

Supreme Court, State of Colorado  
Colorado State Judicial Building  
2 East 14<sup>th</sup> Avenue  
Denver, Colorado 80203

DATE FILED: December 26, 2017 3:24 PM

District Court, Water Division 2  
Honorable Larry C. Schwartz  
Case No. 12CW95

**Appellant/Defendant:**

YAMASAKI RING, LLC

v.

**Appellees/Plaintiff:**

DONALD E. DILL, CATHIE G. DILL, JERRY R.  
PEARCE, AND FRANCES M. PEARCE

And

**Appellees/Defendants:**

STEVE WITTE, P.E., AS DIVISION ENGINEER FOR  
WATER DIVISION 2, KEVIN REIN, P.E., AS STATE  
ENGINEER, TOM FRENCH AND JOAN FRENCH

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Δ COURT USE ONLY Δ

Case No.: 2017SA\_\_\_\_\_

**NOTICE OF APPEAL**

Appellant, Yamasaki Ring, LLC, by and through its attorneys Monson, Cummins & Shoheit, LLC, respectfully files this Notice of Appeal pursuant to C.A.R. 1(a)(2) and 4(a).

**I. Brief Description of the nature of the case**

**a. General Statement**

Appellant, Yamasaki Ring, LLC (“Ring”), owns the Campbell Ditch water right. The Campbell Ditch water right was adjudicated In the Matter of the Priority of Water Rights in District No. 12 of the State of Colorado, In the District Court of the County of Fremont, CA 2700, entered November 14, 1905, replaced by a decree entered January 4, 1909. The Campbell Ditch was awarded 2.34 c.f.s. from Cherry Creek with an appropriation date of March 1, 1882, and 2.34 c.f.s. from Cherry Creek with an appropriation date of March 1, 1890. In addition, the decree for the Campbell Ditch water rights states that the Campbell Ditch water right is entitled to receive and conduct into said ditch spring water from certain springs water and from all springs along the line of the ditch.

Donald E. Dill, Cathie G. Dill, Jerry R. Pearce, and Frances M. Pearce (“Plaintiffs”) filed a Complaint for Declaratory Judgment on September 20, 2012, with the District Court, Water Division 2 (“Complaint”).

The Complaint was assigned Case No. 12CW95. The Complaint, without limitation, sought a declaratory judgment that the spring waters decreed to the Campbell Ditch were a separate and distinct water right, independent of Cherry Creek Priority Nos. 3 and 4 water rights and that such water right carries an 1883 priority date.

On January 13, 2016, the District Court, Water Division 2, entered an Order, stating, “it is this Court’s opinion that the 1909 Decree adjudicates a supplemental source of water from the springs to the two Campbell Ditch priorities up to the total decreed amount for the two Campbell Ditch priorities of 4.68 c.f.s.” On November, 9, 2017, however, the District Court, Water Division 2, entered an Order, stating, that the springs adjudicated to the Campbell Ditch were not adjudicated in the 1909 Decree.

**b. Judgement, orders or parts being appealed and statement of basis for the appellate court’s jurisdiction.**

Ring is appealing the orders issued by the District Court, Water Division 2 entered on January 13, 2016, September 20, 2016, and November 9, 2017. This Court has jurisdiction over this matter pursuant to Colo. Const. Art. VI, § 2(2), § 13-4-102(1)(d), 5 C.R.S. (2002), and C.A.R.

1(a)(2). See, Colorado Ground Water Comm'n v. N. Kiowa-Bijou Groundwater Mgmt. Dist., 77 P.3d 62, 69 (Colo. 2003)

**c. Whether the judgment resolved all issues.**

The judgment resolved all issues in the case.

**d. Whether the judgment was made final pursuant to C.R.C.P. 54(b).**

There was no need to make the judgment final pursuant to C.R.C.P. 54(b).

**e. Date of judgements.**

January 13, 2016, September 20, 2016, and November 9, 2017.

**f. Extensions for post-trial relief**

No party asked for an extension of time to file post-trial motions.

**g. Date of post-trial relief motions.**

No post-trial relief motions were filed.

**h. Date post-trial relief was denied.**

No post-trial relief motions were filed.

**i. Extension of Time to File the Notice of Appeal:**

There were no requests to extend the deadline to file this notice of appeal.

