

<p>DISTRICT COURT, WATER DIVISION 1, STATE OF COLORADO Weld County Courthouse 901 9th Avenue Greeley, Colorado 80631 Telephone: (970) 475-2400</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF ARAPAHOE COUNTY WATER AND WASTEWATER AUTHORITY; UNITED WATER AND SANITATION DISTRICT; and EAST CHERRY CREEK VALLEY WATER AND SANITATION DISTRICT, IN ADAMS, ARAPAHOE, DENVER, AND WELD COUNTIES.</p>	
<p>ORDER RE: STATE AND DIVISION ENGINEERS' MOTION FOR DETERMINATION OF QUESTIONS OF LAW AND CENTRAL COLORADO WATER CONSERVANCY DISTRICT'S CROSS MOTION FOR DETERMINATION OF QUESTIONS OF LAW</p>	

An application for a change of the use¹ of water shares in the Western Mutual Ditch Company, owned by Arapahoe County Water and Wastewater Authority ("ACWWA") and East Cherry Creek Valley Water and Sanitation District ("ECCV"), was filed in this case by ACWWA, ECCV, and United Water and Sanitation District ("United"), collectively, "Applicants."

The State and Division Engineers ("Engineers") filed a motion requesting determinations from the Court on the following legal questions:

1. Does Applicants' ownership of 99.5 shares out of 800 total shares (amounting to roughly 12% of the total) in the Western Mutual Ditch Company ("Western

¹ Applicants also seek to appropriate water under a new water right in this case, but the current motions do not relate to that claim.

- shares”) entitle Applicants to a *pro rata* share of the decreed flow rates diverted into the Western Mutual Ditch, amounting to approximately 21.64 cubic feet of water per second (cfs)?
2. By changing the use of their Western shares, are Applicants quantifying and changing the use of their *pro rata* interest in the 21.64 cfs flow rate?
 3. If Applicants did not include a claim in the application for continued irrigation use of the Applicants’ changed Western shares, are Applicants and all other Western Mutual Ditch shareholders precluded from continuing to use any of Applicants’ 99.5 Western shares for irrigation under the Western Mutual Ditch?
 4. Once Applicants reach the volumetric limits on diversions of their Western shares, must all diversions attributable to Applicants’ shares (i.e. 21.64 cfs) from the South Platte River into the Western Mutual Ditch cease?
 5. Does the Court lack jurisdiction to allow any irrigation use of Applicants’ Western shares under the Western Mutual Ditch—which includes irrigation use by Applicants or any other shareholder—after the use of the water is changed, because Applicants did not include irrigation as a claimed use in the application?

Central Colorado Water Conservancy District (“Central”) filed a cross motion requesting determinations of these legal questions:

- A. Are shareholders in a mutual ditch company owners of the water rights managed by the company as tenants in common, and absent an express agreement in the company’s bylaws to the contrary, does each shareholder have the right to possess the entirety of the water right and use any portion of the water right that is not being used by another shareholder?
- B. Are the other shareholders in the company entitled to protection from injury to their interests in the water rights, including the right to continue the

practice of mutual sharing of water between shareholders, when one shareholder changes the use of his or her shares?

Because the questions raised by the Engineers and Central are closely related, the Court has elected to address both motions in this single order. The motions have sparked great interest in the Division One water community, leading to a flurry of responses and briefs in support of and in opposition to both motions.

The Court concludes that the shareholders of the Western Mutual Ditch Company do not possess an ownership interest as tenants in common of the entire amount of water managed by the mutual ditch company. The Court further finds that once the Applicants apply the water attributable to their Western shares to the changed uses claimed in this case, then that amount of water is no longer available for use within the Western Mutual Ditch Company system by Applicants or other shareholders.

The Court cannot, however, issue legal determinations regarding how that amount of water will be quantified and apportioned to prevent injury to other Western Mutual Ditch shareholders and other water users along the South Platte River, as there are many germane, disputed factual matters remaining to be resolved.

I. LEGAL STANDARD

Colorado Rule of Civil Procedure 56(h) provides a mechanism for a 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.” *Bd. of Cnty. Comm’rs v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995) (internal citation omitted).

“[T]he nonmoving party is entitled to all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party.” *Coffman v. Williamson*, 2015, 348 P.3d 929. “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.” C.R.C.P. 56(h). In reviewing a motion for determination of question of law, the court may decline to enter an order deciding the question if a genuine dispute exists over any material fact necessary for the determination of the question.

II. ANALYSIS

Moving water in the arid western states from where it naturally flows to where it is needed has always been of paramount importance. Recognizing that the resources of many—whether in labor, finances, and/or decreed water rights—can often be combined to the benefit of all, many farmers banded together to form mutual ditch companies.

