DATE FILED: January 31, 2017

Supreme Court, State of Colorado Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
Water Court, Division 1 Honorable James F. Hartmann 2016CW3132	
Plaintiff-Appellant: Bar Star Land, LLC v. **Defendant-Appellee:** Elkhorn Ranch Homeowners Association, Inc.	▲ **COURT USE ONLY** ▲
Attorney for Plaintiff-Appellant Bar Star Land, LLC: Adam C. Davenport 112 North Rubey Drive, Ste. 101 Golden, Colorado 80403 Cell: 970-217-7387 Office: 720-627-6151 Fax: 720-216-2055 Email: adam.davenport@dtservices.com Atty. Reg. #: 45342	Case Number: 17SC_____

NOTICE OF APPEAL IN CIVIL CASE PURSUANT TO C.A.R. 3 AND C.R.S. § 13-4-102 OF PLAINTIFF-APPELLANT BAR STAR LAND, LLC

I. TRIAL COURT INFORMATION

Court from Which Appeal is Taken: Division 1 Water Court

Presiding Judge in Court Below: Honorable James F. Hartman

Party Initiating Appeal: Plaintiff Bar Star Land, LLC ("Bar Star")

Trial Court Case Number: 2016CW3132

II. DESCRIPTION OF NATURE OF CASE AND DISPOSITION IN TRIAL COURT

Water Rights at Issue: This matter involves 4 cfs of the Slater Ditch originally decreed in Case No. 341, Park County District Court, and changed to storage for augmentation use in Case No. W-7903 (Div. 1) and 0.75 cfs of the Guiraud Ditch, a.k.a. the Guiraud 3T Ditch right, originally decreed in Case No. 341, Park County District Court for irrigation use, and changed for storage for subsequent augmentation use of up to 10.08 acre feet of water per year in Case Number 8107 (the "Replacement Water Rights").

Nature of Case: Bar Star owns, operates, and maintains the Slater Ditch and the Tarryall Ranch Reservoir where the Replacement Water Rights are stored. Bar Star and its corporate predecessors have exclusively possessed and utilized the Replacement Water Rights to replace out-of-priority depletions accruing to the South Platte River from groundwater pumping in the Elkhorn Ranch Subdivision since the respective decrees were entered in the 1970s.

Elkhorn Ranch Homeowners Association sued Bar Star in Park County District Court case 2016CV30050 alleging, *inter alia*, that by virtue of being the title owner of the Replacement Water Rights it has the right to make unfettered use of Tarryall Ranch Reservoir and for an easement to access Bar Star's property. In response, Bar Star counterclaimed for adverse possession, or in the alternative

abandonment of the Replacement Water Rights based on its exclusive use of those rights for over 40 years. Adverse possession and abandonment of water rights are "water matters" and as such, Bar Star brought the above referenced action in the Water Court.

Judgment or Order Being Appealed: The Water Court concluded that Bar Star's complaint was insufficient as a matter of law to support claims for adverse possession, or in the alternative, abandonment of the Replacement Water Rights and granted Defendant's C.R.C.P. 12(b)(5) Motion to Dismiss. The Water Court concluded that Bar Star did not allege a use of the Replacement Water Rights that was exclusive or adverse to Elkhorn's "use" and "interest" in the Replacement Water Rights. Appendix A, p. 7. The court also considered and denied Plaintiff's *Motion to Amend Findings and Order* pursuant to C.R.C.P. 59(a)(3) and (4).

Basis for Supreme Court's Jurisdiction: A final judgment of the Water Court as contemplated by C.R.C.P. 41(b)(1), C.R.C.P. 54(a), and C.A.R. 1(a)(2). Appeals from final judgments in water cases involving priorities or adjudications are taken directly by the Supreme Court. C.R.S. § 13-4-102(1)(d). Cases involving the alleged adverse possession or abandonment of water rights are left to the exclusive jurisdiction of the water court. *Archuleta v. Gomez*, 140 P.3d 281, 287 (Colo. App. 2006).

Whether the Judgment or Order Resolved all Issues Before the Trial Court: The Water Court's Order Granting Defendant's C.R.C.P. 12(b)(5) Motion to Dismiss entered December 13, 2016 resolved all issues pending before the Water Court.

Whether the Judgment Was Final in Accordance with C.R.C.P. 54(b): No further orders were necessary and the judgment was final pursuant to C.R.C.P. 54(b).

Date Judgment or Order Was Entered: The Water Court's Order dismissing Bar Star's claims was entered on December 13, 2016.

Whether Extension Was Granted to File Motion(s) for Post-Trial Relief: No extensions for filing motions for post-trial relief were sought or granted.

Whether a Motion for Post-Trial Relief was Filed, and if so, the Relief Sought: Bar Star filed a C.R.C.P. 59 Motion to Amend the Water Court's Findings and Order on December 27, 2016. Bar Star requested that the Court amend its findings and order to state that Bar Star's Complaint made specific factual allegations sufficient, pursuant to Colorado law, to state claims for either adverse possession of the Replacement Water Rights, or in the alternative, abandonment. In the alternative, Bar Star requested the Water Court amend its Order to state what "use" of the Replacement Water Rights it was ascribing to Elkhorn.

Date Motion for Post-Trial Relief was Denied: Bar Star's Motion to Amend was denied by the Water Court on January 25, 2017.

Whether Extension Was Granted to File Notice of Appeal: No extension to file a notice of appeal was sought or granted.

III. ISSUES PROPOSED TO BE RAISED ON APPEAL

1. Whether the Water Court erred in requiring Bar Star to "establish" its adverse possession claims in its Complaint.
2. Whether the Water Court erred in finding that Elkhorn has made some "use" of the Replacement Water Rights when Bar Star's Complaint alleged that Elkhorn has made no use of those rights.
3. Whether the Water Court erred in determining that the allegations in Bar Star's Complaint are insufficient as a matter of law to state a claim for either adverse possession or abandonment of the Replacement Water Rights.

IV. TRANSCRIPT INFORMATION

Whether a Transcript of Evidence is Necessary: Other than Bar Star's Complaint and the briefing by the parties, no other proceedings were taken in the Water Court.

Name of Court Reporter: N/A

Approximate Number of Pages of Transcript: N/A

Whether Extension Has Been Requested: No.

