

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p> <hr/> <p>Trial Court: Water Court for Water Division 3 State of Colorado 702 4th Street Alamosa, CO 81101 The Honorable Pattie P. Swift Case Nos. 2016CW3013</p> <hr/> <p>CONCERNING THE APPLICATIONS FOR WATER RIGHTS OF</p> <p>Applicant: LEE CROWTHER</p> <p>In the Conejos River or its Tributaries In CONEJOS COUNTY</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorney for S. Cade and Bradley H. Huffaker Name: ERICH SCHWIESOW, PC By: Erich Schwiesow Address: 603 3rd Street P.O. Box 1974 Alamosa, Colorado 81101 Phone Number: (719) 589-6625 E-Mail: erich@erichschwiesowpc.com Atty. Reg.#: 23385</p>	<p>Case Number: 2018 SA Division Courtroom</p>
<p style="text-align: center;">NOTICE OF APPEAL</p>	

Opposers S. Cade Huffaker and Bradley H. Huffaker, by and through their undersigned attorney, submit this Notice of Appeal pursuant to C.A.R. 3:

1. Nature of the Case: This case was originally filed by Lee Crowther as an

application for a tailwater right in Conejos County, Colorado as Case No. 2016 CW 3013. It was consolidated for trial with Case No. 2013 CW 3012, an application for tailwater on the same source (in fact with overlapping areas of collection) by the Huffakers. After trial, the trial court issued one decree for both cases, which decree is the subject of this appeal.

A. Nature of the Controversy:

The cases were consolidated for trial because they share many of the same facts, most saliently, the same source of water: tailwater accumulating in a borrow ditch along a County Road. The trial court's decree frames the issue, and the nature of the controversy, succinctly (paragraph numbers kept, but paragraphs re-ordered for clarity):

24. The Huffakers' application claims water that is collected in the 3,377 feet of the borrow ditch from just north of the Bagwells' [non-party with existing decreed tailwater right in same borrow ditch] northernmost culvert all the way to the flume they installed at the intersection of County Road 19 and County Road R.

23. The Bagwells' northernmost culvert is located approximately 800 to 1000 feet south of Mr. Crowther's Culvert Number 1. The stretch of borrow ditch between these two culverts and the water collected and delivered from this stretch constitute the major disagreement between the Huffakers and Mr. Crowther.

25. Mr. Crowther objects to the court awarding the Huffakers the water that

collects south of Mr. Crowther's Culvert Number 1 because water cannot travel north of this location in the L.N. Bagwell Seepage and Drainage Ditch. Immediately to the north of Culvert Number 1 along the western edge of County Road 19 is an entryway into the field lying directly west of County Road 19. Water flowing north in the borrow ditch cannot pass the entryway because it blocks the borrow ditch [there is no culvert] and, in effect, directs water into Culvert Number 1.

These paragraphs quoted from the Decree entered by the trial court state the nature of the controversy in a nutshell.

B. The Judgments or orders being appealed and the basis for this Court's jurisdiction: The Huffakers appeal the decree in the cases entered July 24, 2018.

The Supreme Court has jurisdiction pursuant to C.R.S. §§ 37-92-304(9) and 13-4-102(1)(d), as this is a water matter.

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

The Orders resolved all issues pending before the trial court.

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

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

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

The decree was made and entered July 24, 2018, and was served on counsel on that same day.

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

No extensions were sought or granted.

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

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

Not Applicable.

I. Whether there were any extensions granted to file any Notices of Appeal: None.

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

A. Did the Trial Court err in decreeing that the Huffakers' water right applied for in 2013 CW 3012 was junior to a portion of the water right applied for by Lee Crowther in 2016 CW 3013 where the postponement doctrine, set forth in C.R.S. § 37-92-306, provides that priority on the same water source is determined by date of application?

B. Did the trial court err in not requiring Lee Crowther to install any measuring or control devices at his culvert no. 1 to adequately administer the water in the borrow ditch between himself and the Huffakers?

3. Transcript: No transcript of the trial held on March 27, 2018, is necessary to resolution of the appeal, as the Huffakers do not challenge any factual findings or evidentiary rulings made by the trial court.

