriation of unappropriated waters of the natural stream, not to the appropriation of appropriated waters. *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1147 (Colo. 2001). “The property right we recognize as a Colorado water right is a right to use beneficially a *specified* amount of water, from the available supply of surface water or tributary groundwater, that can be captured, possessed, and controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right.” *Id.* (emphasis added).

Thus, a “water right is created when a person appropriates or initiates an appropriation of unappropriated water of a natural stream of the state.”



*Id.* A decree for an absolute water right confirms that an appropriative right has vested and identifies the right's priority and *amount*. *Id.* at 1148.

Moreover, water rights are decreed to structures and points of diversion. *Id.* And the measure of every water right for change purposes is its historic beneficial use at its *decreed location*. See *Williams v. Midway Ranches Prop. Owners' Ass'n, Inc.*, 938 P.2d 515, 521 (Colo. 1997) ("Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes, typically quantified in acre-feet of water consumed."). So priority, location of diversion at the source of supply, and amount of water for application to beneficial uses are the essential elements of an appropriative water right. *Empire Lodge*, 39 P.3d at 1148.

K-Low argues that Faith's request to move the single diversion point as to South Platte River water was also an implicit request to establish an alternate point of diversion for the Plum Drain Ditch seepage and waste water. But this argument has no merit: Faith's application requested a single new diversion point for the entire water right and nowhere suggested that this new diversion point did not include seepage and waste water.

Also, as discussed in Select's *Motion for Partial Summary Judgment* and its *Reply*, the new diversion point is located downstream of both the original headgate and the historical ditch. The new diversion point is also downstream of the confluence of the Plum Drain Ditch and the South Platte River. These undisputed facts mean that all the original sources of Faith's water right—including seepage and waste water from the Plum Drain Ditch, which would be delivered to the South Platte River upstream of the new diversion point—can be diverted to Faith through the new diversion point (assuming that the waste and seepage water are returned to the river) and used as part of Faith's decreed water amount.

And because neither the original 1914 decree nor the 2014 decree that approved the simple change in the diversion point specified an amount of

water from a source other than the South Platte River, Faith had no vested right in any source other than the river.

“[T]he law is that one who appropriates the waste water from the stream cannot assert a right to have the irrigator continue to discharge the waste water into the stream.” *City of Boulder v. Boulder & Left Hand Ditch Co.*, 192 Colo. 219, 222, 557 P.2d 1182, 1185 (1976). Thus, “no permanent right can be obtained by the attempted appropriation of waste water. More specifically, in the absence of bad faith, an appropriator of waste water cannot obtain a right against the water waster to compel continuation of the waste water discharge.” *Id.*

And, to the extent that a distinction can be made here between waste water and seepage, Colorado law is clear that “[s]eepage flows into ditches cannot be allocated independent of existing priorities on the river.” *Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist.*, 256 P.3d 645, 667 (Colo. 2011); *see also Left Hand Ditch Co.*, 557 P.2d at 1185 (“Return flow is not waste water. Rather it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function.”). The capture and reuse of seepage or return flow water by junior appropriators without regard to injury to downstream decreed rights is unlawful in Colorado. *See id.*; *Comstock v. Ramsey*, 55 Colo. 244, 133 P. 1107 (1913). Indeed, this rule of noninjury is the guiding principle in nearly every area of Colorado water law, except the right to reuse transmountain diversions to extinction. *See, e.g.*, §§ 37-92-305(3), 37-92-305(5), 37-92-501, & 37-90-137(7), C.R.S. 2015.

Thus, Faith (or K-Low, to the extent it has acquired Faith’s rights) has no right to use seepage or waste water from the Plum Drain Ditch. *See* § 37-82-102, C.R.S. 2015 (“All ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the state shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; but the person upon whose land

the seepage or spring waters first arise shall have the prior right to such waters if capable of being used upon his lands.”). Because Faith has never been decreed the right to use any specified amount from these other sources, it cannot grant a right to K-Low to use water form these sources.

#### 4. Conclusion

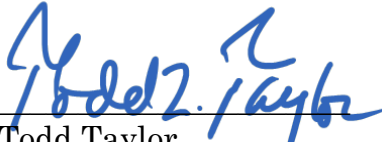
Based on the undisputed material facts, I determine as a matter of law that the decree obtained by Faith in case no. 2014CW3050 changed the point of diversion for the entire water right related to the Sterling Drain and Seepage Ditch, established in case no. 2142, through the 1914 decree. All water associated with the 1914 right must now be diverted from the new diversion point located on Faith’s property, and not through the ditch historically used for that purpose.

#### 5. Order

Accordingly, *Select Energy’s Motion for Partial Summary Judgment* is GRANTED.

*So Ordered:*  
March 10, 2016

BY THE COURT:

  
Todd Taylor  
Alternate Water Judge  
Water Division 1