

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Trial Court: Water Court for Water Division 3
State of Colorado
702 4th Street
Alamosa, CO 81101
The Honorable Pattie P. Swift
Case No. 2007CW53

PEOPLE OF THE STATE OF COLORADO
ex rel. THE STATE ENGINEER AND THE
DIVISION ENGINEER FOR WATER
DIVISION THREE,
Plaintiffs, Appellees
v.
ROBERT GREGG SEASE
Defendant, Appellant

▲ COURT USE
ONLY ▲

Attorney for Robert Gregg Sease
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Case Number: 2017 SA 130

Division Courtroom

NOTICE OF APPEAL

Robert Gregg Sease, by and through his undersigned attorney, submits this

Notice of Appeal pursuant to C.A.R. 3:

1. Nature of the Case: This case is a contempt proceeding. The State and Division Engineers filed the case originally in 2007 seeking an injunction to enforce various cease and desist orders the Division Engineer had issued to Mr. Sease between 2003 and 2007. The parties reached an agreement concerning the request for injunctive relief and the court approved this agreement in its Stipulated Order on Complaint for Injunctive Relief issued on January 31, 2008. Since then, the state has requested and the court has issued a total of seven contempt citations to the defendant. The most recent, upon which this appeal is based, was issued based on alleged violations of an Order Regarding Mandatory and Permanent Injunction issued by the court on November 8, 2013, *nunc pro tunc* October 29, 2013, containing the following terms:

a. Except for the remediation work ordered in the Court's Order Continuing Contempt Hearing and Requiring Remediation entered on April 13, 2013, the Defendant, Robert Gregg Sease, whether acting individually or through his agents, servants, and employees is hereby ordered to do nothing whatsoever, directly or indirectly, in, along or to Sheep Creek as it traverses the Sease Ranch, as shown on the map attached to this order as Exhibit A, without the prior written approval of the Division Engineer. . .

b. The Defendant, Robert Gregg Sease, whether acting individually or through his agents, servants and employees is hereby ordered to not construct, maintain or encourage the development of: (1) any new or expanded structures or the placement of any natural or manmade materials

whatsoever within the ordinary high watermark of Sheep Creek as delineated on the map attached to this order as Exhibit A, including but not limited to: ditches, dams, pipelines, plants, boulders, rocks, soil, head gates, or any other diversion, impoundment, fill or obstructions, or (2) any other new or expanded on-stream or off-stream impoundments, surface or groundwater diversion, or other water structures whatsoever anywhere on Sease Ranch, which is delineated on the map attached to this order as Exhibit A, without first receiving prior written approval of the Division Engineer, the State Engineer. . .

A. Nature of the Controversy:

The State and Division Engineers filed a motion for contempt citation on October 14, 2015, and an amended motion for issuance of a contempt citation on January 20, 2016, alleging that Gregg Sease had violated both of the above provisions of the October 2013 order by undertaking various actions both in the stream and on the property through which the stream flowed, including placement of material in the stream, dredging of material from the stream, alteration of a gravel pit, placement of pipelines, construction of a pond, and alteration of other existing ponds, and replacement of a metal stock tank. The matter came on for trial on June 8, 2016. The Court found that Mr. Sease's actions constituted contempt, and entered an order for remedial sanctions on September 23, 2016. After further hearing held on April 10, 2017, the Court entered an order for punitive sanctions on May 2, 2017, imposing a 90 day jail sentence and a \$10,000

fine.

B. The Judgments or orders being appealed and the basis for this Court's jurisdiction: Mr. Sease appeals the oral finding of contempt entered by the Court after the hearing on June 9, 2016, which forms the basis for the September 23, 2016 Order Requiring Remediation and Imposing Remedial Sanctions (Mr. Sease does not appeal the sanctions themselves). Mr. Sease also appeals the Findings of Fact, Conclusions of Law, and Order Imposing Punitive Sanctions entered May 2, 2017, which is again based upon that oral finding of contempt made June 9, 2016. Mr. Sease believes that jurisdiction is in the Court of Appeals, pursuant to C.R.S. § 13-4-104(1), as this is not a water matter involving priorities, adjudications, or the administration of water rights. The Appellees have informed Mr. Sease's attorneys that they believe that the Supreme Court has jurisdiction pursuant to C.R.S. §§ 37-92-304(9) and 13-4-102(1)(d). Mr. Sease has previously filed Motions for Extension of Time in which to file this Notice of Appeal in both the Court of Appeals and the Supreme Court. The Court of Appeals denied the Motion, noting that it was also filed in the Supreme Court and concerns a water matter, but no final determination of jurisdiction has been made. Accordingly, Mr. Sease is filing

this Notice of Appeal both in the Court of Appeals and in the Supreme Court.

C. Whether the Judgment or orders resolved all issues pending before the trial court including attorneys fees and costs:

The Orders resolved all issues pending before the trial court, however, Mr. Sease notes that an out-of-time “Submittal of Attorney Fees and Unopposed Motion to Set Deadline for Any Response or Hearing Request by Defendant Beyond the Resolution of Any Appeal” was filed by the State and Division Engineers on July 21, 2017.

D. Whether Judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b):

Judgment was not made final pursuant to C.R.C.P. 54(b) but is rather final because the Orders being appealed resolved all issues pending before the trial court.

E. The date judgment or order was entered and the date of mailing to counsel:

The oral order finding contempt was made June 9, 2016. It was not a final

order, and was not mailed to Counsel. The Findings of Fact, Conclusions of Law, and Order Imposing Punitive Sanctions entered May 2, 2017, and was served on counsel on that same day.

F. Whether there were any extension granted to file any motion for post-trial relief:

No extensions were sought or granted.

G. The date any motion for post-trial relief was filed: None.

H. The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j):

Not Applicable.

