

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p> <hr/> <p>DISTRICT COURT, WATER DIVISION NO. 7, LA PLATA COUNTY, COLORADO</p> <p>Honorable Jeffrey R. Wilson, Water Judge</p> <p>Case No. 2016CW3008</p> <hr/> <p>Appellants: GARY SHEEK, SHEEK FAMILY LIMITED PARTNERSHIP, and WESLEY SHEEK¹</p> <p>v.</p> <p>Appellees: ROGER BROOKS, VERYL GOODNIGHT</p> <p>Appellee pursuant to C.A.R. 1(e): DIVISION ENGINEER, WATER DIVISION 7</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Appellants: Amy N. Huff COLORADO WATER & LAND LAW, LLC 679 E. 2ND Avenue, Ste 11B Durango, CO 81301 Reg. No. 34897 Telephone No.: (970) 403-1770 Facsimile No.: (866) 915-3933 Email: amy@waterland-law.com</p>	<p>Case No:</p> <p>Div.: Ctrm.:</p>
<p style="text-align: center;">NOTICE OF APPEAL</p>	

¹ Pamsey I. Sheek died on May 16, 2017 and all of her property interests at issue in this dispute, both real and personal, including, but not limited to, her 0.33 c.f.s. in the Davenport Ditch M-13 priority were conveyed to Wesley Sheek.

In accordance with Rule (1)(e), 3, and 4 of the Colorado Appellate Rules, Gary Sheek, Sheek Family Limited Partnership, and Wesley Sheek (collectively “Sheek”), by and through their undersigned counsel, Amy N. Huff, Colorado Water & Land Law, LLC, hereby provide notice to Roger Brooks and Veryl Goodnight (collectively “Brooks”), and to the Colorado Supreme Court that Sheek intends to appeal the Order Granting Motions to Dismiss and for Summary Judgment in Case No. 2016CW3008, District Court, Water Division No. 7.

I. TRIAL COURT INFORMATION

COURT: District Court, Water Division No. 7

COUNTY: La Plata County

JUDGE’S NAME: Hon. Jeffrey R. Wilson

PARTY INITIATING THE APPEAL: Gary Sheek, Sheek Family Limited Partnership, and Wesley Sheek

TRIAL COURT CASE NUMBER: 2016CW3008

II. BRIEF DESCRIPTION OF NATURE OF CASE

A. Statement of Controversy

This dispute concerns the unlawful interference with water rights and an

irrigation ditch that date back to 1881. For over 120 years, the two priorities decreed to the Davenport Ditch (i.e., #M-9 and #M-13) were the only water rights diverted from the Middle Mancos River at the Davenport Ditch headgate. Sheek (and Sheek's predecessors) have been the sole owners of the Davenport Ditch water rights and the ditch easement which extends nearly a mile. All maintenance, repairs, structures, and operations necessary to place the Davenport Ditch water rights to beneficial use have been performed by Sheek². Sheek has exercised exclusive control over the ditch and ditch easement.

Without Sheek's approval or a determination that Brooks could use Sheek's ditch and ditch easement, the Water Judge for Water Division No. 7 signed a decree that purported to change the point of diversion for the Giles Ditch (i.e., #M-20) to the headgate of the Davenport Ditch. Brooks owns Giles Ditch water right. Not only was the change in water right approved without consulting Sheek, but the resume notice was so defective that Sheek could not have reasonably been alerted to the nature, scope, and impact of Brooks's Application for a Change of Water Right (i.e., Case No. 2008CW64, District Court, Water Division No. 7).

² Sheek's predecessor also performed maintenance on the ditch easement, but since acquiring the Davenport Ditch water right decades ago, Sheek has exclusively operated the Davenport Ditch and performed all maintenance and repairs on the ditch and ditch easement.

Sheek maintains that the decree in Case No. 2008CW64 is void because the resume notice was defective. It incorrectly identified the $\frac{1}{4}$, $\frac{1}{4}$ $\frac{1}{4}$, section, and range for the Davenport Ditch headgate. Brooks was required to file an Amended Application to correct the foregoing material errors, but notice of the Amended Application was not published.

Even if the resume notice was sufficient, Sheek is the dominate estate owner and therefore Sheek's approval, or a ruling from the Court, is required before Brooks can lawfully use Sheek's easement and structures. Brooks never notified Sheek of the decree in Case No. 2008CW64. Brooks did not install a measuring device at the headgate of the Davenport Ditch or at any location along Sheek's ditch easement. Instead, Brooks cut the banks of Sheek's ditch, placed sandbags in the ditch, and began pumping water straight out of the ditch; never measuring diversions.

Sheek's complaint sought to void the Decree in Case No. 2008CW64, quiet title to Sheek's ditch easement, injunctive relief to prevent Brooks from using and interfering with Sheek's easement, and damages for trespass, theft and interference with Sheek's easement and water rights.