V. A PREARGUMENT CONFERENCE IS NOT REQUESTED

VI. ATTORNEY INFORMATION

Attorney for Plaintiff-Appellant:

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Attorney for Defendant-Appellee

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VII. APPENDICES TO THIS NOTICE OF APPEAL

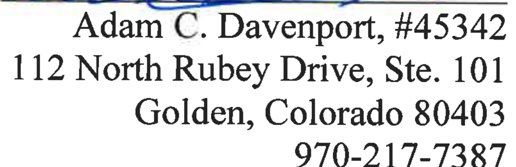
Appendix A - Order Granting Defendant's C.R.C.P. 12(b)(5) Motion to Dismiss, dated December 13, 2016;

Appendix B - Bar Star's C.R.C.P. 59 Motion to Amend Findings and Order, dated December 27, 2016; and

Appendix C - Order Denying Plaintiff's Motion to Amend Findings and Order Dismissing Plaintiff's Complaint, dated January 25, 2017.

Dated: January 31, 2017

Attorney for Plaintiff-Appellant
Bar Star Land, LLC



Adam C. Davenport, #45342
112 North Rubey Drive, Ste. 101
Golden, Colorado 80403
970-217-7387

CERTIFICATE OF SERVICE

I certify that on the 31st day of January, 2017, a true and correct copy of the above NOTICE OF APPEAL, together with complete copies of all attachments was served by e-Filing via ICCES and addressed to the following:

Paul F. Holleman, #21888
John D. Buchanan, #45191
Buchanan Sperling & Holleman
7703 Ralston Road
Arvada, Colorado 80002

Clerk of the Water Court
Water Division 1
P.O. Box 2038
Greeley, Colorado 80632
Undersigned counsel has also mailed a paper copy of this Notice of Appeal with a cost bond in the amount of $250 required by C.A.R. 7 to the Clerk of the Water Court.

Adam C. Davenport
E-Filed Pursuant to C.A.R. 30
Duly signed original on file
with counsel

DATE FILED: December 13, 2016 6:52 PM
DATE FILED: January 31, 2017 4:52 PM
CASE NUMBER: 2016CW3132

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, CO 80631 (970) 475-2400	
Plaintiff: Bar Star Land, LLC **v.** **Defendant:** Elkhorn Ranch Homeowners Association, Inc.	**▲COURT USE ONLY▲**
	Case No.: 16CW3132 Div. 1
ORDER GRANTING DEFENDANT'S C.R.C.P. 12(b)(5) MOTION TO DISMISS	

This matter comes before the court on a *Motion to Dismiss* filed by Elkhorn Ranch Homeowners Association, Inc. (Defendant). Bar Star Land, LLC (Plaintiff) filed a response, and Defendant filed a reply. The motion has now been fully briefed. The court has considered the motion, response, and reply and now enters the following findings and conclusions.

In this proceeding, Plaintiff asks the court for a declaratory judgment under two alternative theories of law. Plaintiff first asserts that it has adversely possessed Defendant's augmentation plans and their associated water rights and seeks a decree to that effect. Plaintiff argues that by operating, maintaining, accounting for, and possessing Defendant's augmentation plans and associated water rights for more than thirty-five years, it has satisfied the requirements for adverse possession of a water right. In the alternative, Plaintiff asserts that Defendant abandoned its augmentation plans and the water rights used as replacement sources in those plans. Plaintiff relies on the fact that it and its predecessors are the only entities

Appendix A

to ever operate, maintain, and account for Defendant's augmentation plans to support its theory that Defendant abandoned the augmentation plans.

Defendant counters that Plaintiff misconstrues Colorado law concerning both adverse possession and abandonment of water rights, thereby justifying dismissal of the complaint under C.R.C.P. 12(b)(5). As to Plaintiff's adverse possession claim, Defendant sets forth several arguments to support its motion to dismiss. First, Defendant points out that augmentation plans are not property rights, and because only rights and interests in real property can be adversely possessed, Plaintiff's claim for adverse possession of the augmentation plans must be dismissed. Second, Defendant argues that Plaintiff cannot present any facts that would prove adverse possession of the water rights Defendant uses to replace the out-of-priority depletions from Defendant's tributary ground water wells.

Defendant presents similar arguments in support of its motion to dismiss Plaintiff's abandonment claim—namely, that Plaintiff fails to allege facts that, even if true, prove abandonment. Primarily, Defendant argues that Plaintiff has not alleged the nonuse of Defendant's water rights, let alone nonuse for the requisite period of time. To the contrary, Defendant believes that Plaintiff concedes that Defendant's water rights have been consistently diverted and used in accordance with their decreed uses.

The court agrees with Defendant and finds that Plaintiff has not pled any facts to support its claims that it has adversely possessed Defendant's water rights or that Defendant has abandoned its water rights. Instead, Plaintiff's recitation of facts only confirms that Defendant's augmentation plans have been continuously operated for many decades to replace out-of-priority depletions from homeowner wells in Defendant's subdivision, as required by the augmentation plans decreed in the water court. Because Plaintiff has failed to assert any facts to support either legal theory for relief proffered in its complaint, dismissal under C.R.C.P. 12(b)(5) is warranted.

I. STANDARD OF REVIEW

The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the formal sufficiency of the complaint. *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor and are rarely granted. *Id.* at 1291 (quoting *Davidson v. Dill*, 503 P.2d 157, 162 (Colo. 1972)). The trial court properly grants a C.R.C.P. 12(b)(5) motion when, accepting all allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, the factual allegations cannot, as a matter of law, support a claim for relief. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010).

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court may only consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). Material allegations are deemed admitted, and the motion to dismiss should only be granted if it appears beyond doubt that the plaintiff cannot prove facts in support of a claim that would entitle it to relief. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1157–58 (Colo. App. 2008); *Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994). A complaint may be dismissed if the substantive law does not support the claims asserted. *W. Innovations, Inc.*, 187 P.3d at 1158.