Several farmers in the Peckham/Gilcrest area of Weld County, Colorado recognized such benefit and formed the Western Mutual Ditch Company in 1909 and filed articles of incorporation with the secretary of state. Two structures were identified in the articles of incorporation, the Western Ditch and the Extension Ditch of the Great Bend Farring, and one of the purposes spurring the formation of the company was to consolidate operations of these two ditches. Other purposes of this company, as expressed in the articles of incorporation, include: maintaining and operating the ditch to carry irrigation water “to those entitled thereto”; “to issue stock of our said company fully paid to the owners of water rights from or under said ditches”; and “to assume the carriage and delivery of water to such water right owners and users”

In addition to drafting the articles of incorporation, Western Mutual Ditch Company prepared company bylaws in 1909. In 1998, the company amended the bylaws by adding Article 9. Section 1 of Article 9 authorizes a shareholder to lease or otherwise allow the use of that shareholder’s entitlement of water for a given water year, provided the water continues to be diverted and measured through the company’s

headgate or measuring weir on the South Platte River. Article 9, Section 2 sets forth the company's bylaws for a shareholder to change the use of his/her water rights.

Relying on the analysis and holdings of the Colorado Supreme Court in *Great Western Sugar v. Jackson Lake Reservoir*, the Court finds that shareholders in the Western Mutual Ditch Company are not owners as tenants in common of the entire amount of water within the mutual ditch system; instead, each shareholder is the owner of his or her individual water rights, subject to a *pro rata* division between shareholders based on the number of shares each individual owns in the ditch company and the total amount of water available within the system. 681 P.2d 484 (Colo. 1984). This is because the “[o]wnership of shares of stock in a mutual ditch corporation, unlike ownership of stock in other corporate entities, is merely incidental to the ownership of the water rights.” *Id.* at 491 (citations omitted). The shareholders in a mutual ditch company possess not only a specific water right, which is their individual property interest, but they also share an interest in the structures utilized by the company to deliver the water. *Id.*

Because there may be times when there is not enough water in the ditch to fully satisfy every shareholder's water need, each of the shareholders is entitled to a *pro rata* share of the amount of water available in the system based on the number of shares that person owns in the corporation. *Id.* This concerted method of sharing water results in all shareholders receiving at least a portion of the total amount of water in the system, as opposed, for example, to a scenario where the shareholders located closer to the headgate divert their full water requirement and those situated down ditch receive nothing.

The Court is not persuaded by Central's argument that the mutual sharing of water between shareholders—i.e. when one shareholder is not using all or part of his/her water that another shareholder may use that water—converts an individual water right to a legally cognizable communal ownership interest. Western Mutual Ditch Company is “merely the vehicle by which its owners operate and manage its

affairs." *Jacobucci v. District Court*, 541 P.2d 667, 672 (Colo. 1975), quoting *Billings Ditch Co. v. Industrial Comm'n*, 253 P.2d 1058 (Colo. 1953). A shareholder's stock certificates "are merely incidental to the ownership of water rights by the shareholders." *Jacobucci, id.*

All that said, it is axiomatic that a shareholder may not change his or her water rights in a mutual ditch company if the change of use would result in injury to another shareholder's water rights. *Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 P. 1060 (1907). This legal protection exists in direct recognition of the conjoined interest and requisite cooperation among shareholders in the operations and structures comprising the mutual ditch system (as opposed to the individual water rights), which are vitally important to the very existence of the system. *See e.g. Jacobucci, id.*

As such, it may very well be necessary for the Court to consider the operations of the entire mutual ditch system over the historical period selected by Applicants to quantify the historical consumptive use on lands irrigated by Applicants' Western shares, to ensure that other shareholders' individual water rights are not injured through Applicants' change of use of their shares. Relevant factors may include, but are not limited to: the location of the lands historically irrigated by Applicants' Western shares in relation to the Western Mutual Ditch headgate and the lands of the other shareholders; the amount of water necessary to transport a sufficient supply of water to all shareholders along the ditch; the amount of ditch loss along the system; financial assessments necessary to maintain the company's structures or payment of company debt; the timing and amounts of historical diversions of Applicants' Western shares and those of the other shareholders throughout the irrigation season.

The Court does not, however, agree with Central's position that Western shareholders can claim injury if they will no longer benefit from the mutual sharing of water practice between shareholders if Applicants change the use of their shares. To allow this argument to be broadly cast as a claim of injury would allow a mutual ditch

company or other shareholders to present a significant bar any proposed change of use of shares, which runs counter to the principle that the specific property water right interest of one shareholder “cannot be ‘defeated or altered by any action of the ditch company or its shareholders.’” *Jacobucci*, 541 P.2d at 673 (citing *United States v. 508.88 Acres of Land*, U.S. Dist. Ct. (D. Colo. May 8, 1973, Unpublished). Instead, if there were years when Applicants’ water shares were not fully used, or not used at all, that will likely be accounted for in the Applicants’ historical use analysis.

The Court simply lacks the requisite facts at this stage of the proceedings to determine whether Applicants can change the use of their Western shares without causing injury to other shareholders or other water users along the South Platte River. If Applicants are granted permission to change the use of a portion of or all their Western shares, the amount of water applied to the changed uses will no longer be available for use within the Western system, either by Applicants or other Western Mutual Ditch Company shareholders. Until more data is presented, the Court is unable to determine how the amount of water subject to a changed use will be quantified, i.e. by flow rate, volumetric amounts, or some other method.

Dated: September 2, 2019.

BY THE COURT



James F. Hartmann
Water Judge, Water Division 1