COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Colorado Judicial Center 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: October 23, 2015 4:07 PM Δ **COURT USE ONLY** Δ
On Appeal From: DISTRICT COURT, RIO BLANCO COUNTY, COLORADO The Honorable Daniel Brett Petre Case No: 2013 CV 30003	
Plaintiffs/Appellees: **ALLEN D. REISHUS, CRAIG T. ECKROTH and RONALD J. DANNER, Individually and as MANAGERS for ADAMS RANCH** vs. Defendants/Appellants: **BULLMASTERS, LLC, ENRIQUE GARCIA, JR, GERARDO GARCIA, GABRIEL A. SAENZ, ADAN SAENZ and BOBBY W. WOODALL, Individually and as MEMBERS of BULLMASTERS, LLC, BUGLE BASIN RANCHES, LLC, and KENT GORDON, Individually and as a MEMBER of BUGLE BASIN RANCHES, LLC, and BRENT BIGGS**	
PORTERFIELD & ASSOCIATES, LLC. WENDELL B. PORTERFIELD, JR., Atty. Reg. No: 5881 P.O. Box 3149 Vail, Colorado 81658 Telephone No: (970) 949-5380 Facsimile No: (970) 845-9135 Email: wporterfield@opa-law.com	Case Number: **2015 CA 959** Div. Ctrm:

DEFENDANTS'/APPELLANTS' AMENDED OPENING BRIEF

CERTIFICATE OF COMPLIANCE

Defendants/Appellants, Bullmasters, LLC, Enrique Garcia, Jr, Gerardo Garcia, Gabriel A. Saenz, Adan Saenz and Bobby W. Woodall, Individually and as Members of Bullmasters, LLC, Bugle Basin Ranches, LLC and Kent Gordon, Individually and as a Member of Bugle Basin Ranches, LLC and Brent Biggs, hereby certify that this Amended Opening Brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

a. The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g), it contains 5,111 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words);

b. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b). For each issue raised by defendants/appellants, the Opening Brief contains under a separate heading, before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

c. I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 28.1 and C.A.R. 32.

WENDELL B. PORTERFIELD, JR. #5881

/s/ Wendell B. Porterfield, Jr.
Counsel for Defendants/Appellants

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Pursuant to C.A.R. 28(a), Defendants/Appellants, Bullmasters, LLC, Enrique Garcia, Jr, Gerardo Garcia, Gabriel A. Saenz, Adan Saenz and Bobby W. Woodall, Individually and as Members of Bullmasters, LLC, Bugle Basin Ranches, LLC and Kent Gordon, Individually and as a Member of Bugle Basin Ranches, LLC and Brent Biggs (the "Affected Owners") file their Opening Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May fewer than all co-owners of a 560 acre parcel of real property, all of whom hold as tenants-in-common, restrict the access rights, and thus the hunting and possessory rights, of other co-owners, without the express agreement of those co-owners and co-tenants, by a non-unanimous amendment to an ownership agreement that did not initially restrict or address such rights?

2. Are provisions of an agreement relating to how the agreement may be amended, covenants that run with the land?

NATURE OF THE CASE

The parties are co-owners as tenants-in-common of a 560 acre ranch in Rio Blanco County, known as the Adams Ranch, acquired, held and used for hunting. The parties to this proceeding are not all of the original owners, because the ownership interests, and the owners themselves, have changed from time to time since the ranch was purchased in 1983. Nevertheless, the ownership interests have always been held as tenants-in-common. The ownership interests of the tenants-in-

common have not been, and are not, equal some owners having owned a 2/12th interest, some owning a 1/12th interest, some owning a 1/24th interest and some owning a 1/48th interest.

On October 21, 2011, a Second Amendment to Amended and Restated Adams Ranch Ownership Agreement was recorded in the real property records of Rio Blanco County (the "Second Amendment"). (CF, p.40) The Second Amendment was signed by fewer than all of the owners, and limited access, and thus hunting, to the ranch to 30 days during the "Prime Season," defined as running from the first day of archery season through the last day of the first rifle season, for each 1/12th ownership interest in the ranch, and to 15 days for two individuals each owning a 1/24th ownership interest. (CF, p.46-47). This limitation was imposed without regard to the price paid for each ownership interest, and effectively restricted the hunting rights of Enrique Garcia, Gerardo Garcia, Gabriel Saenz, Aidan Saenz and Bobby W. Woodall, each of whom owns less than a 1/12th interest, but each of whom pays the same cost of ownership and maintenance of the ranch as do owners of larger interests who have greater access and hunting rights by virtue of the Second Amendment.

An Amended and Restated Ownership Agreement recorded in 2007 contained a provision that it "may be amended (by(a) either modifying or deleting existing provisions or (b) adding new provisions) or terminated . . . by a written

and recorded instrument signed by the then-record Owners of at least 7/12^{ths} of the Ownership Interests." (C.F., p.47). Purporting to act under this provision, the Second Amendment was recorded by "at least 7/12^{ths} of the Ownership Interests."