II. ANALYSIS

Defendant is a homeowner's association whose membership includes several hundred individuals owning residential lots and homes near Como, Colorado. Each lot in the subdivision has a separate ground water well to supply potable water for domestic and household uses. Because the homeowner wells withdraw ground water hydraulically connected to Tarryall Creek, a tributary of the South Platte River, the Defendant obtained two augmentation plans, decreed in Water Division

One Case Nos. W-7903 and W-8107, to replace out-of-priority depletions. Defendant's replacement water sources for the augmentation plans were at one time decreed for irrigation use, but the use of the water was subsequently changed in the water court for use in the augmentation plans. During the irrigation season, the augmentation plans require Defendant to leave a portion of the water in the stream. To replace out-of-priority depletions occurring during the non-irrigation season, and to replace depletions that exceed the amount of water Defendant leaves in the stream during the irrigation season, a portion of the water must be diverted through the Slater Ditch for storage in Tarryall Ranch Reservoir[1] and released when ordered by the State Engineer.

Plaintiff owns, operates, and maintains Tarryall Ranch Reservoir, the Slater Ditch headgate, and the associated ditch system used to fill the reservoir. In addition to operating the augmentation plans for Defendant's subdivision, Plaintiff also operates and maintains a separately decreed augmentation plan for the benefit of homeowners in the nearby Indian Mountain Subdivision. Similar to the operation of Defendant's augmentation plans, the Indian Mountain augmentation plan involves storage of replacement water in Plaintiff's reservoir, which is released by Plaintiff when directed by the State Engineer to meet Indian Mountain's out-of-priority tributary ground water depletions.

Plaintiff and its predecessors[2] have exclusively operated and maintained the augmentation plans for the benefit of Defendant and Indian Mountain since the mid-1970s, when the augmentation plan decrees were issued by the water court. Apparently, Defendant has neither compensated Plaintiff for operating the augmentation plan for Defendant nor financially contributed to the maintenance and costs of the structures involved. Defendant has not physically operated the augmentation plans itself, but instead has relied upon Plaintiff to release the

[1] Originally, the Defendant's decrees referenced storage in Tarryall Ranch Reservoirs Nos. 1 and 2. The two reservoirs were consolidated into a single storage pool in the mid-1970s.
[2] The structures involved in this dispute were originally owned and operated by Park Development Company (later Meridian Property). Plaintiff became the successor-in-interest after its 2013 purchase of the land underlying and surrounding the reservoir.

replacement water from the reservoir. In 2013, after Plaintiff's purchase of the land associated with the reservoir, Plaintiff sent an invoice to Defendant seeking payment of $29,920 for services rendered in the operation of Defendant's augmentation plans and maintenance of the reservoir. Defendant refused to pay and subsequently requested access to the reservoir to release its own replacement water. Plaintiff denied Defendant's request for access to the reservoir. In an effort to come to a long-term agreement, Plaintiff sent an offer to Defendant in September 2016 to operate Defendant's augmentation plan for $68,000 per year, which amounts to $100 per year for each of the 680 lots in Plaintiff's subdivision. Defendant declined Plaintiff's offer.

With the parties at an impasse regarding how, and at what price, water would be stored in and released from Plaintiff's reservoir to meet Defendant's replacement obligations under its augmentation plans, Defendant filed a civil complaint for declaratory relief in Park County, Colorado. In the civil action, Defendant requests a declaration that it owns an exclusive easement to store water in one-third of the reservoir's usable capacity, with a minimum of forty-one acre-feet of capacity allotted for use by Defendant. The civil complaint alleges that two agreements—the Slater Agreement and the Tarryall Agreement—authorize Defendant's access to a storage easement in the reservoir, along with the rights of ingress and egress as reasonably necessary. In the alternative, Defendant alleges that it owns easements to divert, store, and access water by any one or more of the following legal principles: grant, license, prescription, or estoppel. Second, Defendant seeks to quiet title to the water rights, the storage easement, the augmentation plans, and all associated rights and interests. Third, Defendant requests damages for interference with its storage easement and all easements associated with the replacement water supplies and the augmentation plans. After the Park County District Court denied Plaintiff's motion to dismiss, Plaintiff filed the current proceeding in Water Division One asserting the adverse possession and abandonment claims.

As a preliminary matter, it is not for this court to determine whether formal agreements existed between Plaintiff and Defendant to operate and maintain the augmentation plans, to grant access to the reservoir and associated structures, or to require Defendant to compensate Plaintiff for services rendered. Those particular issues are presently pending before the district court in Park County. Instead, this court must focus on the water matters that allegedly stem from the facts at hand, and that is whether Plaintiff has sufficiently stated a claim upon which relief can be granted under the theories of adverse possession or, in the alternative, abandonment of Defendant's water rights.

A. Adverse Possession

Ownership of water rights may be deemed interests in real property and support a claim of adverse possession. *In re Water Rights of V-Heart Ranch, Inc.*, 690 P.2d 1271, 1273 (Colo. 1984). To establish adverse possession of a water right, the claimant must establish that such possession is actual, adverse, hostile, and under claim of right, as well as being open, notorious, exclusive, and continuous for the prescribed statutory period. *Id.* Because adverse possession involves the termination and award of water rights, an adverse possession claim relating to a water right lies within the exclusive jurisdiction of the water court. *Archuleta v. Gomez*, 140 P.3d 281, 287 (Colo. App. 2006).

Claims for adverse possession of a water right are very difficult to establish, *Archuleta v. Gomez*, 200 P.3d 333, 344 (Colo. 2009), and many claims are rejected by the courts due to the challenges presented by the facts that water rights are not lightly surrendered by water users and that water rights should only be surrendered under "reasonably clear and satisfactory evidence." *Id.* at 345 (quoting *Loshbaugh v. Benzel*, 291 P.2d 1064, 1070–71 (Colo. 1956). As a general matter, however, in an adverse possession case, the nature of the property at issue is critical in determining what acts by the claimant are necessary for an adverse possession claim. *Id.*at 343. Specifically, when evaluating a claim for adverse

possession of a water right, the fundamental question becomes whether, under all surrounding circumstances, the practices of water use between the rival claimants are consistent or inconsistent with the claimed adverse use. *Id.* at 345.

Here, Plaintiff and Defendant are not asserting rival claims to the use of water behind the headgate. The two parties do not dispute that Defendant's water rights have been used to replace out-of-priority depletions from homeowner wells operating in Defendant's subdivision, as required by Defendant's augmentation plans. Rather, the parties dispute whether a claim for adverse possession may arise simply from Plaintiff's business model itself to provide augmentation services by operating and maintaining the reservoir and its associated water structures to carry out the terms of the decrees in the augmentation plans.