4. Whether the order on review was issued by a magistrate where consent was

necessary. If the order on review was issued by a magistrate where consent was not necessary, whether a petition for review of the order was filed in the trial court and ruled on by a trial court judge pursuant to the Colorado Rules for Magistrates: Not applicable.

5. Names of Counsel for the Parties:

Counsel for the Huffakers:

Erich Schwiesow, #23385
PO Box 1974
Alamosa, CO 81101
erich@erichschwiesowpc.com
(719) 589-6625

Counsel for Lee Crowther

Gordon J. Bosa #8905
202 Edison Avenue/PO Box 58
Alamosa, CO 81101
gordwa@aol.com
(719) 589-6603

Counsel for Opposer Conejos Water Conservancy District

Richard J. Mehren, #32231
William D. Davidson, #49099
Moses, Wittemyer, Harrison and Woodruff, P.C.
2595 Canyon Boulevard, Suite 300
Boulder, Colorado 80302
rmehren@mwhw.com; w davidson@mwhw.com
(303) 443-8782 (303) 443-8796

6. An appendix containing a copy of the judgment or order being appealed, the findings of the court, if any, the motion for new trial, if any, and a copy of the trial

court's order granting or denying leave to proceed in forma pauperis if appellant is filing without docket fee pursuant to C.A.R. 12(b): is attached.

RESPECTFULLY SUBMITTED August 29, 2018

ERICH SCHWIESOW, PC

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

By /s/ Erich Schwiesow
Erich Schwiesow, #23385

CERTIFICATE OF SERVICE

I do hereby certify that on August 29, 2018, a true and correct copy of the above Amended Notice of Appeal and attached appendix was e-filed and served via ICCES upon the trial court, and upon all parties of record in the trial court as indicated in the ICCES electronic record:

Gordon J. Bosa
attorney for Lee Crowther

*Appeals Clerk
12th Judicial District*

Richard J. Mehren
William D. Davidson
Attorney for Conejos Water Conservancy District

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

 /s/ Erich Schwiesow

Water Court, Water Division 3, State of Colorado Court Address: 702 Fourth Street Alamosa, CO 81101 Phone Number: 719-589-4996	DATE FILED: 29 Jul 2018 10:48:20 AM CASE NUMBER: 2016CW3013
<p>CONCERNING THE APPLICATIONS FOR WATER RIGHTS OF Applicants:</p> <p>S. CADE HUFFAKER AND BRADLEY H. HUFFAKER</p> <p>And of</p> <p>LEE CROWTHER</p> <p>In the Conejos River or its Tributaries</p> <p>In CONEJOS COUNTY</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case No.'s: 2013CW3012 and 2016CW3013 Division: 1
<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT, AND DECREE</p>	

THESE MATTERS came on for trial to the court on March 27, 2018. By agreement of the parties the court consolidated these cases for trial because they are, in part, applications for the same water. Applicants in 2013CW3012, S.Cade Huffaker and Bradley H. Huffaker, were present with their attorney, Erich Schwiesow, and Applicant in 2016CW3013, Lee Crowther, was present with his attorney, Gordon J. Bosa. The court, having made a site visit, having heard the testimony presented at trial, having reviewed the exhibits admitted at trial and having reviewed the proposed findings and conclusions of the parties, makes the following Findings of Fact and Conclusions of Law, and enters the following Judgments and Decrees:

I. FINDINGS OF FACT

FILING, NOTICE, STATEMENTS OF OPPOSITION

1. S. Cade and Bradley Huffaker filed the application in 2013CW3012 on December 24, 2013. The Water Clerk caused a resumé of the application to be published, and the court has jurisdiction of the parties and subject matter of this application. C.R.S. § 37-92-302. Lee

Crowther timely filed the sole statement of opposition on February 28, 2014. The basis of the statement of opposition was that Lee Crowther claimed to own 10 c.f.s. of the water that is the subject of the application.