I. Whether there were any extensions granted to file any Notices of Appeal: A motion for extension filed June 13, 2017 was denied by the Court of Appeals on June 16, 2017, case No. 2017CA1064. A motion for extension filed June 13, 2017 with this Court was granted on June 20, 2017, Case No. 2017SA130, granting an

extension to and including July 25, 2017.

2. Advisory listing of issues to be raised on appeal:

A. Did the Trial Court err in finding contempt where the contempt, if any, had been cured prior to filing the amended motion for contempt citation?

B. Did the Trial Court err in failing to require the State to prove the identity of the person committing or causing to be committed the acts alleged to constitute contempt?

C. Did the Trial Court err in shifting the burden of proof of identification to Defendant?

D. Did the Trial Court err in failing to allow Defendant to present expert testimony concerning the impact of the alleged acts on the stream and other water rights at the contempt hearing?

3. Transcript: A transcript of the hearings and status conferences held on November 20, 2015 (< 1 hour) , November 23, 2015 (< 1 hour), January 11, 2016 (< 1 hour), February 22, 2016 (< 1 hour), March 14, 2016 (< 1 hour), May 9, 2016 (< 1 hour), May 17, 2016 (< 1 hour), May 23, 2016 (< 1 hour), June 6, 2016 (< 1

hour), June 8 and 9, 2016 (9 hours), September 22, 2016 (< 1 hour), January 9, 2017 (4 hours), April 10, 2017 (3 hours), April 18, 2017 (1 hour) and April 27, 2017 (1 hour). There was no court reporter, the proceedings will need to be transcribed from recordings, although the proceedings on June 8 and 9, 2016, and on April 10, 2017, have already been transcribed.

4. Whether or not a pre-argument conference is requested: Mr. Sease does not request a pre-argument conference.

5 Names of Counsel for the Parties:

Counsel for R. Gregg Sease:

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Paul.bennington@coag.gov
Michael.toll@coag.gov

RESPECTFULLY SUBMITTED July 25, 2017

ERICH SCHWIESOW, PC

*Duly signed original at the Law Offices
of Erich Schwiesow, PC*

By /s/ Erich Schwiesow

Erich Schwiesow, #23385

CERTIFICATE OF SERVICE

I do hereby certify that on July 25, 2017, a true and correct copy of the above Notice of Appeal was e-filed and served via ICCES upon all parties of record in the trial court as indicated in the ICCES electronic record.

*Duly signed original at the Law Offices of
Erich Schwiesow, PC*

 /s/ Erich Schwiesow

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p> <hr/> <p>Trial Court: Water Court for Water Division 3 State of Colorado 702 4th Street Alamosa, CO 81101 The Honorable Pattie P. Swift Case No. 2007CW53</p> <hr/> <p>PEOPLE OF THE STATE OF COLORADO ex rel. THE STATE ENGINEER AND THE DIVISION ENGINEER FOR WATER DIVISION THREE, Plaintiffs, Appellees v. ROBERT GREGG SEASE Defendant, Appellant</p>	<p><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></p>
<p>Attorney for Robert Gregg Sease Name: ERICH SCHWIESOW, PC By: Erich Schwiesow Address: 603 3rd Street P.O. Box 1974 Alamosa, Colorado 81101 Phone Number: (719) 589-6625 E-Mail: erich@erichschwiesowpc.com Atty. Reg.#: 23385</p>	<p>Case Number: 2017 SA 130</p> <p>Division Courtroom</p>
<p>AMENDED APPENDIX TO NOTICE OF APPEAL – ORDERS APPEALED</p>	

Robert Gregg Sease, by and through his undersigned attorney, submits this

Amended Appendix to Notice of Appeal pursuant to C.A.R. 3. The Amended Appendix substitutes a signed minute order summarizing the oral order entered June 9, 2015 for the transcript of that hearing that was attached to the original Appendix.

Orders Appealed

1. Oral Order entered June 9, 2015, finding contempt. Signed minute order attached.
2. Findings of Fact, Conclusions of Law, and Order Imposing Punitive Sanctions entered May 2, 2017, copy attached.

RESPECTFULLY SUBMITTED August 1, 2017

ERICH SCHWIESOW, PC

*Duly signed original at the Law Offices
of Erich Schwiesow, PC*

By /s/ Erich Schwiesow
Erich Schwiesow, #23385

CERTIFICATE OF SERVICE

I do hereby certify that on August 1, 2017, a true and correct copy of the above Notice of Appeal was e-filed and served via ICCES upon all parties of record in the trial court as indicated in the ICCES electronic record.

*Duly signed original at the Law Offices of
Erich Schwiesow, PC*

/s/ Erich Schwiesow

Print Minute Orders 7/26/17 10:23 AM

Status: ROPN District Court, Alamosa County
 Case #: 2007 CW 000053 Div/Room: 1 Type: Injunction
 In the Interest of: PEOPLE OF THE STATE OF COLORADO,

FILE DATE EVENT/FILING/PROCEEDING

6/09/2016 Minute Order (print)

DATE FILED: July 31, 2017
 CASE NUMBER: 2007CW53

JUDGE: PPS CLERK: REPORTER:

THIS MATTER CAME ON FOR A CONTINUED CONTEMPT HEARING

JUDGE: SWIFT CLERK: SHIRLEE REPORTER: CARLINA GALLEGOS
 PAUL BENNINGTON AND MICHAEL TOLL, COUNSEL FOR THE DIVISION ENGINEER,
 PLAINTIFF; THE DEFENDANT APPEARED IN PERSON WITH COUNSEL, ERICH SCHWIESOW,
 JACK ROTOLE AND RICHARD ROTOLE.