Defendant's motion to dismiss the complaint accurately describes the fatal flaws in Plaintiff's adverse possession claim. First, Plaintiff fails to establish possession of Defendant's water rights that is actual, adverse, hostile, and under claim of right. While Plaintiff may have exercised temporary control over a portion of the Defendant's water rights while the water was stored in Plaintiff's reservoir—due to the historical practice of Plaintiff, and not Defendant, releasing water from the reservoir to meet Defendant's replacement obligations—there was never a time when Plaintiff claimed the water as its own. Clearly, Plaintiff never possessed Defendant's water in a manner that was either adverse or hostile to Defendant's use of the water. Rather, both Plaintiff and Defendant have always recognized and acknowledged that the water Plaintiff releases from its reservoir to meet Defendant's replacement obligations is Defendant's. Aside from the dispute arising when Plaintiff first requested payment from Defendant, Plaintiff's actions have in no way been adverse or hostile to Defendant's interest in utilizing the augmentation plans or the replacement water. And until Plaintiff filed suit in this proceeding, there is no indication that Plaintiff ever made a claim of legal right to Defendant's water rights.

Next, Plaintiff fails to allege any facts to support a claim that its possession of Defendant's water rights, while the water is being stored in Plaintiff's reservoir

or released by Plaintiff to meet Defendant's replacement obligations, was open, notorious, exclusive, and continuous. Instead, when directed by the State Engineer to release water from the reservoir to meet Defendant's replacement obligations under Defendant's augmentation plans, Plaintiff obliged. Clearly, there was nothing said or done by Plaintiff when releasing Defendant's replacement water sources that would indicate to either the State Engineer or Defendant that Plaintiff believed the water belonged to Plaintiff. And finally, Plaintiff provided absolutely no facts to show that Plaintiff made any use of Defendant's water rights for Plaintiff's own purposes.

Because the court can dispose of Plaintiff's adverse possession claim on the grounds that it fails to satisfy the required legal elements for such claim, the court need not address Defendant's argument that augmentation plans cannot be subject to adverse possession because they are not interests in real property.

After considering the facts alleged by Plaintiff and the required elements for an adverse possession claim, the court finds that Plaintiff's factual allegations cannot survive a motion to dismiss under C.R.C.P. 12(b)(5).

B. Abandonment

Abandonment of a water right means "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 a part of the water available thereunder." C.R.S. § 37-92-103(2). Nonuse of the water alone will not result in an abandonment finding, but instead nonuse must be accompanied by the intent to abandon the water right. *Wolfe v. Jim Hutton Educ. Found.*, 344 P.3d 855, 859 (Colo. 2015). Nonuse refers to the water right—defined in terms of a specific point of diversion—not simply the water itself. *Id.* at 860 ("It thus follows that proving nonuse of that diversion point is proof of nonuse of the water right in question."). Because water rights are usufructuary in nature, abandonment of a water right retires the use entitlement back to the stream. *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 553 (Colo. 2000).

Failure to apply a water right to a beneficial use for a period of ten years or longer creates a rebuttable presumption of abandonment. C.R.S. § 37-92-402(11).

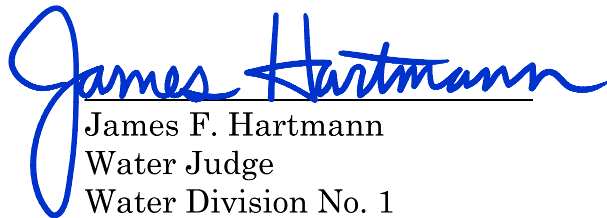
Here, Plaintiff is unable to show that the Defendant failed to use its water rights, let alone establish that Defendant intended to abandon the water rights. It cannot be disputed that homeowners in Defendant's subdivision have been continuously removing tributary ground water through their wells for decades, that the out-of-priority depletions have been replaced through Defendant's augmentation plans with Defendant's replacement water sources, and that Plaintiff, with Defendant's knowledge and approval, has been the entity to release the replacement supplies from the reservoir to the stream, under the direction of the State Engineer. Therefore, as a matter of law, Plaintiff has failed to state a claim for abandonment of Defendant's water rights.

IV. ORDER

Based on the foregoing, the court grants Defendant's motion to dismiss Plaintiff's complaint for declaratory relief in its entirety.

Dated: December 13, 2016.

By the court:



James F. Hartmann
Water Judge
Water Division No. 1

DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO 901 9th Avenue P.O. Box 2038 Greeley, Colorado 80632	DATE FILED: December 27, 2016 [illegible] PM FILING ID: 61B29D18398CC CASE NUMBER: 2016CW3132
Plaintiff: BAR STAR LAND, LLC **v.** **Defendant: ELKHORN RANCH HOMEOWNERS ASSOCIATION, INC.**	▲ **COURT USE ONLY** ▲
Attorney for Plaintiff Adam C. Davenport, #45342 112 N. Rubey Drive, Ste. 101 Golden, Colorado 80403 Tele: (303) 459-5499 Fax: (720) 216-2055 adam.davenport@dtservices.com	Case No. 16CW3132 Courtroom 1
PLAINTIFF BAR STAR LAND, LLC's C.R.C.P. 59 MOTION TO AMEND FINDINGS AND ORDER	

Plaintiff, Bar Star Land, LLC ("Bar Star"), files this Motion to Amend the Court's December 13, 2016 Order Granting Defendant Elkhorn Ranch Homeowners Association, Inc.'s ("Elkhorn") Motion to Dismiss ("Order") and states as follows.

C.R.C.P. 121 § 1-15 CERTIFICATION

Undersigned counsel conferred with Elkhorn before filing this Motion; Elkhorn opposes the relief requested.

INTRODUCTION

Bar Star filed this case in response to Elkhorn's claim that its purported ownership of the water rights changed to replacement sources in cases W-7903 and W-8107 (the "Replacement Water") gives it the right to make unfettered use of Bar Star's property. Complaint, ¶ 22, p. 4. The factual allegations in the Complaint, when taken as true, are sufficient to state claims for both

Appendix B

adverse possession and abandonment of the Replacement Water and as such, Bar Star respectfully requests that the Court amend its findings, and Order as follows.