2. Lee Crowther filed the application in 2016CW3013 on September 29, 2016. The Water Clerk caused a resumé of the application to be published, and the court has jurisdiction of the parties and subject matter of this application. C.R.S. § 37-92-302. S. Cade Huffaker and Bradley H. Huffaker timely filed a statement of opposition on November 28, 2016. The Conejos Water Conservancy District also timely filed a statement of opposition on November 30, 2016, but settled with Mr. Crowther prior to trial. The basis for the Huffakers' statement of opposition was that any water rights Mr. Crowther claimed were junior to their rights in this water.

REFERRAL

3. The Water Judge referred the Application in 2013CW3012 to the Water Referee for Water Division 3 on December 30, 2013, in accordance with C.R.S. § 37-92-203(7). The Water Referee re-referred the Application to the Water Judge on November 26, 2017.

4. The Water Judge referred the Application in 2016CW3013 to the Water Referee for Water Division 3 on October 28, 2016, in accordance with C.R.S. § 37-92-203(7). The Water Referee re-referred the application to the Water Judge on November 6, 2017.

NAME, ADDRESS AND TELEPHONE NUMBER OF APPLICANTS

5. The Applicants in 2013CW3012 are S. Cade Huffaker, 16497 County Road P, La Jara, Colorado 81140, chuffaker@northconejos.com, (719) 580-7134; and Bradley H. Huffaker, 15142 County Road S, La Jara, Colorado 81140, bhuff.ncsd@gmail.com, (719) 843-0934.

6. The Applicant in 2016CW3013 is Lee Crowther, 14000 County Road Z, La Jara, CO 81140, lee.crowther25@gmail.com, (719) 480-1764.

NAME OF STRUCTURE

7. The Applicants in both 2013CW3012 and 2016CW3013 claim rights to tail and waste water that collects in the L.N. Bagwell and Sons Seepage and Drainage Ditch.

VESTED RIGHTS

8. Granting these Applications in the manner set forth below will not result in a change in time, place or amount of water available to other water rights, and the Applications may be granted consistent with the Division Engineer's Report and Recommendation filed on March 14, 2017, in 2016CW3013, and filed on April 18, 2014, in 2013CW3012, and this Decree.

9. At the time of the filing of the application in 2013CW3012, and at the time of trial, the Huffakers owned the Southwest quarter of Section 8, Township 34 North, Range 10 East, N.M.P.M. Their great grandfather, L.N. Bagwell, who filed the map and filing statement for the L.N. Bagwell and Sons Seepage and Drainage Ditch in 1952 (Exhibit 7), owned the property until 1977 when he conveyed it to the Huffakers' parents. The Huffakers acquired the property in 2010.

10. At the time of the filing of the application, and at the time of trial, Mr. Crowther owned 160 acres located directly south of the Huffakers' land and more particularly described as the Northwest quarter of Section 17, Township 34 North, Range 10 East, N.M.P.M.

11. County Road 19 runs north and south along the western edge of the Crowther property and is the section line between Sections 17 and 18 of Township 34 North, Range 10 East, N.M.P.M.

12. To the north, County Road R intersects County Road 19 and is located on the section line between the Northwest quarter of Section 17, which Mr. Crowther owns, and the Southwest quarter of Section 8, which the Huffakers own.

13. The source of supply for the water rights claimed in both of these cases is tail water that collects in the borrow ditch along the western edge of County Road 19. This tail water is from the irrigation of lands west of the North half of the Southwest quarter and the Northwest quarter of Section 17, Township 34 North, Range 10 East, N.M.P.M., in Conejos County, Colorado. Both applicants deliver the tail or waste water to their respective properties through culverts under County Road 19.

14. The amount of tail water collected in the borrow ditch on the west side of County Road 19 varies from year to year, and within each year, depending upon the irrigation practices upgradient from the borrow ditch on the west side of County Road 19. Historically, there was more tail water collected and flowing in the borrow ditch on the west side of County Road 19 than there is today.

