

District Court, Water Division 5, Colorado  
Garfield County Courthouse  
109 8<sup>th</sup> Street, Suite 104  
Glenwood Springs, CO 81601  
970/945-5075

**EFILED Document**  
**CO Garfield County District Court 9th JD**  
**Filing Date: Sep 15 2011 2:24PM MDT**  
**Filing ID: 39836038**  
**Review Clerk: Kathy Hall**

SAVING OUR STREAMS, a Colorado not for profit corporation; T. RICHARD BUTERA; YASMINE DEPAGTER; MAUREEN HIRSCH; JOSEPH and SHEILA COSNIAC; KIT GOLDSBURY; ELK MOUNTAIN LODGE, LLC; CRYSTAL, LLC; AMERICAN LAKE, LLC; ASHCROFT, LLC; THE BRUCE E. CARLSON TRUST and B&C, LLC

Plaintiffs

v.

THE CITY OF ASPEN, COLORADO, a Colorado municipal corporation, and all unknown persons who claim any interest in the subject matter of this action

Defendant

Attorneys: Paul L. Noto, #34074  
Danielle M. Lubber, #42800  
Patrick, Miller & Kropf, P.C.  
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**▲ COURT USE ONLY ▲**

Case Number:

11CW\_\_\_\_\_

This is a water law proceeding that is NOT subject to the simplified procedures for court actions under Rule 16.1

Division Courtroom

**VERIFIED COMPLAINT FOR ABANDONMENT OF WATER RIGHTS**

Plaintiffs, Saving Our Streams et al. ("SOS"), by and through their attorneys, Patrick, Miller and Kropf, P.C., seek a determination by this Court that the water rights described herein have been abandoned due to an extended period of nonuse coupled with intent to abandon, and request that the water rights be cancelled. In support of this Complaint, Plaintiffs allege as follows:

**JURISDICTIONAL STATEMENT**

1. This court has subject matter jurisdiction to hear this case pursuant to C.R.S. § 37-92-203(1) (2010).
2. This court has jurisdiction over the parties and water rights herein pursuant to Gardner v. State, 614 P.2d 357, 362 (Colo. 1980).
3. This court has jurisdiction to hear this complaint for declaratory judgment pursuant to Colorado Rules of Civil Procedure ("C.R.C.P."), Rule 57.
4. Venue is proper in the Division 5 Water Court pursuant to C.R.S. §§ 37-92-201(1)(e) and 37-92-203(1).

### **GENERAL ALLEGATIONS**

5. Plaintiff SOS is a Colorado non-profit corporation whose purposes are furthering and ensuring the preservation of the natural environment, riparian habitat, and stream flows of Castle Creek and Maroon Creek in Pitkin County, Colorado.
6. Plaintiffs T. Richard Butera, Yasmine Depagter, Maureen Hirsch, Joseph and Sheila Cosniac, Kit Goldsbury, Elk Mountain Lodge, LLC; Crystal, LLC; American Lake, LLC; Ashcroft, LLC; The Bruce E. Carlson Trust; and B&C, LLC own land adjacent to or near Castle Creek or Maroon Creek in Pitkin County, Colorado. Some of the Plaintiffs own water rights and wells diverting from Castle Creek or Maroon Creek.
7. Defendant City of Aspen, Colorado is a Colorado home rule municipal corporation.
8. The Garfield County District Court decreed the Castle Creek Flume Ditch water right in Civil Action No. 305 for 60 cubic feet of water per second ("c.f.s.") for irrigation, domestic, and other purposes, with a date of appropriation of November 16, 1885, and a date of adjudication of June 25, 1892. The court assigned the Castle Creek Flume Ditch water right Priority No. 136A, and structure number 98A. The original claimant of the water right was Castle Creek Water Company. The decreed location for the headgate of the Castle Creek Flume Ditch was on the east bank of Castle Creek at a point on the NW ¼ of the SE ¼ of Section 23, Township 10 S., Range 85 West, in Pitkin County, Colorado.
9. The Garfield County District Court decreed the Midland Flume Ditch water right in Civil Action No. 305 for 100 c.f.s. for irrigation, domestic, and other purposes, with a date of appropriation of May 11, 1889, and a date of adjudication of June 25, 1892. The court assigned the Midland Flume Ditch water right Priority No. 207, and structure number 141. The original claimant of the water right was the Midland Water and Power Company. The decreed location for the headgate of the Midland Flume Ditch is on the west bank of Castle Creek at a point on the SW ¼ of the SE ¼, Section 23, Township 10 South, Range 85 West, in Pitkin County, Colorado.