STANDARD OF REVIEW

Amendment of Findings and Order

Within 14 days of entry of judgment, a party may move for amendment of the court's findings, judgment, or both. C.R.C.P. 59(a)(3) and (4).

Dismissal for Failure to State a Claim

A complaint may be dismissed pursuant to C.R.C.P. 12(b)(5) if the factual allegations fail to state a claim upon which relief can be granted. The function of the complaint is to give notice of the events that are the subject of the plaintiff's lawsuit. *Public Service Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). C.R.C.P. 12(b)(5) motions to dismiss are looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove *no* set of facts which would entitle the claimant to relief. *Id*. When reviewing a motion to dismiss for failure to state a claim, factual allegations in the complaint must be accepted as true, and viewed in the light most favorable to plaintiff. *Id*. at 386.

PRINCIPLES OF LAW

Adverse Possession of Water Rights

Water rights may be adversely possessed when, behind the headgate, the adverse claimant makes an actual beneficial use of the deeded owner's right that is adverse, hostile and under claim of right, open, notorious, and exclusive for the statutory 18-year period. *Archuleta v. Gomez*, 200 P.3d 333, 342 (Colo. 2009).

Actual Beneficial Use, Behind the Headgate

Adverse possession of a decreed water right can only occur once water has been diverted from the stream. *Id*. at 342. In addition, the adverse claimant must have put the deeded owner's water to an actual beneficial use. *Id.* at 347. "'Beneficial use' means the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made." C.R.S. § 37-92-103(4); *St. Jude's Co. v. Roaring Fork Club, LLC*, 351 P.3d 442, 449 (Colo. 2015). The legislature has also deemed "beneficial use," to include "the impoundment of water . . . or storage for any purpose for which an appropriation is lawfully made . . . ." C.R.S. § 37-92-103(4)(a).

Adverse

"The requirement that adverse possession be both hostile and adverse does not mean that there need be any violence connected with the entry onto the property or that there be any actual dispute as to ownership between the adverse possessor and the owner of the property." *Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 757-58 (Colo. 1969). Possession is presumed adverse when the claimant exercises "control and dominion over the premises as are usually and ordinarily associated with ownership." *Vade v. Sickler*, 195 P.2d 390, 391 (Colo. 1948). The presumption of adverseness arises when the claimant states actual and exclusive possession of the property for the statutory period. *Palmer Ranch, Ltd. v. Suwansawasdi*, 920 P.2d 870 (Colo. App. 1996).

Hostile and Under Claim of Right

The question of hostile intent "is to be arrived at by reasonable deductions from the acts as well as declarations of the parties involved." *Vade*, 195 P.2d at 392. Neither adverseness nor hostility require a subjective intent to knowingly take the property of another: "If it were, the protection of the [adverse possession] statue would be limited to those who deliberately set out to steal their neighbor's property and to cases where there has been an actual dispute" as to the

ownership of property. *Id.* Instead, "the intent must be that which reasonably appears from the nature and extent of the possession held." *Id.* Force or actual dispute is not necessary to constitute hostile possession. *Palmer Ranch*, 920 P.2d at 872. "All that is required to establish hostility is that the person claiming adverse possession occupy the property adversely to the rights of the record holder." *Id.*; *Moss v. O'Brien*, 437 P.2d 348, 349 (Colo. 1968).

Open and Notorious

An adverse claimant may use any actual visible means that puts the true owner and the public on notice of the claimant's dominion over the property. *Schuler v. Oldervik*, 143 P.3d 1197, 1203 (Colo. App. 2006). No published Colorado cases describe what constitutes "notoriety" in the context of adverse possession. As it relates to possession of property, Black's Law Dictionary defines "notorious" as, "so conspicuous as to impute notice to the true owner." Black's Law Dictionary, 10th ed. 2014.

Exclusive

Absolute exclusivity is not required to state a claim for adverse possession. *In re V-Heart Ranch, Inc.*, 690 P.2d 1271, 1275-1276 (Colo. 1984). Instead, the claimant need only to act as the average property owner would to assert the exclusive nature of the possession. *Palmer Ranch,* 920 P.2d at 872.

Continuous for the Statutory Period

The alleged adverse use must be continuous for the 18-year statutory period. *Id.* "Where the claimant has been in possession for the required period, the record owner must show an interruption of some aspect of the possession to defeat the claim; mere assertion of a claim of record ownership is not sufficient." *Ocmulgee Properties Inc. v. Jeffery*, 53 P.3d 665, 667 (Colo. App. 2001). The claimant's recognition of the owner's record title while in possession strengthens

the adverse possession claim. *Id.* It is then incumbent upon the true owner to dispossess the claimant to toll the running of the 18-year statutory period; actions by the owner involving the property, but not dispossessing the claimant are insufficient to toll the period. *Id.* Where possession is initially permissive, permission must be repudiated to start the running of the statute of limitations. *Nesbitt v. Jones*, 344 P.2d 949, 954 (Colo. 1959). However, where the claimant has become the absolute owner by adverse possession, any subsequent permission to utilize the property by the former paper owner is irrelevant. *Hunter v. Mansell*, 240 P.3d 469, 475 (Colo. App. 2010).

Abandonment

Abandonment is "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." C.R.S. § 37-92-103(2) (emphasis added). "The critical element of abandonment is intent." *Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 552 (Colo. 2000). "The intent to abandon a water right may be inferred through the circumstances of a case, and need not be proved directly." *Id.* "Continued and unexplained nonuse of a water right for an unreasonable period of time creates a rebuttable presumption of intent to abandon." *Id.*

ARGUMENT

I. Bar Star Does Need Not To "Establish" its Claims in the Complaint

The Court found that the Complaint failed to "establish" both adverse possession and abandonment. Order at pp. 7, 9. At this stage of the case Bar Star need not definitively establish any claim but must merely make factual allegations that give the defendant notice of the claims asserted. *Van Wyk*, 27 P.3d at 385 (Colo. 2001). "A short and plain statement advising the defendant of the relief sought provides such notice." *Hemmann Mgmt. Servs. v. Mediacell, Inc.*,

176 P.3d 856, 859 (Colo. App. 2007); *See also Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551, 553 (Colo. App. 2003) ("A complaint need not express all facts that support the claim, but need only serve notice of the claim asserted."). Bar Star respectfully suggests that, as set forth below, the Complaint contains factual allegations that give Elkhorn notice of the events that form the basis of Bar Star's claims for adverse possession or abandonment, and as such dismissal is not warranted.