B. The Judgment, Order or Parts Being Appealed and a Statement Indicating the Basis for the Appellate Court's Jurisdiction

The Order Granting Motions to Dismiss and For Summary Judgment entered on March 2, 2018.

This Court has jurisdiction over this matter pursuant to Colo. Const. art VI § 2(2); § 13-4-102(1)(d), C.R.S.

C. Whether the Judgment or Order Resolved All Issues Pending Before the Trial Court, Including Attorneys' Fees and Costs

The Order described above resolved all issues.

D. Whether the Judgment Was made Final for Purposes of An Appeal Pursuant to CRCP 54(b)

No.

E. The Date the Judgment or Order was Entered

March 2, 2018

F. Whether There Were Any Extensions Granted to File Any Motions for Post-Trial Relief

No.

G. The Date Any Motion for Post-Trial Relief Was Filed

No motions for post-trial relief were filed.

H. The Date Any Motion For Post-Trial Relief Was Denied or Deemed Denied Under CRCP 59(j)

N/A

I. Whether There Were Any Extensions Granted to File Any Notice(s) of Appeal

No.

III. AN ADVISORY LISTING OF THE ISSUES TO BE RAISED ON APPEAL

- A. Whether the trial court erred in finding that the resume notice for the relief sought in Case No. 2008CW64 satisfied the injury notice standard.
- B. Whether the trial court erred in holding that the District Court, Water Division No. 7, had subject matter jurisdiction over Case No. 2008CW64.
- C. Whether the trial court erred in declaring moot Sheek's request for injunctive relief to prevent Brooks from using the Davenport Ditch.
- D. Whether the trial court erred in declaring moot Sheek's trespass claim.
- E. Whether the trial court erred in affirming that Brooks has "the right to use the Davenport Ditch," without the consent of the dominate estate owner or a judicial determination that Brooks can lawfully use Sheek's property interest.
- F. Whether the trial court erred in dismissing Sheek's 2, 3, 4, and 5 causes of action, as set forth in Sheek's Second Amended Complaint.

IV. WHETHER THE TRANSCRIPT OF ANY EVIDENCE TAKEN BEFORE THE TRIAL COURT IS NECESSARY TO RESOLVE THE ISSUES RAISED ON APPEAL

No. No hearing was held.

**V. WHETHER THE ORDER ON REVIEW WAS ISSUED BY A
MAGISTRATE**

No.

**VI. NAMES, ADDRESSES, TELEPHONE NUMBERS, AND
REGISTRATION NUMBERS OF COUNSEL FOR THE PARTIES**

Sheek's Counsel: Amy N. Huff, Reg. No. 34897, (amy@waterland-law.com)
COLORADO WATER & LAND LAW, LLC, 679 E. 2nd Avenue, Ste 11B,
Durango, Colorado 81301. (970) 403-1770.

Brooks' Counsel: Keenen Lovett, Reg. No. 47178,
(klovett@mccabelawcortez.com), KELLY R. McCABE, P.C., 22 E. Main St.,
P.O. Box 1296 Cortez, Colorado 81321. (970) 565-7209.

and Jennifer Russell, Reg. No. 22047 (jenny.russell@lawtelluride.com),
RUSSELL & PIETERSE, LLC, P.O. Box 2673 Telluride, Colorado 81435. (970)
239-1972.

**VII. AN APPENDIX CONTAINING A COPY OF THE JUDGMENT OR
ORDER BEING APPEALED.**

The Order referenced herein is attached.

VIII. CERTIFICATE OF SERVICE

Attached below is a Certificate of Service in compliance with CAR 25, which shows that service of the Notice of Appeal (with attachments) was made on the following via ICCES:

Roger Brooks and Veryl Goodnight
44255 Road L
Mancos, CO 81328

Ida May Smith
11612 CR 44

Mancos, CO 81328

The James Fenberg Revocable Trust
218 South Central
Clayton, MO 63105

Robert Genualdi
Division Engineer, Water Division No. 7

This Notice of Appeal was also filed with the District Court, La Plata County, Water Division No. 7, through ICCES and the electronic procedures authorized by CRCP 121, Sec 1-26.

Respectfully submitted this 20th day of April, 2018

COLORADO WATER & LAND LAW, LLC

s/Amy N. Huff
By: Amy N. Huff, #34897

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 20th day of April, 2018, a true and correct copy of the foregoing was served on the following via ICCES:

Roger Brooks and Veryl Goodnight
44255 Road L
Mancos, CO 81328

Ida May Smith
11612 CR 44
Mancos, CO 81328

The James Fenberg Revocable Trust,
218 South Central
Clayton, MO 63105

Robert Genualdi
Division Engineer, Water Division No. 7

The undersigned also certifies that, on this 20th day of April, 2018, a true and correct copy of the foregoing was filed with the District Court, La Plata County, Water Division No 7.