**III. Advisory issues to be raised on appeal.**

1. Whether the springs decreed to the Campbell Ditch are a decreed enforceable supplemental source for the Campbell Ditch water right.

**IV. Transcript information.**

A transcript of testimony was taken before the trial court during a preliminary injunction. Ring does not believe that the transcript is necessary to resolve the issues raised on appeal at this time.

**V. Attorney information**

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VII. **Appendix**

A. Order dated January 13, 2016, Case No. 12CW95, District Court, Water Division 2.

B. Order dated September 20, 2016, Case No. 12CW95, District

Court, Water Division 2.

C. Order dated September 20, 2016, and November 9, 2017,  
Case No. 12CW95, District Court, Water Division 2

VIII. **Certificate of service**

See attached Certificate of Service.

Dated this 26<sup>th</sup> day of December 2017.

Respectfully submitted,

MONSON, CUMMINS & SHOHET, LLC



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David M. Shohet, #36675

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Designation of Record was served via US Mail or by email on the 26<sup>th</sup> day of December 2017 to the following parties:

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By 



<p>DISTRICT COURT, WATER DIVISION 2, COLORADO</p> <p>501 North Elizabeth Pueblo Judicial Building Pueblo, Colorado 81003</p> <hr/> <p><b>CONCERNING THE WATER RIGHTS OF: DONALD E. DILL, CATHIE G. DILL, JERRY R. PEARCE, and FRANCES M. PEARCE</b></p> <p><b>IN FREMONT COUNTY</b></p> <hr/> <p><b>BY THE COURT:</b></p>	<p>DATE FILED: December 26, 2017 3:24 PM DATE FILED: January 13, 2016 2:30 PM CASE NUMBER: 2012CW95</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2012 CW 95</p> <p>Courtroom:406</p>
<p align="center"><b>ORDER RE: MOTION FOR DETERMINATION OF QUESTION OF LAW FILED SEPTEMBER 28, 2015</b></p>	

**THIS MATTER** comes before this Court on Opposer Yamaski Ring, LLC's ("Ring") Motion for Determination of Question of Law filed September 28, 2015 pursuant to C.R.C.P 56(h) ("56(h) Motion"). Applicants, Donald E. Dill, Cathie G. Dill, Jerry R. Pearce and Frances M. Pearce ("Applicants") filed a combined Response to the 56(h) Motion ("Applicants' Response") and a Motion for Summary Judgment pursuant to C.R.C.P. 56 ("Motion for Summary Judgment") on October 26, 2015. Such Motion for Summary Judgment is addressed in an independent, contemporaneous Order of this Court. The State Engineer and Division Engineer ("Engineers") filed their Response to the 56(h) Motion on October 26, 2015 ("Engineers' Response"). Having reviewed the briefs, pleadings, supporting documents, exhibits, and relevant statutes and case law, and being otherwise fully advised, this Court enters the following **FINDINGS AND CONCLUSIONS:**

**I. BACKGROUND (FACTS AND PROCEDURAL HISTORY)**

1. Applicants filed a Complaint for Declaratory Judgment on September 20, 2012 with this Court in Case No. 12CW95 ("Complaint").

2. The Complaint seeks a declaratory judgment that waters derived from that certain spring situated south 6° and 35' east 1,230 feet from the northwest corner of Section 27, Township 48 North, Range 10 East of the N.M.P.M. and water from all springs along the line thereof which runs northeast 7380 feet to the original headgate of the Campbell Ditch are a separate and distinct water right, independent of Cherry Creek Priority Nos. 3 and 4 water rights and that such water right carries an 1883 priority date.
3. Along with the Complaint, the Applicants filed a Motion for Preliminary Injunction requesting the State Engineer or agents thereof be prevented from interfering with their water rights.
4. Ring filed a Statement of Opposition to the Complaint. In response to the Complaint, Ring asserted the affirmative defense that the water right claimed by the Applicants is not a separate and distinct water right, but rather a supplemental source of water for the Campbell Ditch water rights, which are Cherry Creek Priority Nos. 3 and 4, and therefore, water therefrom belongs to the owners of the Campbell Ditch water rights.
5. A preliminary hearing was held on March 19, 2013 after which this Court issued an Order on April 3, 2013 denying the Motion for Preliminary Injunction. The Order explained that the two decrees specifically identified priority numbers for the Campbell Ditch and the Deever's Extension, but did not include any priority numbers for the Horton Extension, which led this Court to believe that something was missing which prevented that court from decreeing a complete water right. As such, this Court was not persuaded that the Applicants had a reasonable probability of success on the merit of the case.
6. As the 12CW95 case was pending, the Applicants filed an Application for Absolute Surface Water Rights on September 13, 2013 with this Court in Case No. 13CW3041 ("Application"). The Application claimed absolute water rights for the Horton Creek Extension of which the listed sources are "[t]he five Upper springs feeding the Horton Creek Extension, the Moore Spring, Horton Spring 1,

Horton Spring 2 and Horton Spring 3 all tributary to Stout Creek tributary to the Arkansas River. . . .”