15. The Huffakers deliver water to their property by fluming water under the intersection of County Road 19 and County Road R at the location identified as the headgate on the Exhibit 7 map and filing statement. From there it runs east in a ditch described on that map and filing statement. In the past, that ditch was flumed over the Ephraim, Richfield, and Sanford canals to irrigate the entire Southwest quarter of Section 8. Now, the flume system has deteriorated, and only about 75 acres lying west of the Ephraim Ditch are irrigated. The Huffakers seek an absolute water right for 8 c.f.s. to irrigate those 75 acres lying west of the Ephraim Ditch, and a conditional water right for those same 8 c.f.s. to irrigate the remaining 85 acres lying east of the Ephraim Ditch.

16. In 2016, the Huffakers installed a Parshall flume to measure the water in the borrow ditch, at a point just upstream of the headgate where they flume the water under the

intersection of County Road 19 and County Road R. The Huffakers measured the peak flow through the flume in May of 2016 as 9.1 c.f.s. They measured the peak flow in 2017 at 7.3 c.f.s.

17. Mr. Crowther has delivered water to his property through three culverts located south of the intersection of County Road 19 and County Road R and all delivering water west to east under County Road 19.

18. Culvert Number 3, the northernmost culvert, is located approximately 900 feet south of the north section line and 5 feet west of the west section line of Section 17. This culvert is totally sealed across the borrow ditch and Mr. Crowther uses it exclusively to deliver Manassa Land and Irrigation water to his property. This culvert is irrelevant to the applications in these cases.

19. Culvert Number 2, the middle culvert, was located approximately 1,350 feet south of the north section line and 5 feet west of the west section line of Section 17. Several years ago, Conejos County removed this culvert at the request of the Huffakers and Mr. Crowther would like to have it re-installed. According to Conejos County Commissioner Mitchell Jarvies, the County is willing to re-install this culvert if Mr. Crowther can show that he has a water right to take water out of the borrow ditch at that location. Mr. Crowther asks the court to decree a conditional water right of 3 c.f.s. to this culvert. Mr. Crowther concedes that any water rights diverted from this culvert are junior to the Huffakers' claims.

20. Culvert Number 1, the southernmost of Mr. Crowther's culverts, is located 2,630 feet south of the north section line and 5 feet west of the west section line of Section 17. Mr. Crowther uses this culvert to transport his Manassa Land and Irrigation water to the Northwest quarter of Section 17, Township 34 North, Range 10 East, N.M.P.M. Because this culvert is open to the borrow ditch on the west side of County Road 19, it has, historically, also transported

tail and waste water from the L.N. Bagwell Seepage and Drainage Ditch to what is now the Crowther property.

21. G. Lee Bagwell and Grace Bagwell own the property that abuts Mr. Crowther's property on the south. The Bagwells' property is more particularly described as the North half of the Southwest quarter of Section 17, Township 34 North, Range 10 East, N.M.P.M.

22. The Bagwells have a tail water decree for waters collecting in the borrow ditch located along the western edge of County Road 19, but further south. They also deliver water to their property through culverts under County Road 19.

23. The Bagwells' northernmost culvert is located approximately 800 to 1000 feet south of Mr. Crowther's Culvert Number 1. The stretch of borrow ditch between these two culverts and the water collected and delivered from this stretch constitute the major disagreement between the Huffakers and Mr. Crowther.

24. The Huffakers' application claims water that is collected in the 3,377 feet of the borrow ditch from just north of the Bagwells' northernmost culvert all the way to the flume they installed at the intersection of County Road 19 and County Road R.

25. Mr. Crowther objects to the court awarding the Huffakers the water that collects south of Mr. Crowther's Culvert Number 1 because water cannot travel north of this location in the L.N. Bagwell Seepage and Drainage Ditch. Immediately to the north of Culvert Number 1 along the western edge of County Road 19 is an entryway into the field lying directly west of County Road 19. Water flowing north in the borrow ditch cannot pass the entryway because it blocks the borrow ditch and, in effect, directs water into Culvert Number 1. Mr. Crowther claims that he is entitled to a water right for the water that collects in the stretch of the borrow ditch between the Bagwells' northernmost culvert and his Culvert Number 1.