II. Bar Star's Claims Relate to the Replacement Water

The Court found that Bar Star's use of the Replacement Water was not "adverse or hostile to Defendant's *interest in utilizing the augmentation plans* or the replacement water." Order at p. 7 (emphasis added). Whatever interest Elkhorn may have in the individual, junior groundwater rights within the Subdivision ("Junior Rights"), it is separate and distinct from the Replacement Water rights. Bar Star is attempting to adversely possess the latter, not the former. Complaint ¶ 36, p. 7. Bar Star alleged – and the Court found – that Bar Star exclusively has diverted the Replacement Water rights to and from storage since those rights were decreed. Complaint, ¶ 13, p. 2; ¶¶ 34, 36, p. 5; ¶¶ 32, 35.a., p. 6; Order p. 4. Therefore, if the "use" ascribed to Elkhorn in the Order is groundwater pumping under the Junior Rights, Bar Star respectfully requests the Court make an additional finding to that effect.

III. Bar Star Alleged Facts Sufficient to State a Claim for Adverse Possession

a. Bar Star's Adverse Use Occurred Behind the Headgate

The Court appears to find that Bar Star's adverse use has taken place behind the headgate. Order at p. 7. Because only decreed water rights may be adversely possessed, the adverse claimant must allege that the purported adverse use has taken place behind the headgate. *Archuleta*, 290 P.3d at 485. Bar Star made such allegations in the Complaint.

Specifically, Bar Star alleged that it diverts the Replacement Water from Tarryall Creek, through a structure known locally as "Long Pond," through the Slater Ditch headgate, down the Slater Ditch for 7 miles and stores the Replacement Water in Tarryall Ranch Reservoir ("Reservoir") (Complaint at ¶ 14, p. 2); that the Replacement Water is released from the Reservoir to replace depletions from the Junior Rights (Complaint at ¶ 15, p. 3); and that the Replacement Water is released from the Reservoir, located on lands owned by Bar Star (Complaint at ¶ 33, p. 6). As such, Bar Star respectfully requests that the Court amend its findings and Order to reflect that Bar Star has alleged facts sufficient to state that its adverse use has taken place behind the headgate.

b. Bar Star Placed the Replacement Water to Actual Beneficial Use

The Court found that Bar Star's use of the Replacement Water rights was not "actual." Order at p. 7. "Actual" possession means the ordinary use to which the property being claimed is utilized, as the true owner would make of it. *Anderson*, 458 P.2d at 759. Any actual visible means, which gives notice of exclusion from the property to the true owner or to the public and the claimant's dominion over the property is sufficient. *Id.*

The Replacement Water rights are decreed to replace depletions caused by the Junior Rights. Complaint ¶ 13, p. 2. As such, to "actually possess" the rights Bar Star need only to use them as the true owner would, i.e. to replace out-of-priority depletions to the South Platte River. Bar Star alleged that it has made actual, beneficial use of the Replacement Water rights on its land "by diverting water under [the Replacement Water] decrees to, and releasing it from, storage for the express purpose of offsetting out-of-priority depletions accruing to Tarryall Creek and the South Platte River caused by [the Junior Rights]." Complaint, ¶ 33, p. 6. Bar Star alleged that it maintained the ditch system and Reservoir necessary to use the Replacement Water rights, at its

own expense, for over 40 years. Complaint, ¶ 17, p. 3. Bar Star also alleged that the foregoing actions were sufficient to, and did, put Elkhorn on notice of Bar Star's dominion over those rights. Complaint, ¶¶ 32, 34, p. 6. Bar Star's use of the Replacement Water was also sufficient to put the rest of the world on notice of Bar Star's possession because the Water Commissioner consulted with Bar Star, not Elkhorn, regarding the amount of water to be released from the Reservoir. Complaint, ¶ 15, p. 3; ¶ 35.a., p. 6. The foregoing actions amount to using the Replacement Water as the true owner and are therefore sufficient to state a claim that Bar Star has made actual use of those rights. *Anderson*, 458 P.2d at 759 (Colo. 1969).

The Court also found that "[Bar Star] provided absolutely no facts to show that Plaintiff made any use of Defendant's water rights for [Bar Star's] own purposes." Order, p. 8. If this is an element of adverse possession, Bar Star respectfully suggests it has alleged facts sufficient to state that it has used the Replacement Water for its own purposes.

Specifically, Bar Star alleged and the Court found, that Bar Star operates several augmentation plans for 3rd parties out of the Reservoir, pursuant to various decrees from this Court (Complaint ¶¶ 9-14; Order at p. 7) and that it has diverted the Replacement Water to storage for the express purpose of replacing out-of-priority depletions accruing to the South Platte River. Complaint ¶ 36, p. 5; ¶ 33, p. 6. These allegations are sufficient to state a claim for actual beneficial use, for its own purposes because in Colorado storage of water "for any purpose for which an appropriation is lawfully made" is an actual beneficial use. C.R.S. § 37-92-103(4)(a). As such, Bar Star respectfully requests that the Court amend its findings and order to reflect that Bar Star has alleged facts sufficient to state that it has made actual beneficial use of the Replacement Water.

c. <u>Bar Star's Use of the Replacement Water is Adverse to Elkhorn's Non-use</u>

The Court found that Bar Star's alleged use of the Replacement Water rights was not "adverse" to "Defendant's use of the water." Order at p. 7. The Court appears to make three findings in support of this conclusion: (1) Bar Star "never claimed the water as its own;" (2) Bar Star allegedly "always recognized and acknowledged that the water [Bar Star] releases from its reservoir to meet Defendant's replacement obligations is Defendant's;" and (3) prior to filing this case, Bar Star's "actions have in no way been adverse or hostile to Defendant's interest in utilizing the augmentation plans or the replacement water." Order at p. 7. Bar Star respectfully suggests that it was not required to allege any of the foregoing for its use of the Replacement Water to be "adverse" to Elkhorn, which has admittedly never exercised the Replacement Water rights.