7. As a result of the filing of the Application, the Applicants filed a Motion to Stay Proceedings in Case No. 12CW95 on July 23, 2014, which was granted by this Court on August 13, 2014.
8. In District Court, County of Fremont, Case No. CA 2700, a statement of claim for water rights dated September 23, 1905 for the irrigation of 100 acres of land was filed by W. S. Horton seeking an adjudication for the Campbell Ditch (“Statement of Claim”). (Ring’s Exhibit A.)
9. The Statement of Claim set forth the date when W. S. Horton began construction on the initial ditch (“Initial Ditch”), the date when the ditch was first extended called the “Deever’s Addition” (later decreed and referred to herein as the “Deever’s Extension”), and the date when the ditch was extended a second time to capture water from upstream springs referred to herein as the “Horton Extension.” (Ring’s Exhibit A, pp. 1-2, ¶¶ 2-5.)
10. The Statement of Claim also explained the carrying capacities of the Initial Ditch, the Deever’s Extension, and the Horton Extension and that water from all three has been appropriated. (Ring’s Exhibit A, pp. 2-3, ¶ 6.)
11. The Statement of Claim concludes by stating:

That the waters so appropriated have been used continuously during each and every year since the same was appropriated as aforesaid by and through the irrigation of said lands lying under said ditch and said extensions and to the extent of 4.68 cubic feet per second from Cherry Creek and to the extent of the entire supply afforded by said springs.

(Ring’s Exhibit A, p. 4, ¶ 7.)
12. Along with the Statement of Claim, a petition was filed by W. S. Horton’s attorney reiterating the claims set forth in the Statement of Claim (“Horton Petition”). (Ring’s Exhibit B.)
13. Previous to the filing of the Statement of Claim and Horton Petition, W. S. Horton filed a *Plat and Statement of the Campbell Ditch* on April 1, 1904 with the State Engineer’s Office (“Plat”). (Ring’s Exhibit E.)

14. The resulting decree in District Court, County of Fremont, Case No. CA 2700 adjudicated water rights to the Campbell Ditch the Deever's Extension to W. S Horton on November 14, 1905 ("1905 Decree"). (Ring's Exhibit C.)

15. The 1905 Decree stated:

It is by the Court considered, ordered, adjudged and decreed that there be allowed to flow into the said The Campbell Ditch out of the waters of Cherry Creek under and by virtue of an appropriation of date March 1st, 1882, being Cherry Creek Priority Number 1.5 and Arkansas River Priority Number 263.5, 2.34 cubic feet of water per second of time for the use and benefit of said W. S. Horton;

That there be further allowed to flow into said ditch under and by virtue of an appropriation by enlargement and extension through the Deevers Extension out of the waters of Cherry Creek under an appropriation of date March 1st, 1890, being Arkansas River Priority No. 384.7 and Cherry Creek Priority No. 3, 2.34 cubic feet of water per second of time for the use and benefit of said W. S. Horton.

It is further adjudged that the said The Campbell Ditch is entitled to receive and conduct from a certain spring situate South 6° 35' East 1230 feet from the North West Corner of Section 27, Twp. 48 North of Range 10 East N. M. M. and water from all springs along the line thereof, which runs thence Northeast 7380 feet to the original headgate of The Campbell Ditch, which is located on the North bank of Cherry Creek South 21° 15' West 3300 feet from the South quarter corner of Section 15, Township 48 North of Range 10 East N. M. M.

(Ring's Exhibit C, pp. 3-4.)

16. A. W. Alexander filed a petition dated October 29, 1907, with the District Court, County of Fremont seeking review of the 1905 Decree challenging the appropriation date claimed by W. S. Horton for use of water from Cherry Creek and the springs, asserting that the entirety of the water of Cherry Creek, including the springs as a source to Cherry Creek, was already appropriated ("Alexander Petition"). (Engineers' Exhibit 1.)