26. The Huffakers claim they are entitled to the water that collects in the borrow ditch for the entire 3,377 feet because the Map of the L.N. Bagwell Seepage and Drainage Ditch, Exhibit 7, appears to indicate that all the water collecting in the ditch from one mile, or 5,280 feet, south of the intersection of County Road 19 and County Road R was intended to irrigate the Southwest quarter of Section 8, Township 34 North, Range 10 East of the N.M.P.M., *i.e.* the Huffakers' property. As drawn, the Map shows the L.N. Bagwell Seepage and Drainage Ditch located in the borrow ditch of County Road 19 and extending for a mile south of the intersection between County Road 19 and County Road R. Cade Huffaker testified that he believed his great grandfather, L.N. Bagwell, intended to appropriate all of the water that seeped into the L.N. Bagwell Seepage and Drainage Ditch but that, because G. Lee and Grace Bagwell had obtained a water right for seepage and tail water from the L.N. Bagwell Seepage and Drainage Ditch, he and his brother were only seeking the water that accumulated north of their headgate. He measured the distance from the Bagwells' headgate to the intersection of County Road 19 and County Road R as 3,377 feet.

27. In this case, however, the evidence at trial showed that for the past thirty years or more there has been a driveway, located directly north of Mr. Crowther's Culvert Number 1, which blocks water from flowing north in the L.N. Seepage and Drainage Ditch. Testimony of Dennis Crowther. According to L.N. Bagwell's grandson, Robert Bagwell, it looks like this driveway has been in place for a number of years but he had not noticed it prior to the current dispute between the Huffakers and Mr. Crowther. As long as that driveway has been in place, the only way the Huffakers could have received water that collected in the borrow ditch south of Mr. Crowther's Culvert Number 1 would be if the water overflowed the borrow ditch and flowed

down the road, which has frequently occurred. *See* Exhibit 9a (photograph of County Road 19 flooded) and testimony of Robert Bagwell.

28. In addition, even before the driveway was installed directly north of Mr. Crowther's Culvert Number 1, there was a culvert in that location to take Manassa Land and Irrigation water under County Road 19 to irrigate what was then Boyd Brady's property--now Mr. Crowther's property. Testimony of Robert Bagwell. According to Mr. Bagwell, the culvert caused water to back up at that location and some water did come around that culvert and into the road although he was uncertain as to how much. *Id.*

29. Mr. Crowther has not installed measuring devices to measure the tail and waste water from the L.N. Bagwell Seepage and Drainage Ditch that he has transported to his fields using Culvert Number 1 or Culvert Number 2.

II. CONCLUSIONS OF LAW

30. A water right is a judicial recognition of the application of water to beneficial use. C.R.S. 37-92-103(3)(a), (4); *Farmer's High Line Canal & Reservoir Co. v. Southwick*, 21 P. 1028 (Colo. 1889). Mere diversion of water does not constitute a beneficial use. *Danielson v. Milne*, 765 P.2d 572, 575 (Colo. 1988).

31. In this case, both applications involve tail or waste water. As such, neither applicant can acquire vested rights in the water because "an appropriator of waste water cannot obtain a right against the water waster to compel continuation of the waste water discharge." *City of Boulder v. Boulder & Left Hand Ditch Co.*, 557 P.2d 1182, 1185 (Colo. 1976)(citations omitted); *Burkhart v Meiberg*, 37 Colo. 187, 86 P. 98 (1906).

32. Nevertheless, the Division 3 Water Court has a long-standing practice of resolving disputes between tail water users even if those rights do not compel continued tail

water supply. Here both applicants are asserting competing claims to the same tail water and the court will resolve these claims.

33. The Huffakers argue that because both they and Mr. Crowther seek a water right from the L.N. Bagwell and Sons Seepage and Drainage Ditch and because they filed their application first, that, under the postponement doctrine, they are entitled to the prior water right. “Under the postponement doctrine, water rights adjudicated in a previous decree are senior to water rights adjudicated in a subsequent decree on the same stream, regardless of their dates of appropriation.” *South Adams County Water and Sanitation Dist. v. Broe Land Co.*, 812 P.2d 1161, 1164 (Colo. 1991), *Concerning Application for Water Rights of Turkey Canon Ranch*, 937 P.2d 739, 749 (Colo. 1997)(citations omitted). This doctrine has been a part of Colorado law since 1883 when “[t]he General Assembly established a system for settling the conflicting priorities to water rights through [the] process of adjudication and decree.” *South Adams County Water and Sanitation Dist.*, 812 P.2d. at 1163. The Water Right Determination and Administration Act of 1969 sets forth this doctrine as follows:

. . . the priority date awarded for water rights or conditional water rights adjudged and decreed on applications for a determination of the amount and priority thereof filed in [a water division] during each calendar year shall establish the relative priority among other water rights or conditional water rights awarded on such applications filed in that calendar year; but such water rights or conditional water rights shall be junior to all water rights or conditional water rights awarded on such applications filed in any previous calendar year . . .

C.R.S. § 37-92-306. Pursuant to this statute, the Huffakers claim that since they filed their application in Water Division 3 before Mr. Crowther filed his, that his decree should be junior to theirs.

34. The postponement doctrine, however, applies only when all the claimants have appropriated water from the same source. *South Adams County Water and Sanitation Dist.*, 812

P.2d at 1166. In *South Adams County Water and Sanitation Dist.*, the Colorado Supreme Court affirmed the water court’s decision that the postponement doctrine did not apply to make water rights on the North Fork of the South Platte River adjudicated in 1913 subordinate to water rights adjudicated in 1889 on the South Fork of the South Platte because “the North and South Forks are separated by a high mountain range” and, thus, there could be no conflict of right between the water users on the two forks of the river. *Id.* at 1167.

35. The situation in the current case is similar. Here, rather than a high mountain range between the points of diversion of the two water rights there is a driveway without a culvert that blocks water in the borrow ditch south of Mr. Crowther’s Culvert Number 1 from travelling north into the borrow ditch north of Culvert Number 1. Much of this water is diverted into Mr. Crowther’s Culvert Number 1 and cannot reach the Huffakers’ point of diversion. To the extent that Culvert Number 1 stops the water from travelling north to the Huffakers’ point of diversion, this portion of the borrow ditch is not a source of the Huffakers’ water. Since the source of the Huffakers’ water right is different from the source of Mr. Crowther’s water right, the postponement doctrine does not apply and Mr. Crowther’s right to divert water from the L.N. Bagwell and Sons Seepage and Drainage Ditch at Culvert Number 1 is not junior to the Huffakers’ right to this water.

36. Nevertheless, the evidence in this case shows that excess water, beyond what Mr. Crowther and his predecessor in interest have diverted into Culvert Number 1, frequently leaves the borrow ditch south of Culvert Number 1 and flows down to the road and back into the borrow ditch, eventually reaching the Huffakers’ point of diversion. The Huffakers have appropriated that water—the excess beyond what Mr. Crowther has appropriated through Culvert Number 1.

37. Since it serves no party to have the water spill out into the road, the court will order that the Huffakers install a culvert under the driveway north of Mr. Crowther's Culvert Number 1. In addition, the parties shall share the cost of constructing a water structure that will allow Mr. Crowther to first divert his appropriation from the borrow ditch through Culvert Number 1 and then allow any excess water to flow through the newly installed culvert under the driveway and on down the borrow ditch to the Huffakers' point of diversion and, thus, stop the practice of water flowing into the road.

38. The court must also determine how much water the court should award to each applicant. An applicant is only entitled to the amount of water "sufficient for the purpose for which the appropriation" is made "without waste or excessive use." *In re Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1169 (Colo. 2002)(citations omitted). "A diversion of water decreed for irrigation purposes is limited by the 'duty of water' with respect to the decreed place of use." *Id.* (citations omitted).

39. The court takes judicial notice that early decrees in this water district generally assume a duty of water of 1 c.f.s. for 40 acres. Recently, however, in Case No. 2001CW25 this court awarded Blaine Bagwell a decree for 7 c.f.s. to irrigate 75 acres of land in this vicinity.

40. Here, the Huffakers seek a decree for 8 c.f.s absolute for the irrigation of 75 acres and the same 8 c.f.s conditional for the irrigation of an additional 85 acres. The Huffakers presented evidence that they diverted more than 8 c.f.s. during May 2016 and applied that water to beneficial use on 75 acres. Accordingly, they are entitled to an absolute decree for 8 c.f.s. for 75 acres. In addition, their evidence showed that they intend to repair the flume system to take this water across the Ephraim Ditch and use it on their remaining 85 acres. Accordingly, they are entitled to a conditional decree for the same 8 c.f.s. to irrigate an additional 85 acres.