THE COURT HEARD ADDITIONAL EVIDENCE ON THE STATE'S 7TH AMENDED CITATION FOR CONTEMPT. THE STATE RESTED AND THE DEFENSE CHOSE TO PRESENT NO EVIDENCE. THE COURT HEARD ARGUMENT AND FOUND THE DEFENDANT IN PUNITIVE CONTEMPT OF COURT. THE COURT SET THE MATTER FOR SENTENCING FOR FOUR HOURS ON TUESDAY 9/27/16 AT 9:00 AM. THE COURT ORDERED THAT THE STATE WOULD PROPOSE AN ORDER FOR REMEDIATION, THAT THE DEFENDANT WOULD FILE A RESPONSE BY JULY 15, 2016 AND THE STATE COULD FILE A REPLY BY JULY 22, 2016. /SKI

7-31-17



Pattie P. Swift
Water Judge
Water Division 3

Water Court, Water Division 3, State of Colorado Court Address: 702 Fourth Street, Alamosa, CO 81101 Phone Number: (719) 589-4996	DATE FILED: May 2, 2017 5:17 PM CASE NUMBER: 2007CW53 ▲ COURT USE ONLY ▲ <hr/> Case No: 2007CW53 Division: 1
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IMPOSING PUNITIVE SANCTIONS	

THIS MATTER came before the court for a hearing on the People’s Seventh Amended Contempt Citation on June 8 and 9, 2016. At the conclusion of the hearing, the court made oral findings of fact and conclusions of law and found, beyond a reasonable doubt, that Mr. Sease had violated this court’s orders, that he was in contempt of court, and that the court should impose both remedial and punitive sanctions. The court set the matter for sentencing to impose the punitive sanctions on September 27, 2016. The court ordered the state to propose an order for remediation of the violations of the court’s previous orders and gave Mr. Sease an opportunity to respond to the proposed remediation order. On September 23, 2017, the court issued its Order Requiring Remediation and Imposing Remedial Sanctions. In addition, on September 22, 2016, the court granted the defendant’s motion to continue the sentencing hearing until January 9, 2017. On January 9, 2017, the court granted defendant’s unopposed motion to continue the sentencing hearing and continued the sentencing hearing to April 10, 2017. On April 10, 2017, the court held the sentencing hearing and imposed a three month jail sentence. At the sentencing hearing, the state asked the court to impose a \$400,000 fine, in addition to the jail sentence. The defendant asked the court to delay imposing the fine until the defendant had time to provide the

court with evidence concerning his financial condition. The court informed the defendant the court was going to impose a fine but granted the defendant's request for additional time to provide financial information to the court as the court found this would be relevant in determining an appropriate amount for the punitive fine.

The matter was again before the court on April 18, 2017, on the defendant's request for a stay of execution on the jail sentence until the court imposed the fine and, thus, had completed the sentencing. The court granted the defendant's request for a stay and also informed counsel that, because the court had not provided the defendant the opportunity to have a jury trial on the contempt citation, the court could not impose a fine in the range of \$400,000 as the state was requesting. Rather, the court indicated, the court could only impose a fine in the \$6,000 to \$10,000 range. The state requested time to review the precedents the court cited. The court set the matter for a hearing on April 27, 2017, for the court to decide the amount of the punitive fine.

The state is represented by Paul Benington, Esq. and Michael Toll, Esq., of the Colorado Attorney General's Office. The defendant is represented by Erich Schwiesow, Esq., John Rotole, Esq., and Richard Rotole, Esq.

I. PROCEDURAL HISTORY

1. The State and Division Engineers filed this case in 2007 seeking an injunction to enforce various cease and desist orders the Division Engineer had issued to Mr. Sease between 2003 and 2007. The parties reached an agreement concerning the request for injunctive relief and the court approved this agreement in its Stipulated Order on Complaint for Injunctive Relief issued on January 31, 2008. Since then, the state has requested and the court has issued a total of seven contempt citations to the defendant.

2. On May 27, 2008, the court issued a citation for contempt based on the state's allegation that the defendant had not complied with the January 31, 2008, stipulated order. On June 24, 2008, the court approved a stipulation of the parties under which the state agreed to continue the contempt proceedings in exchange for Mr. Sease's agreement to comply with the January 31, 2008, order as well as to complete other work at the Sease Ranch, to continuously replace all out-of-priority depletions caused by three un-decreed ponds located on the Sease Ranch and to pay \$30,000 to the State of Colorado for "the Engineer's claims for civil penalties for the pond structures and ditches, costs and attorney's fees." *Order Regarding Engineers' Motion to Approve Stipulated Agreement of the Parties, Continue Show Cause Hearing, and Vacate Hearing Related to the Engineers' Remaining Claims for Injunctive and Other Relief* at ¶ 30.
3. On June 9, 2009, the court issued a second citation for contempt based on the state's allegation that the defendant had violated the June 24, 2008 order by not continuously replacing all out-of-priority depletions occurring between December 31, 2008 and July 14, 2009. On July 14, 2009, the defendant and the state reached a stipulation under which the defendant admitted he was in contempt of court for failing to replace the out-of-priority depletions caused by his un-decreed structures and for failing to obtain a substitute water supply plan or court decreed augmentation plan for 2009. Mr. Sease agreed he would either obtain a substitute water supply plan ("SWSP") to replace those depletions or breach the un-decreed structures and he would submit a formal appeal of the Engineers' denial of his 2009 SWSP. In exchange, the State and Division Engineers agreed to withdraw their claims for punitive and remedial sanctions related to the

defendant's violation of the court's June 24, 2008, order. The court approved this stipulation on July 15, 2009.