17. The District Court held a hearing regarding the Alexander Petition and issued a new decree on January 4, 1909, ("1909 Decree") modifying the findings and conclusions of the 1905 Decree (Ring's Exhibit D.)

18. The 1909 Decree stated:

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that said The Campbell Ditch is hereby numbered 316.5, and that there be allowed to flow into said The Campbell Ditch, out of the waters of Cherry Creek, under and by virtue of an appropriation of date March 1st, 1883, being Cherry Creek Priority No. 3, and Arkansas River Priority No. 282.5, 2.34 cubic feet of water per second of time, for the use and benefit of said W. S. Horton, and of his grantees claiming by, through and under said W. S. Horton.

That there be further allowed to flow into said Ditch, under and by virtue of an appropriation by enlargement and extension through the Deever's Extension, out of the waters of Cherry Creek, under an appropriation of March 1st, 1890, being Arkansas River priority Number 384.7, and Cherry Creek Priority Number 4, 2.34 cubic feet per second of time, for the use and benefit of said W. S. Horton, and of his said grantees claiming by, through and under said W. S. Horton.

AND IT IS FURTHER ADJUDGED that said The Campbell Ditch is entitled to receive and conduct from a certain spring situate south 6° and 35' east, 1230 feet from the Northwest corner of Section 27, Township 48, North, of Range 10 East of the New Mexico Meridian, and water from all springs along the line thereof, which runs thence northeast 7380 feet to the original headgate of The Campbell Ditch, which is located on the north bank of Cherry Creek, south 21° and 15' west, 3300 feet from the south quarter corner of Section 15, Township 48, North of Range 10 East of the New Mexico Meridian.

(Ring's Exhibit D, pp. 3-4.)

19. The 1909 Decree specifically stated that the 1905 Decree was "hereby set aside and annulled" and that the 1909 Decree was "hereby declared to be the only decree for said The Campbell Ditch." (Ring's Exhibit D, p. 4.)

20. Effectively, the 1909 Decree changed the appropriation date of the water right from March 1, 1882 to March 1, 1883. This had the effect of requiring the change of the Cherry Creek Priority Number from 1.5 to 3 and its' Arkansas River Priority Number from 263.5 to 282.5. Additionally, it required modifying the Deever's Extension Cherry Creek Priority Number from 3 to 4. The rest of the 1909 Decree remained consistent with the 1905 Decree. (See Ring's Exhibits C and D.)

## **II. ISSUE**

Ring's 56(h) Motion presented the issue of whether the springs as set forth in the 1909 Decree are a decreed supplemental source for the two Campbell Ditch water rights.

## **III. STANDARD OF REVIEW**

C.R.C.P. 56(h) provides, "At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question." The Colorado Supreme Court has explained that the purpose of Rule 56(h) is "to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds." *Matter of Bd. Of County Commissioners of County of Arapahoe*, 891 P.2d 952, 963, n. 14 (Colo. 1995) (quoting 5 Robert Hardaway & Sheila Hyatt, *Colo. Rules of Civil Procedure Annotated* § 56.9 (1985)).

"A material fact is simply a fact that will affect the outcome of the case." *Peterson v. Hallstead*, 829 P.2d 373, 375 (Colo. 1992) *citing* *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984) *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo.App.2008). In determining whether a genuine issue of material fact exists, the nonmoving party is entitled to all inferences that reasonably may be drawn from the undisputed facts, and any doubt as to the existence of a genuine issue of material fact must be resolved in the nonmoving party's favor. *Hennisse v. First Transit, Inc.*, 220 P.3d 980,985 (Colo. App. 2009) See *West Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 480–81 (Colo.2002) (applying summary judgment standards to a Rule 56(h) motion).

## **IV. ANALYSIS**

There are no genuine issues of material fact regarding the 56(h) Motion. The issue before this Court is fully rooted in a determination of a question of law regarding the legal interpretation of the 1909 Decree and what the 1909 Decree specifically

adjudicated regarding the spring water that feeds the Horton Extension of the Campbell Ditch.