41. In addition, although the Huffakers' request for 8 c.f.s. to irrigate 160 acres is a very generous duty of water, given the court's recent decree to Mr. Bagwell, the court will approve it.

42. Here, in the application, Mr. Crowther sought a decree for 10 c.f.s. absolute for the irrigation of 160 acres. At trial, Mr. Crowther asked the court to award him 3 c.f.s. out of Culvert Number 2 after Conejos County replaces Culvert Number 2 and Mr. Crowther agreed that this water right would be junior to the Huffakers' decreed right out of the borrow ditch. In addition, in his proposed Decree, Mr. Crowther asks the court to award him 7 c.f.s. absolute, out of Culvert Number 1. Because Mr. Crowther has not installed any measuring devices at his diversion structures, the evidence at trial did not establish the amount of water from the borrow ditch that Mr. Crowther has actually applied to beneficial use through either Culvert Number 1 or Culvert Number 2. Accordingly, the court can only award him conditional water rights at this time.

43. Although 10 c.f.s. to irrigate 160 acres is a very generous duty of water, given the court's prior precedent in this location, the court will approve this request.

44. So, the court will decree the Huffakers' water right with a collection area north of the driveway and Culvert Number 1 and a right junior to Mr. Crowther's to any excess water collected in the borrow ditch south of Culvert Number 1 that is left after Mr. Crowther diverts his 7 c.f.s. The court will decree Mr. Crowther a conditional right with a collection area south of Culvert Number 1 and another, conditional right that is junior to the Huffakers' water right for water collected in the borrow ditch north of Culvert Number 1 but south of re-installed Culvert Number 2.

III. JUDGMENTS AND DECREES

A. DECREE IN 2013CW3012--APPLICATION OF S. CADE AND BRADLEY HUFFAKER

45. S. Cade Huffaker and Bradley H. Huffaker are granted the following described water rights, absolute in part and conditional in part:

- a. Name of Structure: L. N. Bagwell and Sons Seepage and Drainage Ditch.
- b. Amount and Source of Water: 8 c.f.s. absolute and 8 c.f.s. conditional, the source of which is seepage, waste water and tail water from irrigation of lands lying south and west of the Southwest quarter of Section 8, Township 34 North, Range 10 East, N.M.P.M. The Seepage and Drainage Ditch collects water along the eastern boundary of Section 18, Township 34 North, Range 10 East, N.M.P.M., Conejos County, Colorado described more particularly as follows: from a point just north of Lee Crowther's Culvert Number 1 which is located at a point 2,630 feet south of the north section line and 5 feet east of the west section line of Section 17, Township 34 North, Range 10 East, N.M.P.M., Conejos County, Colorado, north approximately 2,630 feet to the point where the borrow ditch crosses County Road R, which is the north section line of Section 17 and Section 18. The GPS location of Culvert No. 1 is UTM Zone 13S NAD83 419245 mE and 4166150 mN. In addition, the Huffakers are entitled to a conditional right of up to 8 c.f.s. of excess water that previously left the borrow ditch and travelled out into Road 19. This 8 c.f.s. is junior to Lee Crowther's conditional decree for the diversion of 7 c.f.s. at Culvert Number 1 but is senior to Lee Crowther's conditional decree for the diversion of 3 c.f.s. at Culvert Number 2, both decrees in the consolidated case 2016CW3013,

- c. Location of Points of Diversion: At the intersection of County Road 19 and County Road R by means of culverts north under County Road R and then east under County Road 19.
- d. Type of Beneficial Use: Irrigation
- e. Location and Number of Acres Irrigated: An absolute water right to irrigate no more than 75 acres lying west of the Ephraim Ditch in the Southwest quarter of Section 8, Township 34 North, Range 10 East, N.M.P.M. A conditional water right to irrigate no more than an additional 85 acres lying east of the Ephraim Ditch in the Southwest quarter of Section 8, Township 34 North, Range 10 East, N.M.P.M.
- f. Priority Date of Appropriation: May 5, 1952.