4. On July 9, 2010, the court issued a third citation for contempt based on the state's allegation that the defendant was continuing to violate the June 24, 2008, order because he had not obtained a water source to replace the out-of-priority depletions occurring after December 31, 2008, as the result of the retention of water in various un-decreed structures he had constructed on the Sease Ranch.
5. On August 12, 2010, the court held a hearing on the third citation for contempt and found the defendant in contempt of court and subject to both remedial and punitive sanctions. On September 14, 2010, the court issued a written order requiring Mr. Sease to take various actions to stop the out-of-priority depletions from continuing to occur and imposing some remedial fines. On December 7 and 8, 2010, the court heard evidence and argument on additional remedial sanctions and on the appropriate punitive sanction. The court issued a written order on February 10, 2011, in which it imposed a punitive fine of \$39,000 and a jail sentence of 90 days, which it suspended on condition Mr. Sease comply with the requirements of the remainder of the February 10, 2011, order. In addition, the court imposed remedial fines of \$7300 for delays in backfilling the Feeder Ditch and Horseshoe Pond No. 2, and \$2500 for failure to drain Horseshoe Pond No. 1 to its natural size. Finally, the court ordered Mr. Sease to pay the Engineers' costs and attorney's fees in the amount of \$35,010.14.
6. On August 16, 2011, the court issued a fourth citation for contempt based on the state's allegation that Mr. Sease continued to violate the court's June 24, 2008 order requiring him to cease out-of-priority diversions and storage in the Corral Ponds, to cease out-of-

priority diversions at the Sheep Creek Ditch and not to construct, maintain or encourage the development of any new structure, including on-stream improvements without first receiving the approval of the Division Engineer or his designated appointee.

7. The court set the matter for a hearing on September 19, 2011. On September 18, 2011, the parties filed a stipulation which the court approved on September 20, 2011. In the stipulation, Mr. Sease admitted he had violated the court's June 24, 2008 order because he had repaired the breach in Corral Pond No. 1 in the Spring of 2011 which caused the pond to again store water out-of-priority and that he had reconstructed at least two previously removed on-stream obstructions in Sheep Creek without first consulting with the Division Engineer. In the stipulation, Mr. Sease agreed to perform several actions to remediate his violations and agreed to be subject to remedial fines if he did not complete the remedial actions within the deadlines specified. In addition, Mr. Sease agreed to pay the Engineers' costs and attorneys' fees. Finally, Mr. Sease agreed to punitive sanctions of a five day jail sentence and a fine of \$15,000. In lieu of completing five days in jail, Mr. Sease was allowed to complete 30 hours of community service within 120 days of the court's order.
8. On April 11, 2012, the court issued a fifth contempt citation based on the state's claim the defendant was in violation of the court's September 20, 2011, order because he had not completed 30 hours of community service within 120 days of September 20, 2011, paid \$15,000 in punitive sanctions within 90 days of September 20, 2011, completed remedial actions with respect to Sheep Creek Ditch, completed remedial actions concerning dams in Sheep Creek or completed remedial actions regarding the "Feeder Ditch." The court set the matter for a trial on May 4, 2012.

9. On May 4, 2012, the parties filed a “Stipulation Re: Contempt” in which Mr. Sease agreed that he violated the court’s September 20, 2011, order. Mr. Sease agreed to pay certain remedial sanctions and to spend one night in jail for failure to pay the fine and to complete the 30 hours of community service. In addition, Mr. Sease agreed to place additional fill in the Feeder Ditch “to the Division Engineer’s reasonable satisfaction.” Finally, Mr. Sease agreed to pay the Engineers’ costs and fees.
10. On May 20, 2013, the court issued a sixth contempt citation based on the state’s allegations that Mr. Sease had constructed eighty-six unlawful dams, obstructions, and impoundments in Sheep Creek; had enlarged Horseshoe Pond #2; and had failed to fill the Feeder Ditch, all in violation of the court’s orders of June 24, 2008, February 10, 2011, September 20, 2011, and May 9, 2012.
11. On October 24, 2013, Mr. Sease and the state reached an agreement, memorialized in the Stipulation and Plea Agreement filed with the court on October 25, 2013. In this stipulation, the defendant agreed to plead guilty to indirect contempt for violation of the court’s prior orders. The state agreed the defendant’s admission was as to some, but not all, of the violations alleged in the Amended Motion for Sixth Contempt Citation. Mr. Sease agreed he would be subject to both punitive and remedial sanctions as a result of his admission to being in contempt. Mr. Sease stipulated that an appropriate punitive sanction was 30 days in the Saguache County Jail, with work release and a punitive fine of \$50,000. In addition, Mr. Sease agreed to pay \$61,920.50 to the state for its attorney’s fees and costs and he agreed to pay a remedial sanction of \$48,400 for his failure to comply with the court’s May 9, 2012, order to remedy the damage problems with the Feeder Ditch and the slide gate.

12. Pursuant to the stipulation, Mr. Sease appeared before the court on October 29, 2013.

The court advised him of his rights and took his admission to being in contempt of court.

The court imposed the stipulated sentence for punitive contempt and the stipulated fines for remedial contempt.

13. The stipulation between Mr. Sease and the Division Engineer included Mr. Sease's agreement that the court issue a new mandatory and permanent injunction. This court issued an Order Regarding Mandatory and Permanent Injunction on November 8, 2013, *nunc pro tunc* October 29, 2013, containing the following terms:

- a. Except for the remediation work ordered in the Court's Order Continuing Contempt Hearing and Requiring Remediation entered on April 13, 2013, the Defendant, Robert Gregg Sease, whether acting individually or through his agents, servants, and employees is hereby ordered to do nothing whatsoever, directly or indirectly, in, along or to Sheep Creek as it traverses the Sease Ranch, as shown on the map attached to this order as Exhibit A, without the prior written approval of the Division Engineer, which approval shall not be unreasonably withheld. Any requests by Mr. Sease for any such approval by the Division Engineer shall be made in writing and shall fully detail and document what the Defendant proposes to do or have done. Any such approvals may include reasonable terms and conditions, including a requirement for full documentation and verification of the extent of work or activity completed to the satisfaction of the Division Engineer. If the Division Engineer either denies or fails to approve a request by the Defendant within 30 days, the Defendant may file a petition in this case seeking the Court's approval of what the Defendant proposes to do. The Court retains jurisdiction over this matter to resolve any such petitions.
- b. The Defendant, Robert Gregg Sease, whether acting individually or through his agents, servants and employees is hereby ordered to not construct, maintain or encourage the development of: (1) any new or expanded structures or the placement of any natural or manmade materials whatsoever within the ordinary high watermark of Sheep Creek as delineated on the map attached to this order as Exhibit A, including but not limited to: ditches, dams, pipelines, plants, boulders, rocks, soil, head gates, or any other diversion, impoundment, fill or obstructions, or (2) any other new or expanded on-stream or off-stream impoundments, surface or groundwater diversion, or other water structures whatsoever anywhere on Sease Ranch, which is delineated on the map attached to this order as Exhibit A, without first receiving prior written approval of the Division Engineer, the State Engineer, their designated appointees, or the Water Court. Any requested approvals by the Division Engineer, the State Engineer, or their designated

appointees shall not be unreasonably withheld. Any requests by Mr. Sease for such approval(s) shall be made in writing and shall fully detail and document the extent of work proposed. Any such approvals may include reasonable terms and conditions including a requirement for full documentation and verification of the extent of work completed to the satisfaction of the Division Engineer, State Engineer, or the Water Court.

- c. The Defendant shall remain subject to the Court's orders entered in Case No. 07CW53, District Court, Water Division 3, on June 24, 2008, February 10, 2011, September 20, 2011, and May 9, 2012. However, the terms and conditions of this permanent injunction and order shall be the controlling order of the Court. The Defendant remains subject to the Court's Order Continuing Contempt Hearing and Requiring Remediation entered on April 11, 2013.
 - d. This order shall be mandatory and permanent until such time as it is expressly lifted by further order of the Water Court, and shall survive any dismissal of the original complaint in Case No. 07CW53, District Court, Water Division 3. This order is also binding on Mr. Sease and upon such of his agents, servants, and employees, and upon those persons participating with them or Mr. Sease who receive actual notice of this order by personal service or otherwise. The Water Court retains full jurisdiction to enforce this order. Any person found to be in violation of this order shall be subject to fines, imprisonment, or both.
14. On October 14, 2015, the State filed its Motion for Seventh Contempt Citation. The court issued a citation for contempt and then issued an alias citation to allow the state to properly serve Mr. Sease. Ultimately, defense counsel, Jack Rotole, accepted service on behalf of Mr. Sease. On January 11, 2016, defense counsel waived further advisement on behalf of Mr. Sease. The court set the matter for a hearing on the contempt citation for June 8-9, 2016.
15. The state filed an Amended Motion for Seventh Contempt Citation on January 20, 2016. On January 28, 2016, the court ordered that the amended seventh citation for contempt be issued. On February 22, 2016, defense counsel, Jack Rotole, appeared by telephone for a status conference and agreed that service of the amended seventh citation for contempt was complete and he waived further advisement of the contempt citation.

16. The court held a trial on the amended seventh citation for contempt on June 8 and June 9, 2016. At the conclusion of the trial, the court made findings of fact and conclusions of law detailed below and found, beyond a reasonable doubt, that the defendant had violated this court's orders in numerous ways.
17. The court set a deadline for the state to propose a remediation order, allowed the defense to file a response and permitted the state to file a reply. After considering these filings, the court issued its Order Requiring Remediation and Imposing Remedial Sanctions on September 23, 2016.
18. The court initially set a sentencing hearing for the court to determine the appropriate punitive sanctions for September 27, 2016. On September 22, 2016, the court granted Mr. Sease's request for a continuance of the sentencing hearing to January 9, 2017. The court then continued the sentencing hearing from January 9, 2017, to April 10, 2017, on the request of Mr. Sease with no objection from the state.

II. MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE JUNE 8 AND 9, 2016 CONTEMPT TRIAL

The court held a hearing on the seventh citation for punitive contempt on June 8 and 9, 2016. At the hearing, the defendant chose to present no evidence. The court heard evidence from the state and argument from both sides. After hearing the evidence and argument, the court orally made findings of fact and conclusions of law. Those findings and conclusions are detailed and further explained here:

19. When a court finds that a defendant committed indirect contempt of court, the court may impose punitive sanctions which include “[p]unishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.” C.R.C.P. 107 (a)(4)and(d)(1).

20. Punitive sanctions “must be supported by findings of fact establishing beyond a reasonable doubt: (1) the existence of a lawful order of the court; (2) the contemnor’s knowledge of the order; (3) the contemnor’s ability to comply with the order; and (4) the contemnor’s willful refusal to comply with the order.” *In re Marriage of Cyr and Kay*, 186 P.3d 88, 92 (Colo. App. 2008).
21. This court issued a lawful order on October 29, 2013, which the court signed on November 8, 2013, *i.e.* the Order Regarding Mandatory and Permanent Injunction.
22. Mr. Sease had knowledge of this order because he signed the stipulation and plea agreement which referred to the mandatory and permanent injunction. In addition, the court took Mr. Sease’s plea and admission on October 29, 2013, and discussed the mandatory and permanent injunction with him then. Although it was discussed numerous times during the plea hearing, at one point the court specifically asked the defendant “Are you aware of that permanent injunction?” and Mr. Sease answered “Yes, I am.” *Tr.* 10/29/2013 Hearing at p 10:8-11.
23. The order required Mr. Sease not to develop any new or expanded structures or to place any natural or man-made materials whatsoever within the ordinary high-water mark of Sheep Creek. The order also required that Mr. Sease would not construct any new or expanded on-stream or off-stream impoundments, surface or ground water diversions, or other water structures whatsoever anywhere on the Sease Ranch without first receiving the prior written approval of the Division Engineer, the State Engineer, or their designated appointees, or the water court.
24. The order required the State Engineer and Division Engineer not to unreasonably withhold such approval.