Ring has presented the argument in its 56(h) Motion that the springs, as adjudicated in the 1909 Decree, constitute a supplemental source of water for the decreed Campbell Ditch water rights. Ring argues that such supplemental source is not in and of itself an independent water right, but rather an adjudicated source of water decreed to the two Campbell Ditch water rights up to the total decreed amount for both Campbell Ditch priorities of 4.68 c.f.s.

Applicants presented two arguments in the Applicants' Response concerning the 1909 Decree. First, the Applicants assert that the 1909 Decree did decree a separate and distinct water right in regards to the spring water feeding the Horton Extension. Second, the Applicants assert that even if the 1909 Decree did not decree a separate and distinct water right, it still decreed a separate and distinct right that is independent of the two Campbell Ditch priorities.

In the Engineers' Response, the Engineers argue that the springs referred to in the 1909 Decree were neither adjudicated as a separate and distinct water right nor as a supplemental source to the Campbell Ditch, but rather that the District Court in the 1909 Decree was simply recognizing an entitlement to receive the water from the springs with such entitlement supporting a future claim for a decreed appropriation. Having reviewed the evidence presented by all parties, the pleadings in Case Nos. 13CW3041 and 12CW95, and the arguments presented to this Court, it is this Court's opinion that the 1909 Decree adjudicates a supplemental source of water from the springs to the two Campbell Ditch priorities up to the total decreed amount for the two Campbell Ditch priorities of 4.68 c.f.s.

When interpreting a contract, a court's duty is to enforce the contract as written and not to rewrite or restructure it. *Roberts v. Adams*, 47 P.3d 690, 694 (Colo. 2001). To further that rationale, when interpreting and giving effect to a statute passed by the legislature, a court must look to the plain language of the statute and give meaning to every word and render none superfluous. *Colorado Water Conservation Board v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005). A court

should interpret a decree by focusing on its plain language. See *LoPresti v. Brandenburg*, 267 P.3d 1211, 1215 (Colo. 2011). “It is fundamental that a decree should be complete and certain in itself.” *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 199 n.14. Therefore, a court is to read a decree and give effect to the language as found in the decree.

The language of the 1909 Decree is clear. The District Court awarded W. S. Horton, and those claiming under him, an initial water right of 2.34 c.f.s. for the Campbell Ditch, a water right of 2.34 c.f.s. for the Deever’s Extension, and the right to the water from all the springs along the line running NE 7380 feet to the Campbell Ditch headgate. To read the 1909 Decree differently would be to ignore specific language in the decree concerning the spring water by giving that language no meaning. The 1909 Decree clearly acknowledges an appropriation of a supplemental/additional source of water from the springs to the two Campbell Ditch priorities up to the total decreed amount for the two Campbell Ditch priorities of 4.68 c.f.s.

When it comes to interpreting a decree of a court, if such decree is unambiguous, its language cannot be varied by extrinsic evidence. *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 199 n.14 (Colo. 1999). In this case, this Court does not read the 1909 Decree as facially ambiguous. However, even though extrinsic evidence may not be used to define or explain the language of a decree, it is arguable that extrinsic evidence may be used to determine whether or not the language of a decree is ambiguous. See, *East Ridge of Fort Collins, LLC v. Larimer and Weld Irr. Co.*, 109 P.3d 969, 974 (Colo. 2005). In determining if a decree is ambiguous, the language must be examined and construed in harmony with the plain and generally accepted meaning of the words used. *Id.* Accordingly, courts are free to review extrinsic evidence to determine if the language found in a decree is ambiguous. In this case, as the 1909 Decree merely acknowledges an appropriation of a supplemental source of water from the springs to the two Campbell Ditch priorities.

The Plat filed by W. S. Horton in 1904 provides a diagram of the Initial Ditch, the Deever’s Extension, and the Horton Extension. (Ring’s Exhibit E.) The Plat requested a total of 4.68 c.f.s. from Cherry Creek and 2.34 c.f.s. from the springs captured by the