First, Possession of another's property is presumed adverse when the claimant's possession has been actual and continuous for the statutory period. *Palmer Ranch*, 920 P.2d at 872; *Nesbitt*, 344 P.2d at 956. Here, it was alleged, and the Court found, that Bar Star has been in possession of the Replacement Water rights for well over the statutory 18-year period. Complaint, ¶ 13, p. 2; ¶ 17, p. 3; ¶ 34, p. 5; ¶ 36, p. 5; ¶ 32, p. 6; ¶ 35.a., p. 6; Order, p. 4 ("[Bar Star] and its predecessors have exclusively operated and maintained the augmentation plans for the benefit of [Elkhorn] and Indian Mountain since the mid-1970s, when the augmentation plan decrees were issued by the water court.").

Next, acknowledgment of paper title in someone other than the adverse claimant does not eliminate, but strengthens a claim for adverse possession. *Ocmulgee Properties Inc. v. Jeffery*, 53 P.3d 665, 667 (Colo. App. 2001). Moreover, if both the adverse claimant and the true owner acknowledge that the disputed property is in the claimant's possession, it is incumbent upon the true owner to dispossess claimant to toll the statutory 18-year period. *Id.*; *McKelvy v. Cooper*, 437

P.2d 346, 347 (Colo. 1968) (property adversely possessed where owner "recognized and acquiesced in [adverse claimant's] possession and use of the property").

Here, it has not been alleged that Bar Star acknowledged Elkhorn as the true owner of the Replacement Water. Even if it did, this acknowledgment would not be sufficient to overcome the presumption of adverseness until Elkhorn takes some action to dispossess Bar Star of the Replacement Water. *Id.* Bar Star has been exercising the Replacement Water rights since their respective decrees were entered in the late 1970s. Complaint, ¶ 13, p. 2; Order, p. 4. Elkhorn's Park County action seeking to effectively dispossess Bar Star of the Replacement Water is ineffective to toll the statutory 18-year statute of limitations which passed years ago. Complaint ¶ 36, p. 7; *Nesbitt*, 344 P.2d at 957.

Finally, the fact that prior to filing of this action, there has been no dispute between Bar Star and Elkhorn regarding the ownership of the Replacement Water is no bar to the claims in this case. *Anderson*, 458 P.2d at 757-58 (Colo. 1969); *Moss*, 437 P.2d at 349 (Colo. 1968) (previous dispute between owner and adverse possessor not necessary for claim to be adverse); *Vade*, 195 P.2d at 392 (Colo. 1948) (subjective intent to knowingly take something from someone else not necessary for possession to be "adverse" or "hostile"). As such, Bar Star respectfully requests that the Court amend its findings and order to reflect that Bar Star has alleged facts sufficient to state that its use of the Replacement Water is adverse to Elkhorn, which has never used the Replacement Water rights.

d. <u>Bar Star's Use has been Hostile and Under a Claim of Right</u>

The Court found that the Complaint failed to establish possession of the Replacement Rights that was hostile and under a claim of right. Order at p. 7. "A showing of force or actual dispute is not necessary to constitute hostile entry or to lay a foundation for a claim of adverse

possession." *Palmer Ranch*, 920 P.2d at 872. "All that is required to establish hostility is that the person claiming adverse possession occupy the property adversely to the rights of the record holder." *Id.*; *Moss*, 437 P.2d at 349.

In the Complaint, Bar Star alleged that its possession of the Replacement Water has been hostile to Elkhorn and under a claim of right because Bar Star has been exercising the Replacement Water rights as the true owner would for over 35 years by maintaining the diversion structures at its own cost, diverting the Replacement Water to and from storage, consulting with the Water Commissioner about the amount needed to be released, and requesting payment from Elkhorn for receiving those services (Complaint, ¶ 35, p. 5; ¶¶32, 35.a., p. 6); within the last two years when Elkhorn has attempted to dispossess Bar Star of the Replacement Rights, Bar Star has refused. Complaint, ¶ 35.c., p. 6. As a result, Bar Star respectfully requests that the Court amend its findings and Order to state that Bar Star has alleged facts that its possession of the Replacement Water was hostile and under a claim of right.

e. <u>Bar Star's Use of the Replacement Rights has been Open and Notorious</u>

The Court found that Bar Star's diversion of the Replacement Rights to and from storage was not "notorious." Order at p. 8. Black's Law Dictionary defines "notorious" as, "generally known and spoken of," and "(of the possession of property) so conspicuous as to impute notice to the true owner." Black's Law Dictionary, 10th ed. 2014.

The Complaint alleged that Elkhorn had actual knowledge of Bar Star's use of the Replacement Water. Complaint ¶ 34, p. 6. Moreover, Exhibits B, C, and D to the Complaint are meeting minutes in which Elkhorn discusses Bar Star's use of the Replacement Water. Bar Star respectfully requests that the Court amend its findings and Order to reflect that Bar Star has alleged facts sufficient to state that its use of the Replacement Water has been open and "notorious."

f. Bar Star's Use of the Replacement Rights has been Exclusive

The Order states that Bar Star has not alleged that its use of the Replacement Water was "exclusive." Order p. 8. A claimant need only to act as the average property owner would in asserting exclusive possession. *Palmer Ranch*, 920 P.2d at 872. As previously discussed, the Junior Rights and Replacement Water rights are distinct. Bar Star specifically alleged, and the Court found, that Bar Star has exclusively exercised the Replacement Water rights since their decrees were entered in the 1970s. Complaint ¶ 13, p. 2; ¶¶ 16-17, p. 3; ¶¶34, 36, p. 5; ¶¶ 32, 33, 35.a.; Order p. 4. The actions alleged by Bar Star in the Complaint are consistent with the actions that would have been taken by the title owner, and are therefore sufficient to state a claim for exclusive possession. Bar Star respectfully requests the Court amend its findings and Order that Bar Star has alleged facts sufficient to state a claim that its use of the Replacement Rights has been exclusive.

g. Bar Star's Use of the Replacement Rights has been Continuous

The Court found that Bar Star's possession of the Replacement Rights was not "continuous." Order at p. 8. The alleged adverse possession must be continuous for the statutory 18-year period. C.R.S. 38-41-101(1); *V-Heart Ranch*, 600 P.2d at 1273. Bar Star alleged, the Court appears to have found, and Elkhorn appears to agree, that Bar Star's use of the Replacement Water has been continuous since the decrees were entered in the 1970s. Complaint ¶¶ 32, 35.a, p. 6; Motion p. 1-2; Order pp. 4, 7. As a result, Bar Star respectfully requests the Court amend its Order to reflect that Bar Star has alleged facts sufficient to state a claim that its use of the Replacement Water has been continuous for the statutory 18-year period.