 /s/Alice McKaughn
Alice McKaughn

Pursuant to CRCP 121, a duly signed copy of the foregoing is available for inspection at the office of Colorado Water & Land Law, LLC

DISTRICT COURT, WATER DIVISION NO. 7, COLORADO Court Address: 1060 East Second Avenue, Durango, CO 81301 Telephone No.: (970) 247-2304	<p style="text-align: center;">FILED</p> <p style="text-align: center;">IN DISTRICT COURT WATER DIVISION 7</p> <p style="text-align: center;">MAR - 2 2018</p> <p style="text-align: center;">DATE FILED: MAR 21 2018 CASE NUMBER: 2016CW3008 DURANGO COLORADO CLERK</p>
Plaintiffs: GARY SHEEK, SHEEK FAMILY LIMITED PARTNERSHIP, and PAMSEY I. SHEEK v. Defendants: ROGER BROOKS, VERYL GOODNIGHT, IDA MAY SMITH, and THE JAMES FENBERG REVOCABLE TRUST	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
	Case No.: 2016CW3008
ORDER GRANTING MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT	

This matter comes before the Court upon the defendants’ motion for summary judgment on Count 1 of the plaintiffs’ second amended complaint and a separate motion to dismiss the remaining counts of the second amended complaint. The Court grants both motions for the reasons stated below:

MOTION FOR SUMMARY JUDGMENT

The Court shall enter summary judgment when the record shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); C.R.C.P. 56(c). However, “all doubts concerning summary judgment should be resolved against the moving party.” *Dominguez v. Babcock*, 727 P.2d 362, 365 (Colo. 1986). Additionally, the moving party

bears the initial responsibility to inform the court of its basis for summary judgment and to identify those portions of the record which demonstrate the absence of a genuine factual issue.

Celotex Corp. v. Catrett, 477 U.S. 317, 323; *Continental Airlines, Inc.*, p. 712.

Count 1 of the plaintiffs' second amended complaint alleges that because the plaintiffs did not have actual or constructive notice of Defendants Brooks' and Goodnight's application to change the diversion point of their previously decreed water rights from the Giles Ditch to the Davenport Ditch, the decree granting the requested change in the location of the diversion granted in case number 08CW64 is void. The plaintiffs argue that the resume published in the Dolores Star incorrectly identified the new point of diversion as being located in the wrong quarter section, wrong section and wrong range, and did not republish notice of the amended application when the error in the legal description was noticed and that the granting of the decree without adequate notice was a violation of the plaintiffs' due process rights.

While there are disputes of fact regarding whether the plaintiffs had actual notice, the material facts regarding the published notice are not in dispute. In their application in 08CW64, the defendants sought to change the point of diversion of their previously decreed water rights from the Giles Ditch to the Davenport Ditch. The plaintiffs were the only users of the Davenport Ditch at the time of the application and the Davenport Ditch runs across the defendants' property. The resume notice that was published did not list the correct legal description for the defendants proposed new diversion point. The proposed diversion is located approximately 100 feet from the published legal description and in a different quarter section than the legal description that was published. However, the published notice refers to the Davenport Ditch five times, including one time in bold type. The water court issued the decree approving the change

in location on December 23, 2009, and the plaintiffs did not file an objection in 08CW64 and did not file this case until March 28, 2016.

CRS 37-92-302(3)(a) provides for publication notice in water cases which substitutes for personal service “. . . so long as the form of notice and the information provided is sufficient to place parties on inquiry notice.” [citations omitted]. *In re Water Rights of Columbine Ass'n*, 993 P.2d 483, 488 (Colo. 2000).

Inquiry notice requires sufficient facts to attract the attention of interested persons and prompt a reasonable person to inquire further. The receipt of inquiry notice charges a party with notice of all the facts that a reasonably diligent inquiry would have disclosed. *Colburn v. Gilcrest*, 55 Colo. 92, 94, 151 P. 909, 910 (1915). Consequently, alleged deficiencies invalidate the resume only if the resume taken as a whole is insufficient to inform or put the reader on inquiry of the nature, scope and impact of the proposed diversion.

Monaghan Farms, Inc. v. City & Cty. of Denver By & Through Bd. of Water Comm'rs, 807 P.2d 9, 15 (Colo. 1991). Inquiry notice is sufficient if anyone affected by the changed water right “. . . should have anticipated that the disputed rights might be at issue.” *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 24–25 (Colo. 1996), citing *Thornton v. City of Ft. Collins*, 830 P.2d 915 (Colo 1992).