Horton Extension. (Id.) The Plat diverges from the Statement of Claim and the Horton Petition in a significant regard in that the Statement of Claim and the Horton Petition did not request a flow amount for the Horton Extension. (Ring's Exhibits A and B.) The Statement of Claim and the Horton Petition expressly asked for **a total** of 4.68 c.f.s. for the Initial Ditch and the Deever's Extension and "to the extent of the entire supply afforded by said springs." (Id.) This indicates a change in position of W. S. Horton at the time of filing the application and therefore does not lend itself to showing, through extrinsic evidence, ambiguity in the 1909 Decree. Additionally, arguendo, if ambiguity does exist in the 1909 Decree, the change from the request in the Plat to that found in the Statement of Claim and Horton Petition is consistent with the ruling in the 1909 Decree and lends to the interpretation of the language in the 1909 Decree acknowledging an appropriation of a supplemental source of water to the two Campbell Ditch water rights. The 1909 Decree fails to establish a priority number, date or flow rate for this supplemental water source. Therefore, the court did not confirm a specific water right attributable to the springs but only decreed an entitlement to receive and conduct the springs' water without adjudicating any appropriation date or priority enforceable or administrable for a water right in the springs.

The 1905 Decree awarded W. S. Horton with a water right for the Initial Ditch in the amount of 2.34 c.f.s., a water right for the Deever's Extension in the amount of 2.34 c.f.s., and adjudged that the Campbell Ditch "is entitled to receive and conduct from a certain spring . . . and water from all springs along the line thereof . . . ." The 1905 Decree is consistent with the requests on the part of W. S. Horton found in the Statement of Claim and the Horton Petition. This similarity between the 1905 Decree and what was requested through the Statement of Claim and Petition indicates that the 1905 Decree is not ambiguous in its determinations and rulings.

Interestingly, the 1905 Decree was superseded and fully nullified by the ruling in the 1909 Decree. That being said, the 1905 Decree is still extrinsic evidence that can be utilized by this Court to determine if the language in the 1909 Decree is ambiguous in regards to the supplemental nature of the springs to the Campbell Ditch. This position is

strengthened given the fact that District Court Judge M. S. Bailey was the presiding judge in both instances. (See Ring's Exhibits C and D.)

The 1909 Decree does differ from the 1905 Decree in regards to the priority numbers awarded to the Campbell Ditch and consequently to the Deever's Extension based on the challenge to the 1905 Decree's ruling by A. W. Alexander. The 1909 Decree changed the appropriation date of the water right awarded to the Campbell Ditch to one year later. This required the District Court to award new Cherry Creek and Arkansas River priorities to that water right. The Deever's Extension saw its Cherry Creek priority changed simply as a result of the change to the Initial Ditch's Cherry Creek Priority. Other than those changes, the 1909 Decree remained substantively the same as the 1905 Decree. This substantive similarity is a strong indication that what was awarded in the 1905 Decree was intentional, and not the product of a mistake, oversight, or haste on the part of the District Court. As such, this Court, after reviewing the 1905 Decree, cannot find that the language in the 1909 Decree is ambiguous. Additionally, as with the extrinsic evidence discussed supra concerning the Plat, Statement of Claim, and Horton Petition, *arguendo*, if the 1909 Decree was determined to be ambiguous, the 1905 Decree supports the reading of the 1909 Decree as acknowledging an appropriation of a supplemental source of water to the Campbell Ditch water rights.

The Engineers put forth the argument that the District Court by not addressing the issues raised by A. W. Alexander regarding the tributary nature of the springs and the assertion that all of Cherry Creek had been appropriated could be indicative that the District Court did not feel W. S. Horton had proved his claim to the spring. This Court is persuaded by this argument.

The Engineers also have argued that "[i]t has been a longstanding rule in Colorado that if a decree is susceptible of more than one interpretation, one of which is consistent with applicable legal principles and the other of which are inconsistent with those principles, we obviously must choose that interpretation which accords with the controlling legal norms." *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1222 (Colo. 1988). This Court does not read the 1909 Decree as being

susceptible to more than one interpretation, even given the unique nature of its drafting. Courts should interpret decrees under the same principles as they would a contract. See generally, *LoPresti*, 267 P.3d at 1216 (applying general legal principles related to the interpretation of contract to interpret a decree).

This Court does agree with the Engineers' and Ring's position that the 1909 Decree did not award a separate and distinct water right to the springs feeding the Horton Extension of the Campbell Ditch for the reasons set forth by the Engineers. The 1909 Decree specifically does not award a priority to the Horton Extension, it does not decree acreage for the water's use, and it does not decree an amount; all things the District Court in 1909 was clearly aware needed to be included in order to decree a separate and distinct water right as shown by the District Court's award for the Campbell Ditch and the Deever's Extension. Therefore, there was no specific adjudication that the District Court made concerning the springs and Horton Extension.