10. The Garfield County District Court decreed the Maroon Ditch water right in Civil Action No. 3723 for 65 c.f.s. for hydropower generation and domestic purposes, with a date of appropriation of August 12, 1892, and an adjudication date of August 25, 1949. The court assigned the Maroon Ditch water right Priority No. 11, and structure number 324. The original claimant of the water right was the Mountain Utilities Corporation. The source of supply for the ditch is Maroon Creek, and the decreed location for the headgate of the Maroon Ditch is in the NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$ , Section 21, Township 10 South, Range 85 West of the 6<sup>th</sup> P.M., at a point about 1600 feet South 29 degrees West from the East quarter corner of said Section.

11. In Civil Action No. 3723, on August 25, 1949, the Garfield County District Court confirmed the original decrees for the Castle Creek Flume Ditch and Midland Flume Ditch, and confirmed that the decreed uses for the Castle Creek Flume Ditch and Midland Flume Ditch include hydropower generation and domestic purposes. The Court also confirmed a change in point of diversion for the Castle Creek Flume Ditch water right to the headgate of the Midland Flume Ditch, on the west bank of Castle Creek, and that both water rights would thereafter be carried through the same structure.

12. The combined Midland Flume Ditch and Castle Creek Flume Ditch historically diverted water from Castle Creek to the water treatment plant now owned by the City of Aspen, located between Castle Creek and Maroon Creek at 500 Doolittle Drive, Aspen. The Maroon Ditch historically diverted water from Maroon Creek to the water treatment plant now owned by the City of Aspen.

13. On information and belief, beginning on or around 1893, the Midland Water and Power Company constructed a hydropower generation plant on the banks of Castle Creek (the "Hydro Plant"), just downstream from what is now the State Highway 82 bridge over Castle Creek. Midland Water and Power Company and its successors combined water diverted from Castle Creek through the Midland Flume Ditch and from Maroon Creek through the Maroon Ditch at the water treatment plant now owned by the City of Aspen. The combined Castle Creek and Maroon Creek water was stored temporarily in two wooden collection and storage tanks serving as the forebay for the Hydro Plant, which then delivered the water to two 18-inch penstock pipes which led to the Hydro Plant, located approximately 4000 feet downstream, where such water was used to generate electrical power for the City of Aspen.

14. On information and belief, through mesne conveyances, Aspen acquired title to the Castle Creek Flume Ditch, Midland Flume Ditch, and Maroon Ditch water rights in approximately 1956, or thereabouts.

15. On information and belief, Aspen claims sole ownership of the Castle Creek Flume Ditch, Midland Flume Ditch, and Maroon Ditch water rights. On information and belief, SOS is not aware that any other party claims ownership of these water rights.

16. In or around 1957, the City of Aspen and/or the Mountain Utilities Corporation decided to decommission the Hydro Plant in favor of purchasing power from the Bureau of Reclamation

and/or Holy Cross Electrical Association. The Hydropower Plant ceased producing power in 1958, except for approximately one day in or around 1961, when the Hydropower Plant was brought back online in order to generate power during a power outage.

17. Following decommissioning of the Hydro Plant, Aspen dismantled and removed the hydropower generation equipment from the Hydro Plant building.

18. Upon information and belief, no water has been diverted to the Hydro Plant to generate electrical energy since 1961.

19. Upon information and belief, neither Aspen nor its predecessors have diverted and used the Midland Flume Ditch, Castle Creek Flume Ditch, and Maroon Ditch water rights to generate electrical power since at least 1961.

20. Upon information and belief, the pipelines which formerly delivered water to the Hydro Plant from the water treatment plant are incapable of delivering water to the plant due to their deteriorated condition, portions of the pipelines no longer exist, and the pipelines have been incapable of delivering water to the Hydro Plant for 20 or more years.

21. Upon information and belief, since acquiring the Castle Creek Flume Ditch, Midland Flume Ditch, and Maroon Ditch water rights, Aspen has made no attempts to sell or market such water rights.

22. Upon information and belief, Aspen intended to abandon the hydropower use decreed to the Castle Creek Flume Ditch, Midland Flume Ditch, and Maroon Ditch water rights.

23. No fact or condition exists that shows Aspen's intent not to abandon or excuses the nonuse of the hydropower use decree to the Castle Creek Flume Ditch, Midland Flume Ditch, and Maroon Ditch water rights.

24. Plaintiffs do not allege that any other uses than hydropower generation or amounts decreed to the Castle Creek Flume Ditch, Midland Flume Ditch, and Maroon Ditch water rights are abandoned.

**First Claim for Relief: For Abandonment of Hydropower Use Decreed to the Castle Creek Flume Ditch Water Right**

25. Plaintiffs repeat and re-allege paragraphs 1 – 24 as if set out in full herein.

26. Aspen has not used the hydropower use decreed to the Castle Creek Flume Ditch water right for over fifty (50) years.

27. Aspen has shown its intent to abandon the hydropower use decreed to the Castle Creek Flume Ditch water right by not using the water right for this purpose for over fifty (50) years.