25. Mr. Sease had the ability to comply with the court's mandatory permanent injunction in a number of ways. One way was to do nothing, he could simply have done nothing and he would have been in compliance with the court's order. Or, if he wanted to make changes to water structures—to build new or expand existing structures—he could ask permission of the Division Engineer. If, after requesting permission, he felt the Division Engineer unreasonably withheld permission, then he could have asked permission of the court.
26. The state presented the testimony of Craig Cotten, the Division Engineer for Water Division 3. The court found Mr. Cotten was qualified to give testimony as an expert in water rights administration, as a hydrology water resource engineer and in aerial photography analysis and interpretation; and the court found he was a credible witness.
27. Mr. Cotten has extensive familiarity with both Sheep Creek and the water structures on Mr. Sease's property because he has been there many times during the past ten years.
28. Mr. Cotten testified that sometime after April 2015 and before October 2015 a ditch was dug and a pipeline was installed on the defendant's property as depicted on Exhibit 4. The state called this pipeline the northern pipeline. Mr. Cotten testified that on March 21, 2016, when he visited the Sease Ranch, this pipeline had been taken out of the trench and was lying at the side of the trench. Exhibits 7, 8 and 9. This new pipeline was a new off-stream water structure installed after November 2013.
29. Mr. Cotten testified that another pipeline had been installed on the Sease Ranch after the court issued the mandatory and permanent injunction in October 2013. This pipeline, denominated the southern pipeline, is apparent on an October 13, 2015, aerial photograph. Exhibit 29. Mr. Cotten testified that he never saw this southern pipeline on Mr. Sease's property on any of his visits to the Sease Ranch prior to November 8, 2013.

On September 21, 2015, however, when Mr. Cotten conducted a site visit to Mr. Sease's property, he observed that the ground was disturbed by heavy equipment tracks where the ditch for this pipeline had been dug through the lower meadow. Exhibits 54, 55, 56, and 57. Finally, when Mr. Cotton conducted another site visit, on December 31, 2015, he observed that the pipe for this pipeline had been removed from the trench and was lying beside the trench. Exhibits 60, 61, and 62. This new pipeline was a new off-stream water structure installed after November 2013.

30. Mr. Cotten also testified that after April 2015 and before October 2015, a large berm or impoundment, which Mr. Cotten called the lower meadow pond, and also called the southern meadow impoundment, had been built on the Sease Ranch. Exhibits 65, 66, 67, and 68. Mr. Cotten observed this berm on a Google Earth photograph from October 2015 and he also observed it in person during his field inspection on September 21, 2015. Finally, when Mr. Cotten visited the Sease Ranch on March 21, 2016, the berm had been removed. The southern meadow impoundment is an off-stream impoundment and, thus, a water structure, installed after November 2013.

31. Mr. Cotten also testified that the ponded area of the Northwest Pond had been dug out and expanded after August 2014. He testified that review of a Google Earth photo dated April 9, 2015, Exhibit 18, showed that work had already begun on the pond and that by October 2015, Exhibit 19, the pond was dug out and shaped. He also observed this change to the Northwest Pond when he visited the Sease Ranch in March 2016. Exhibits 23-25. The Northwest Pond was an off-stream impoundment, and therefore a water structure, which had been expanded after November 8, 2013.

32. Mr. Cotten also testified that when he visited the Sease Ranch on March 21, 2016, he observed there was a change in the plumbing and the way the water flowed between and among the Northeast Ponds #1 and #2, the stock tank and the pipelines to and from the stock tank. At the time of the 2013 mandatory and permanent injunction, the plumbing and the pipelines were different. In March 2016, however, water went from Northeast Pond No. 1, through a new pipeline into the stock tank and then out of the stock tank and into Northeast Pond No. 2. The new pipeline is a new off-stream water structure installed after November 2013. Mr. Cotten also testified that the stock tank used in this arrangement was new and was not the stock tank that had been present at the time of the November 2013 mandatory and permanent injunction. The court, however, found that changing out the stock tank without permission would not be a violation of the court's mandatory and permanent injunction.
33. In addition, Mr. Cotten's testimony established that a new water structure, a slide gate which worked in conjunction with the southern pipeline had been installed after November 2013. Mr. Cotten testified that the slide gate was not in place during his September 21, 2015, field inspection but it was in place during his December 31, 2015, field inspection. The new slide gate was a new water structure installed after November 2013.
34. Mr. Cotten's uncontroverted testimony also established that changes were made in numerous sites on Sheep Creek after November 2013. In cross-examination and closing argument, the defense argued that these changes could have been caused by dynamic stream conditions rather than by the action of humans. But, Mr. Cotten has extensive familiarity with this area and he has repeatedly examined this section of Sheep Creek. He

signed off on the work that was done to Sheep Creek as a result of the 2014 remediation plan and, thus, was well aware of how the stream looked after all the previously ordered remediation had been completed. In addition, he has significant experience, as Division Engineer, reviewing streams and the changes that nature causes to them in contrast to the changes human activity causes to them. Accordingly, the court found Mr. Cotten credible when he testified that human-caused changes were made in the stream after the 2014 remediation work was completed.