#### **IV. CONCLUSION**

The 1909 Decree does not contain typical decree language when it comes to the "adjudged" spring water from the Horton Extension. As such, this language understandably has caused some confusion. This Court concludes that the language regarding the spring water is not ambiguous, the 1909 Decree and extrinsic evidence support that the spring water feeding the Horton Extension was acknowledged and only decreed as an entitlement to receive and conduct the springs' water without adjudicating any appropriation date or priority enforceable or administrable for a water right in the springs.

This holding is the most consistent with the language of the 1909 Decree and the extrinsic evidence presented. To read the 1909 Decree in any other manner, would require reading into the 1909 Decree language that is not present.

Dated this 13<sup>th</sup> day of January, 2016.

BY THE COURT:  
  
LARRY C. SCHWARTZ, WATER JUDGE  
WATER DIVISION 2

<b>DISTRICT COURT, WATER DIVISION 2, COLORADO</b> Court Address: 501 N. Elizabeth St. Suite 116 Pueblo, CO. 81003 Phone Number: (719) 404-8832	DATE FILED: December 26, 2017 3:24 PM DATE FILED: September 26, 2016 10:52 AM CASE NUMBER: 2012CW95
<b>CONCERNING THE APPLICATION FOR WATER RIGHTS OF:</b>  <b>DONALD E. DILL, CATHIE G. DILL, JERRY R. PEARCE and FRANCES M. PEARCE</b>  <b>IN FREMONT COUNTY</b>	▲ COURT USE ONLY ▲  Case No.: 12CW95  Ctrm.: 406
<b>ORDER RE: MOTION FOR CLARIFICATION OF JANUARY 13, 2016 ORDER</b>	

**THIS MATTER** comes before this Court on Yamaski Ring, LLC's Motion for Clarification of Court's Order of January 13, 2016, and the Judge being fully advised on this matter,

**FINDS AND ORDERS:**

1. The Decree issued on January 4, 1909 in District Court, County of Fremont, Case No. CA 2700 ("1909 Decree") did not adjudicate a separate and distinct water right for the springs apart from the Campbell Ditch water rights as the 1909 Decree did not set forth the necessary information nor did it establish a priority date for the spring water.

2. As the 1909 Decree did not adjudicate a separate and distinct water right for the springs, water from the springs cannot therefore be administered as a separate and distinct water right apart from the Campbell Ditch water rights.

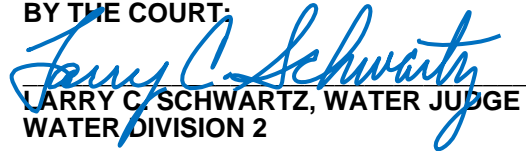
3. The 1909 Decree only recognized an entitlement to receive and conduct the springs' water without adjudicating any appropriation date or priority enforceable as a separate and distinct water right in the springs.

3. The 1909 Decree stated that the water from the springs was a supplemental/additional source for the two Campbell Ditch priorities and by implication was limited to the total decreed amount for the two Campbell Ditch priorities of 4.68 c.f.s.

4. The 1909 Decree stated that the water from the springs is a supplemental/additional source for the two Campbell Ditch water rights, therefore the owners of the Campbell Ditch water rights have an unenforceable entitlement to water from the springs when the two Campbell Ditch water rights are not fully satisfied from diversions from Cherry Creek up to a total of 4.68 c.f.s. however the supplemental/additional water from the springs is not enforceable against any other adjudicated water right holder.

Dated this 20<sup>th</sup> day of September, 2016

BY THE COURT:

  
LARRY C. SCHWARTZ, WATER JUDGE  
WATER DIVISION 2

<b>DISTRICT COURT, WATER DIVISION 2, COLORADO</b>  501 North Elizabeth Street, Suite 116 Pueblo, CO 81003	DATE FILED: <del>November 26, 2017</del> 11:24 PM CASE NUMBER: 2012CW95
<b>CONCERNING THE WATER RIGHTS OF :</b>  <b>DONALD E. DILL, CATHIE G. DILL, JERRY R. PEARCE and FRANCES M. PEARCE</b>  <b>IN FREMONT COUNTY</b>	<b>▲ COURT USE ONLY ▲</b>
	Case No. 12CW95 Div. 2
<b>ORDER GRANTING MOTION TO VACATE ORDER STAYING CASE, TO APPROVE STIPULATION, AND TO ENTER A FINAL ORDER RESOLVING ALL CLAIMS</b>	