In this case, even though the legal description of the proposed new point of diversion was incorrect, the mentioning of the Davenport Ditch five times in the notice, including one time in bold, is certainly sufficient to place the plaintiffs, who were the only users of the Davenport Ditch, on notice that the defendants intended to relocate their point of diversion to the Davenport Ditch.

The plaintiffs cite Rule 4(b) of the Uniform Local Rules for all State Water Courts to argue the defendants were required to republish notice in 08CW64 because the legal description of the new diversion originally published was in a different quarter section of the actual location

of the proposed diversion and that the failure to republish notice with the correct legal description was a jurisdictional defect. While the Court agrees that inadequate notice would deprive the Court of jurisdiction to enter the decree in 08CW64, the Court has already found that adequate notice was given to the plaintiffs. Thus, there is no jurisdictional defect. Rule 4(c) of the Uniform Local Rules for all State Water Courts allows for a water judge to make a finding that republication due to the amendment of the application not necessary so long as no party is injured by the failure to republish. In 08CW64, Judge Lyman found that no party would be injured by the failure to republish. This Court agrees. The plaintiffs had adequate notice that the defendants intended to locate a new diversion point on the Davenport Ditch, which was all that was necessary for notice as the plaintiffs were the only parties using the Davenport Ditch.

The plaintiffs also argue that the lack of notice denied them due process. Again, the Court disagrees. As stated above, the Court finds that the published resume, although it contained a defective legal description, did provide sufficient information to inform the plaintiffs that the Davenport Ditch would be used to transport a decreed water right and that that water right would be diverted from the Davenport Ditch at a point before the plaintiffs' water was delivered to the end of the Davenport Ditch. All that due process requires “. . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 633 (Colo. 1987). The Court does not find a due process violation despite the error in the legal description contained in the published resume.

For the foregoing reasons, the Court grants the defendants' motion for summary judgment and dismisses Count 1 of the plaintiffs' complaint.

MOTION TO DISMISS

The defendants also filed a motion to dismiss the remaining counts of the complaint alleging that the water court does not have jurisdiction to hear the second through fifth causes of action in the plaintiffs' second amended complaint because the remaining claims are not water claims and are not ancillary to the water claim. The plaintiffs argue that water judges have jurisdiction to adjudicate cases involving water rights and to resolve disputes that affect water use and that Counts 2 through 5 of the second amended complaint are ancillary matters to the water claim contained in the first cause of action of the second amended complaint.

Water courts do have jurisdiction to resolve non-water disputes if they are ancillary to water matters pending in the water court. *Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 543 (Colo. 1996). By ruling above that the decree issued in 08CW64 is not void for lack of notice, the Court has reaffirmed that the defendants have the right to use the Davenport Ditch as their means to deliver their water to their land. Thus, the plaintiffs' causes of action alleging trespass and seeking an injunction from using the Davenport Ditch are moot. The remaining causes of action are for a declaratory judgment for a prescriptive easement for the Davenport Ditch (Second Claim for relief), theft for allegedly diverting the Sheeks' water from the Davenport Ditch onto the defendants' land (fourth claim for relief), and for an injunction prohibiting the defendants from interfering with the plaintiffs' property rights (fifth claim for relief). The Court finds it does not have ancillary jurisdiction over the remaining causes of action. A court has ancillary jurisdiction when:

- (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter;
- (2) the ancillary matter can be determined without a substantial new fact finding proceeding;
- (3) determination of the

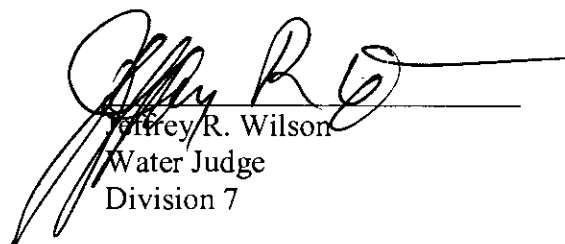
ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

People v. Hargrave, 179 P.3d 226, 229–30 (Colo. App. 2007), citation omitted.

None of the remaining causes of action are ancillary to the plaintiffs' request to declare the change in the water right decreed in 08CW64 is void. Whether the plaintiffs received proper notice of the requested change in a water right has no relation to the remaining causes of action and, thus, the plaintiffs fail the first and fourth prongs of *Hargrave* as listed above. The remaining causes of action also fail the second prong of *Hargrave* as the remaining causes of action would require much different evidence to adjudicate than the evidence necessary to adjudicate a water right. The appropriate court to raise these issues is in the Montezuma County District Court in which both jurisdiction and venue lie for these claims.

For the foregoing reasons, the Court also grants the motion to dismiss Counts 2, 3, 4, and 5 of the plaintiffs' second amended complaint and dismisses this case in its entirety.

Done and signed this 2nd day of March, 2018.


Jeffrey R. Wilson
Water Judge
Division 7