28. Aspen has shown its intent to abandon the hydropower use decreed to the Castle Creek Flume Ditch water right by, among other things, deciding to decommission the hydropower plant for which the right was decreed, by dismantling the electrical generation equipment, by allowing the water delivery pipelines to the Hydro Plant to deteriorate to an unusable condition, by failing to repair the water delivery pipelines to the Hydro Plant, and by purchasing its electrical energy from Holy Cross Electrical Association and others since 1957.

29. Plaintiffs seek a declaratory judgment that Aspen has abandoned the hydropower use decreed to the Castle Creek Flume Ditch water right and that the hydropower use decreed to this water right is cancelled.

**Second Claim for Relief: For Abandonment of Hydropower Use Decreed to the Midland Flume Ditch Water Right**

30. Plaintiffs repeat and re-allege paragraphs 1 – 29 as if set out in full herein.

31. Aspen has not used the hydropower use decreed to the Midland Flume Ditch water right for over fifty (50) years.

32. Aspen has shown its intent to abandon the hydropower use decreed to the Midland Flume Ditch water right by not using the water right for this purpose for over fifty (50) years.

33. Aspen has shown its intent to abandon the hydropower use decreed to the Midland Flume Ditch water right by, among other things, deciding to decommission the hydropower plant for which the right was decreed, by dismantling the electrical generation equipment, by allowing the water delivery pipelines to the Hydro Plant to deteriorate to an unusable condition, by failing to repair the water delivery pipelines to the Hydro Plant, and by purchasing its electrical energy from Holy Cross Electrical Association and others since 1957.

34. Plaintiffs seek a declaratory judgment that Aspen has abandoned the hydropower use decreed to the Midland Flume Ditch water right and that the hydropower use decreed to this water right is cancelled.

**Third Claim for Relief: For Abandonment of Hydropower Use Decreed to the Maroon Ditch Water Right**

35. Plaintiffs repeat and re-allege paragraphs 1 – 34 as if set out in full herein.

36. Aspen has not used the hydropower use decreed to the Maroon Ditch water right for over fifty (50) years.

37. Aspen has shown its intent to abandon the hydropower use decreed to the Maroon Ditch water right by not using the water right for this purpose for over fifty (50) years.

38. Aspen has shown its intent to abandon the hydropower use decreed to the Maroon Ditch water right by, among other things, deciding to decommission the hydropower plant for which the right was decreed, by dismantling the electrical generation equipment, by allowing the water delivery pipelines to the Hydro Plant to deteriorate to an unusable condition, by failing to repair the water delivery pipelines, and by purchasing its electrical energy from Holy Cross Electrical Association and others since 1957.

39. Plaintiffs seek a declaratory judgment that Aspen has abandoned the hydropower use decreed to the Maroon Ditch water right and that the hydropower use decreed to this water right is cancelled.

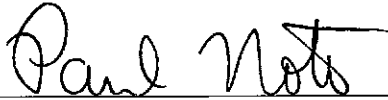
#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for:

1. A declaratory judgment and order of this Court declaring that the hydropower use decreed to the Castle Creek Flume Ditch water right has been abandoned and cancelled.
2. A declaratory judgment and order of this Court declaring that the hydropower use decreed to the Midland Flume Ditch water right has been abandoned and cancelled.
3. A declaratory judgment and order of this Court declaring that the hydropower use decreed to the Maroon Ditch water right has been abandoned and cancelled.
4. An award of costs Plaintiffs have incurred and will incur to bring and prosecute this action.
5. Such additional relief as the Court deems proper.

Dated this 15th day of September, 2011.

PATRICK, MILLER & KROPF  
A Professional Corporation

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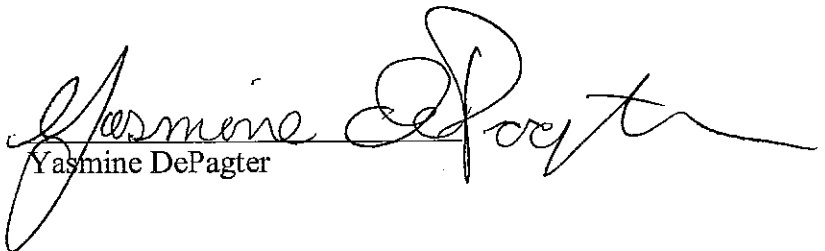
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**VERIFICATION**

STATE OF COLORADO     )  
                                      ) SS.  
COUNTY OF PITKIN     )

I, Yasmine DePagter, state under oath that I have read this Verified Complaint for Abandonment of Water Rights and verify its contents.

  
Yasmine DePagter