The Court, having reviewed the Plaintiff’s Motion to Vacate Order Staying Case, to Approve Stipulation, and to Enter Final Order Resolving All Claims (“Motion”), the documents referenced therein and the responses and replies thereto, and having taken judicial notice of the pleadings and documents in the Court’s files, does hereby Find, Determine, and Order as follows:

1. The Court has had occasion to consider the substance of the First Claim in the captioned matter multiple times, and issued four orders that resolve the First Claim against the Plaintiffs. *See Findings of Fact, Conclusions of Law and Order*, Case No. 13CW3041, at 6 (August 1, 2017); *see also Order Re: Motion for Clarification of January 13, 2016 Order*, Case No. 12CW95, at 1 (September 20, 2016); *see also Order Re: Motion for Determination of Question of Law Filed September 28, 2015*, Case No. 12CW95, at 11 (January 13, 2016); *see also Order Denying Motion for*

*Preliminary Injunction*, Case No. 12CW95, at 3-4 (April 3, 2013). *See* Exhibits 1-4, attached to Motion.

2. As a result, on the First Claim for relief in the above-captioned matter, the Court finds that the water right defined as

[t]he Horton Creek Extension of the Campbell Ditch which comes from a spring located South 6 degrees 35' East 1230 feet from the NW corner of S27, T48N, R10E NMPM, Fremont County, Colorado and water from all springs along the line thereof.

is not a separate and distinct adjudicated water right from the water rights decreed under Cherry Creek Priorities 3 and 4. Instead, the water right described above was not adjudicated until Case No. 13CW3041.

3. The Court approves the stipulation between Dill/Pearce and French resolving the Second Claim, dated October 9, 2017. Previously, the Court approved a stipulation between Dill/Pearce and the Engineers on August 30, 2013 that also resolved the Second Claim.
4. On the Second Claim for relief, the Court in Case No. 13CW304 found that all springs feeding the Horton Creek Extension are tributary to Stout Creek and therefore are not subject to the priorities of Cherry Creek. The legal description of the springs that were adjudicated in Case No. 13CW3041:

- a. Upper Spring 1, WDID 1202823: UTM X/Easting 425000, UTM Y/Northing 4248910, Zone 13S;
- b. Upper Spring 2, WDID 1202824: UTM X/Easting 424914, UTM Y/Northing 4248865, Zone 13S;
- c. Upper Spring 3, WDID 1202825: UTM X/Easting 424729, UTM Y/Northing 4248756, Zone 13S;
- d. Upper Spring 4, WDID 1202826: UTM X/Easting 424755, UTM Y/Northing 4248734, Zone 13S;
- e. Upper Spring 5, WDID 1202827: UTM X/Easting 424815, UTM Y/Northing 4248776, Zone 13S;
- f. Moore Spring, WDID 1202822: UTM X/Easting 425225, UTM Y/Northing 4249291, Zone 13S;
- g. Horton Spring 1, WDID 1201093: UTM X/Easting 425258, UTM Y/Northing 4249058, Zone 13S;
- h. Horton Spring 2, WDID 1202820: UTM X/Easting 425402, UTM Y/Northing 4249433, Zone 13S; and
- i. Horton Spring 3, WDID 1202821: UTM X/Easting 425433, UTM Y/Northing 4249570, Zone 13S.

5. As a result, on the Second Claim, the Court finds for the Plaintiffs.



6. Further, the Court lifts the stay imposed by its March 7, 2016 *Order Vacating March 14, 2016 Evidentiary Hearing and for Stay of Proceedings* in Case No. 12CW95 because the Court found that the springs had not previously been adjudicated, no cause of action lies to quiet title. *See In re Water Rights for Turkey Canon Ranch*, 937 P.2d 739, 750 (Colo. 1997) (“[a]s a general proposition, then, although a water right vests upon appropriation, it is not legally enforceable until it is adjudicated.”).
7. All deadlines are hereby vacated and this order is a final, appealable order of the Water Court pursuant to C.R.C.P. 54(b) as of the date indicated below.

DATED this 9<sup>th</sup> day of November, 2017.



BY THE COURT:

*Larry C. Schwartz*  
LARRY C. SCHWARTZ, WATER JUDGE  
WATER DIVISION 2