46. The Huffakers shall install a culvert under the driveway that blocks the borrow ditch north of Lee Crowther's Culvert Number 1.

47. The Huffakers and Lee Crowther shall share the cost of designing and installing a water structure so that water in excess of the 7 c.f.s. decreed to Culvert Number 1 may pass Mr. Crowther's diversion and travel through the culvert described in the prior paragraph and continue north up the borrow ditch.

B. DECREE IN 2016 CW 3013--APPLICATION OF LEE CROWTHER

- 48. Lee Crowther is granted the following described conditional water rights:
 - a. Name of Structure: The Lee Crowther Tail Water Ditch and the L.N. Bagwell and Sons Seepage and Drainage Ditch.
 - b. Amount and Source of Water: Lee Crowther Tail Water Ditch 7 c.f.s. conditional, the source of which is seepage, waste and tail water from irrigation of lands south and west of the Northwest quarter of Section 17, Township 34 North, Range 10 East,

N.M.P.M. This water is collected between the point of diversion of the northernmost culvert of the Lee and Grace Bagwell Seepage and Drainage Ditch (14 CW 1326) and Mr. Crowther's Culvert Number 1. The L.N. Bagwell and Sons Seepage and Drainage Ditch: 3 c.f.s. conditional.

- c. Location of Points of Diversion: Crowther Culvert Number 1 at a point 2,630 feet from the north section line and 5 feet from the west section line of Section 17, Township 34 North, Range 10 East N.M.P.M. The GPS location of Culvert Number 1 is UTM Zone 13S NAD83 429245 mE and 4166150 mN. (Lee Crowther Tail water Ditch); Crowther Culvert Number 2 at a point 1,350 feet from the north section line and 5 feet from the west section line of Section 17, Township 34 North, Range 10 East, N.M.P.M. The GPS location of Culvert Number 2 is UTM Zone 13S NAD 83 419245 mE and 4116540 mN (The L.N. Bagwell and Sons Seepage and Drainage Ditch).
- d. Type of Beneficial Use: Irrigation
- e. Location and Number of Acres Irrigated: 160 acres in the Southwest quarter of Section 17, Township 34 North, Range 20 East, N.M.P.M.
- f. Priority Date of Appropriation: May 5, 1952.

49. When Conejos County reinstalls Culvert Number 2, Lee Crowther shall install a gate or other means to shut off diversion from Culvert Number 2 at any time his water right is not in priority and there is an unmet call from the Huffakers on the L.N. Bagwell and Sons Seepage and Drainage Ditch. When Conejos County reinstalls Culvert Number 2, Lee Crowther shall install a measuring device at Culvert Number 2.

50. Lee Crowther shall install a measuring device at Culvert Number 1.

51. The Huffakers and Lee Crowther shall share the cost of designing and installing a water structure so that water in excess of the 7 c.f.s. decreed to Culvert Number 1 may pass his diversion and travel to a culvert to be installed under the driveway and continue up the borrow ditch.

52. The provisions of the Stipulation previously entered into between Applicant Lee Crowther and the Conejos Water Conservancy District and filed with the court shall be incorporated into this Decree.

C. PROVISIONS THAT APPLY TO BOTH DECREES

53. These water rights do not guarantee the applicants a continuation in the amount, timing or location of the seepage, waste water and tail water that is the source of water for these water rights. These water rights are dependent upon the irrigation practices to the south and west of Section 17, Township 34 North, Range 10 East N.M.P.M.

54. On or before six years from the date of these decrees, the applicants, or their successors or assigns, shall file with the Water Court, Water Division 3, an application to make absolute the conditional water rights granted herein, or, in lieu of such application, to request a finding of reasonable diligence.

55. Applicants shall install and maintain measuring devices acceptable to the Division Engineer and keep proper records as required by the Colorado Division of Water Resources.

DONE this 24th day of July 2018.

BY THE COURT:



Pattie P. Swift
Water Judge, Water Division 3