IV. Bar Star's Allegations are Sufficient to State a Claim for Abandonment

The Court found that "Plaintiff is unable to show that the Defendant failed to use its water rights, let alone establish that Defendant intended to abandon the water rights." Order at p. 9. However, Bar Star alleged that Elkhorn has failed to exercise the Replacement Water rights in the nearly 40 years since they were decreed and this allegation, when taken as true, is sufficient to create a presumption of abandonment thereby stating a claim for relief.

Abandonment is "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." C.R.S. § 37-92-103(2) (emphasis added). A presumption of abandonment arises when: (1) non-use *by the water right owner* for the statutory period (ten years) is coupled with, (2) *the owner's intent* to abandon the rights. *Haystack Ranch*, 997 P.2d at 552 (Colo. 2000). Continued and unexplained nonuse by an owner for an unreasonable period creates a rebuttable presumption of intent to abandon. *Id*. Abandonment analysis therefore focuses on the actions (or inactions) of the purported owner at the decreed point of diversion, not whether the right has been exercised by some other user. *Mountain Meadow Ditch & Irr. Co. v. Park Ditch & Reservoir Co.*, 277 P.2d 527, 529 (Colo. 1954) (water users abandoned portion of right "either knowingly or by neglect, in not asserting their right to showing an intention to use same."); *Wolfe v. Jim Hutton Educational Foundation*, 344 P.3d 855, 860 (Colo. 2015) (non-use refers to the water right – not simply the water itself).

Bar Star alleged, and the Court found, that Elkhorn has never diverted the Replacement Water to or from storage, maintained the diversion structures, or contributed money for maintenance. Complaint, ¶ 17, p. 3, ¶ 41; Motion p. 11; Order pp. 4 ("Elkhorn has not physically operated the augmentation plans itself"), 7 ("historical practice of [Bar Star], and not Elkhorn, releasing water from the reservoir to meet [Elkhorn's] replacement obligations"). This period of

unexplained non-use of the Replacement Water by the purported owner, Elkhorn, raises a rebuttable presumption of abandonment and is therefore sufficient to state a claim upon which relief may be granted. *Mountain Meadow Ditch & Irr. Co.*, 277 P.2d at 529.

To the extent the Court believes Bar Star's abandonment claim fails because Bar Star's use of the Replacement Water has been with "Defendant's knowledge and approval," Bar Star specifically alleged that its use of the Replacement Water was not permissive and in any event, a paper owner can knowingly abandon its water rights. Complaint at ¶ 35.b, p. 6; *Mountain Meadow Ditch*, 277 P.2d at 529.

Bar Star respectfully requests the Court amend its findings and order to reflect that Bar Star has alleged facts sufficient to state an alternate claim for relief. Alternatively, Bar Star requests a further finding clarifying what "use" of the Replacement Water the Court is ascribing to Elkhorn on page 9 of the Order.

CONCLUSION

WHEREFORE Bar Star respectfully requests the Order be amended to reflect that Bar Star has alleged facts sufficient to state a claim for either adverse possession of the Replacement Water or in the alternative, abandonment.

Submitted this 27th day of December, 2016.

By: _*s/ Adam C. Davenport*_____________
Adam C. Davenport, #45342
E-filed per C.R.C.P. 121
Duly signed original on file with above signed counsel
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December 2016, a true and correct copy of this **C.R.C.P. 59 MOTION TO AMEND FINDINGS AND ORDER** in **Case No. 2016CW3132, Water Division 1** was served by e-filing via ICCES and addressed to the following:

Party Name	Party Type	Attorney Name
Elkhorn Ranch Owners Association	Plaintiff	Paul F. Holleman John D. Buchanan

s/ Adam C. Davenport
Adam C. Davenport, #45342

E-filed per C.R.C.P. 121
Duly signed original on file with above signed counsel

DISTRICT COURT, WATER DIVISION NO. 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue P.O. Box 2038 Greeley, CO 80631 (970) 475-2400	DATE FILED: January 25, 2017 6:32 PM / January 31, 2017 6:51 AM CASE NUMBER: 2016CW3132
Plaintiff: Bar Star Land, LLC **v.** **Defendant:** Elkhorn Ranch Homeowners Association, Inc.	**▲COURT USE ONLY▲** Case No.: 16CW3132 Div. 1

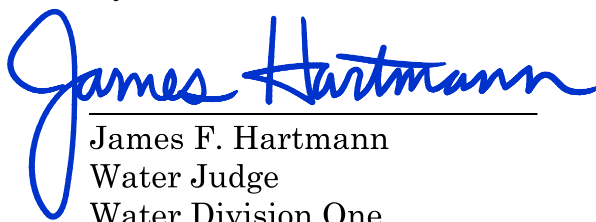
ORDER DENYING PLAINTIFF'S MOTION TO AMEND FINDINGS AND ORDER DISMISSING PLAINTIFF'S COMPLAINT

This matter comes before the court on Plaintiff's *Motion to Amend Findings and Order* pursuant to C.R.C.P. 59(a)(3) and (4). In essence, Plaintiff is asking this court to reconsider and amend the findings and order dismissing the complaint Plaintiff filed in this action. Defendant filed a response and Plaintiff a reply.

The court, when ruling on Defendant's motion to dismiss, assumed the facts Plaintiff asserts in the complaint to be true. The court concluded that those facts are insufficient as a matter of law to support claims for adverse possession and/or abandonment of the water right. In the present motion, Plaintiff merely recites the same arguments raised in its response to Defendant's motion to dismiss the complaint, which the court considered and rejected when granting Defendant's motion to dismiss. Plaintiff's motion to amend findings and order is denied.

Dated: January 25, 2017

By the court:



James F. Hartmann
Water Judge
Water Division One

Appendix C