35. Mr. Cotten testified that rocks and boulders were placed within the ordinary high-water mark of Sheep Creek between sites 22 and 23; and, that material was dredged from Sheep Creek and the ponded area at site 55 deepened and, in addition, that rocks were placed at site 55 in a way that caused an additional on-stream impoundment at that location. At site 56, 57 and 58, material was dredged from Sheep Creek. At site 62, material was placed in the stream that caused an additional impoundment of the water of the stream. Moreover, at site 66, material was dredged from the stream and the ponded area was deepened. Furthermore, at site 73, material was dredged from Sheep Creek to deepen the ponded area at that site. And, at sites 73-A and 73-B material was dredged from Sheep Creek and rocks were placed within the ordinary high-water mark of the creek causing new impoundments at that location. Finally, material was dredged and placed in the channel of Sheep Creek at sites 74 and 75-A.
36. All of these are changes within the course of the stream within the high-water mark.
37. The mandatory and permanent injunction required Mr. Sease to obtain the permission of the Division or State Engineer or of the Water Court before he made changes within the high water mark of Sheep Creek and before he “construct[ed], maintain[ed] or

encourage[d] the development of” any “new or expanded . . . water structures whatsoever anywhere on Sease Ranch.” *See* Order Regarding Mandatory and Permanent Injunction signed November 8, 2013, *nunc pro tunc* October 29, 2013, as quoted at paragraph 13(b) above.

38. Mr. Cotten testified that Mr. Sease did not seek permission of the Division or State Engineer to install the northern or southern pipeline, to construct the south meadow impoundment, to increase the ponded area of the Northwest Pond, to install a new pipeline between the Northeast Pond #1 and the stock tank, to install a slide gate to work in conjunction with the newly constructed southern pipeline, or to make the numerous changes in Sheep Creek. He also did not seek permission of the court. Accordingly, the act of constructing these new water structures and making these changes in Sheep Creek violate the court’s November 8, 2013, mandatory and permanent injunction. If Mr. Sease willfully constructed these structures and made these changes, or willfully caused these things to be done, then he is subject to sanctions for punitive contempt of court.

39. A willful act is one done ‘voluntarily, knowingly, and with conscious regard for the consequences of [one’s] conduct.’ *In re Marriage of Cyr and Kay*, 186 P.3d at 92.

40. The defense argued that the court should find the state did not prove beyond a reasonable doubt that Mr. Sease willfully violated the court’s mandatory and permanent injunction because the state did not present any testimony that anyone actually saw Mr. Sease constructing these water structures or making these changes in Sheep Creek and the state did not present any evidence that Mr. Sease requested someone else to do this work.

41. “Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the

case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.” Colo. Jury Instr., Criminal E:03.

42. In deciding whether the state has proved beyond a reasonable doubt that Mr. Sease willfully violated the court’s mandatory and permanent injunction, the court may consider both direct and circumstantial evidence. Colo. Jury Instr., Criminal D:01; *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973). Circumstantial evidence is indirect evidence that “is based on observations of related facts” that may lead the fact-finder “to reach a conclusion about the fact in question.” Colo. Jury Instr., Criminal D:01.
43. The evidence before the court shows that the pipelines, the southern meadow impoundment, the expansion of the Northwest Pond and the new pipeline between Northeast Pond #1 and the stock tank are large structures and changes, easily visible on the property. Given that Mr. Sease owns the Sease Ranch and has previously, in this case, been involved in the construction of numerous water features and structures on the property, it is reasonable to infer that he was aware of such obvious and visible work being done on his property. Furthermore, it is highly unlikely that an unknown person would bring in heavy equipment to dig a ditch and place and remove pipelines and create and remove an impoundment on Mr. Sease’s land without being paid to do it. In addition, it is highly unlikely that an unknown person would pay for a new pipeline or a slide gate and do the work necessary to install the new pipeline to the stock tank and to install the new slide gate on Mr. Sease’s property without being reimbursed for the materials and without being paid for the installation work. Thus, it is highly unlikely that someone would cause all of this work to be done on Mr. Sease’s property without his

permission and agreement to pay for the work. Finally, although the changes to Sheep Creek are less obvious, it is also highly unlikely that an unknown person, without the permission and encouragement of the owner of the property, would choose to come onto Mr. Sease's property and make changes in Sheep Creek as it crosses his property.

Accordingly, the court finds that the evidence in this case leads to the conclusion that Mr. Sease himself, or through his agents and/or employees, installed the northern and southern pipelines, constructed the southern meadow impoundment, increased the size of the ponded area of the Northwest Pond, installed the new pipeline between the Northeast Pond #1 and the stock tank, installed the slide gate to work in conjunction with the newly constructed southern pipeline, and made the numerous changes in Sheep Creek.

44. Mr. Sease had knowledge of the court's mandatory and permanent injunction of November 8, 2013, and, from previous experience in this case, Mr. Sease was aware that violating the court's orders would subject him to punishment for contempt of court. Therefore, the court finds, beyond a reasonable doubt, that Mr. Sease willfully violated the courts' mandatory and permanent injunction of November 8, 2013.
45. The defense argued that Mr. Sease did not violate the mandatory and permanent injunction with regard to constructing the northern and southern pipelines and the southern meadow impoundment because these structures were removed prior to the time the state filed the initial citation for contempt. But, the timing of the removal of the structures does not matter; the mandatory and permanent injunction was in place when the pipelines and impoundment were constructed and the construction of those water structures violated the terms of the injunction.

III. MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE APRIL 10, 2017 SENTENCING HEARING

46. On April 10, 2017 the court held a sentencing hearing in this matter to address punitive sanctions.
47. The defendant presented evidence from Duane Helton, who the court found qualified as an expert in water resource engineering, water rights, and related hydrological issues. Mr. Helton testified that the violations of the November 8, 2013 mandatory and permanent injunction caused minimal impact to the stream system. The court finds Mr. Helton's testimony credible.
48. The court also heard statements in favor of mitigation from Mr. Sease and his counsel. These statements addressed Mr. Sease's financial situation and his difficulty managing his business responsibilities. The statements also detailed the difficulties Mr. Sease would face if the court sentenced him to jail.
49. The court also heard argument from the state in favor of punitive sanctions. The state argued that Mr. Sease's repeated refusal to abide by court orders justified a six month sentence to the Saguache County Jail and a \$400,000.00 fine.
50. Mr. Sease's continued refusal to abide by court orders offends the authority and dignity of the court. Despite Mr. Helton's testimony and statements in favor of mitigation, the court found that punitive sanctions were warranted in this case. Mr. Sease has either admitted to contempt or has been held in contempt for similar behavior on six prior occasions. To resolve the sixth citation for contempt, Mr. Sease voluntarily entered into a stipulation which included a mandatory and permanent injunction. The terms of that stipulation and the mandatory and permanent injunction were plain and Mr. Sease could have easily complied with the terms. Instead, Mr. Sease constructed new water structures

and made changes, built impoundments and dredged material from the channel of Sheep Creek without the prior approval of the Division Engineer. It is appropriate and just for the court to punish the defendant's repeated refusal to obey court orders by fine and imprisonment. *See* C.R.C.P. 107(d)(1).

51. At the sentencing hearing, the court imposed a 90 day jail sentence but left open the amount of fine to be determined after the court received further financial information from the defense. The court ordered the defendant to provide, within 90 days, the financial information he desired the court to consider in setting the fine.
52. At the sentencing hearing, the court also informed the defendant it would not consider work release until the defendant had served at least 30 days of the jail sentence. The court indicated that, if the defendant desired the court to consider work release for the remainder of his sentence, he must file with the court a letter from his employer explaining the location where he will work, what his hours of work will be, and the nature of the work in which he will be engaged. The court will then determine whether to grant or deny the request for work release.

IV. SUBSEQUENT HEARINGS – MIXED FINDINGS OF FACT & CONCLUSIONS OF LAW

53. After the sentencing hearing, the court held two subsequent hearings to address the level of punitive fines in this case and the execution of the sentence.
54. Counsel for the defendant filed a motion seeking a stay of execution of the jail sentence until the court imposed the fine. Counsel noted that once the court imposed the fine, the sentencing order would be final and appealable. At that point, the defendant would appeal the order and would seek a stay of execution of the jail sentence while the appeal was pending.

55. On April 18, 2017, the court held a telephonic hearing on the defendant's request for a stay of execution on the jail sentence. During that hearing, the state informed the court that it did not object to the requested stay of execution of the jail sentence but would be asking the court to require the defendant to post a supersedeas bond if he sought a stay of execution on the fine.
56. During the April 18, 2017, hearing, the court informed counsel it had determined it could not, constitutionally, impose a fine of \$400,000 as the state was requesting. The court informed the state that the court could impose only a low level fine, one that did not constitute a "serious criminal sanction," because the court did not offer the defendant a jury trial on the contempt charge in this case.
57. In Colorado and throughout the United States "the right to a jury trial equally applies to serious contempt charges, but not to non-serious or 'petty' contempt charges." *People v. Shell*, 148 P.3d 162, 176-78 (Colo. 2006). "When the maximum sentence does not exceed six months in prison, the alleged contemnor is not entitled to a jury trial." *Kourlis v. Port*, 18 P.3d 770, 772 (Colo. App. 2000)(citing *People v. Barron*, 677 P.2d 1370 (Colo. 1984).
58. Similarly, when the fine is less than "a serious criminal sanction," the alleged contemnor is not entitled to a jury trial. *Shell*, 148 P.3d at 177. The *Shell* court referred to United States Supreme Court precedent on the issue, noting "the United States Supreme Court has not specified what magnitude of contempt fine may constitute a serious criminal sanction for purposes of the Sixth Amendment, but it has held that contempt fines [up to] \$5,000 for individuals and \$10,000 for non-individuals such as corporations are presumptively petty and do not require a jury trial." *Id.* See also, *Int'l Union, UMW of*

Am. v. Bagwell, 512 U.S. 821, 837 (1994). The *Shell* court did not set a bright-line for the amount of fine that would trigger the contemnor's right to a jury trial. In *Shell*, the Colorado Supreme Court determined a fine of \$6,000 did not trigger a right to a jury trial and the court said fines in excess of \$5,000 dollars do not give rise to a constitutional right to trial by jury so long as those fines are reasonable. *Id.*

59. At the April 18, 2017, hearing, the state asked for time to review the precedents the court cited. The court re-set the case for a hearing on imposition of fine on April 27, 2017, to give the state time to review the cases.

60. On April 27, 2017, the court heard argument from the state and from the defense and imposed a \$10,000.00 punitive fine.

61. The court has now assessed remedial and punitive sanctions. Therefore, the order on contempt is final.

IT IS THEREFORE ORDERED THAT Mr. Sease has committed contempt of court and shall pay \$10,000.00 in an unconditional punitive fine. Mr. Sease shall pay this monetary fine, in its entirety, to the State of Colorado, through the Division 3 Water Court, within 14 days of the date of this Order; and

IT IS FURTHER ORDERED THAT Mr. Sease shall serve 90 days in the Saguache County Jail; and

IT IS FURTHER ORDERED that the court grants Mr. Sease a stay of execution on the jail sentence until sixty days from the date of this order. At that time, the court will review the case and if an appeal is filed, the court will order the jail sentence stayed while the appeal is pending. But, if no appeal is filed, the court will issue an order setting a date and time for Mr. Sease to report to the Saguache County Jail.

DONE this 2nd day of May, 2017.

BY THE COURT:



Pattie P. Swift
Water Judge
Water Division 3

Certificate of Service

I hereby certify that on this 2nd day of May 2017, I served a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IMPOSING PUNITIVE SANCTIONS** on the following by the Court's electronic filing and service system:

Paul Benington, Esq.
Michael Toll, Esq.
Erich Schwiesow, Esq.
Jack Rotole, Esq.
Richard Rotole, Esq.



Pattie P. Swift, District Judge