Because the Affected Owners asserted that their access and hunting rights could not be so limited by the majority, it was agreed that the question of the validity and enforceability of the Second Amendment be submitted to the court, on stipulated and agreed facts, for declaratory judgment. Those stipulated facts and documents were submitted to the court with the complaint on June 20, 2013. (CF, p.5). It was the argument and position of the Affected Owners that a majority of co-tenants could not limit their rights to access, use and possession, either by amendment to a prior agreement or as a matter of law, without their consent. (CF, p.82).

In 1983, the original purchasers of Adams Ranch, a parcel containing 560 acres, took title as tenants-in-common (CF, p.80-81). In 1983, there were eleven individual owners, two of whom held 2/12th undivided interests, seven of whom held 1/12th undivided interests and two of whom each held 1/24th undivided interests. (CF, p.80). The vesting deed did not place any limits on the possessory or use rights of any owner, but recognized the unequal ownership interests of certain co-tenants. (CF, p.80). Although the owners and their fractional interests have changed over the intervening 30-years, the present owners of the ranch still

hold title as tenants-in-common and the owners always have held title as tenants-in-common. Originally there were 11 owners; now there are 16 owners. An agreement related to the original purchase of the ranch limited the number of owners or future owners to 16. (CF, p.71).

In 1983, an agreement was recorded that had been executed in 1979, when the 1983 purchasers had an option to buy Adams Ranch. This agreement dealt with access and an easement and has no bearing on the issues presented in this action other than to cap the number of owners. (CR, p.71).

An Ownership Agreement, signed by 10 individuals, affecting Adams Ranch was recorded in April 1988 (CF, p.66-68). The agreement is undated and none of the signatures is acknowledged. The agreement does not state that it is signed by all owners. While the District Court stated in its Declaratory Judgment that the agreement "was signed by all of the then-owners of the ranch" (CF, p.208), this was not an agreed or stipulated fact, it being agreed only that "[t]he then-owners of Adams Ranch executing the [Ownership] Agreement were . . ." (CF, p.6, par.5). Hunting on the ranch is not mentioned in this agreement at all, either to allow it or restrict it. The agreement stated that it "or any terms included herewith [sic], may be amended or deleted by simple majority of the individual owners at any time." Thus, voting was not based on percentage of ownership interests, simply on the number of owners. The agreement also states that "it is understood that one

individual cannot obligate the other owners," and at the fourth paragraph refers to "five owners." However, from the language of this agreement, it appears to envision a future division of the parcel into 35 or more acre parcels so that each co-tenant would separately own a lot.

A revised and amended agreement that is neither signed, acknowledged nor recorded exists. (CF, p.63). The last page of this agreement bears the typewritten date June 1990. This 1990 ownership agreement did not place any limits on the possessory, use or hunting rights of any owner but did restate a right of first refusal on the sale of any interest that was found in the original agreement. While the 1988 Agreement had stated: "This Agreement, or any terms included herewith, may be amended or deleted by simple majority of the individual owners at any time," the 1990 Agreement said nothing regarding amendment or deletion of any provision, or how it was to be read or interpreted in conjunction with the original agreement.

In 2007, an Amended and Restated Ownership Agreement was recorded (CF, p.40). This 2007 Agreement referenced the agreement recorded in April 1988, and provided a Statement of Intent that included the following:

> "The signers of the Original Agreement [the 1988 recorded agreement] were of a like mind with one goal, to have agricultural property that would also provide a quality hunting experience . . . It was understood that prior to any action being taken by an Owner, other Owners would be consulted and an agreement reached." (Emphasis added). (CF, p.40, par.2)

While the 1988 agreement did not mention hunting, this Background statement was incorporated into the 2007 agreement as a "substantive" term.

While the 2007 Ownership Agreement mentioned the 1988 Agreement, it did not mention the 1990 Agreement. The 2007 Ownership Agreement confirmed that each owner had an undivided fractional interest "as a tenant in common with the Owners." (CF, p.41, par.3), and prohibit any owner from seeking partition or non-unanimous subdivision.

While the 2007 Ownership Agreement placed certain restrictions on the transfer and ownership of fractional interests, it did nothing to address or limit the hunting rights, or the right of access, of any co-tenant owner. Paragraph 7 provided that owners could each construct a dwelling if approved by a simple majority of owners. Paragraph 12 provided that "[u]nless otherwise approved verbally or in writing by Owners holding at least 7/12 of the Ownership Interests, no guests of an Owner may visit the Ranch unless accompanied by the Owner. The number of guests shall be limited to a reasonable number (determined from time to time by written agreement of the Owners holding at least 7/12^{ths} of the Ownership Interests) so as not to interfere with the use of the Ranch by the other Owners."

Paragraph 13 provided that a partnership was not intended and further that "no Owner may legally bind any other Owner for any obligation." (CF, p.47).

Paragraph 15 of the 2007 Agreement addressed amendment or termination and provided that it could be amended "(by (a) either modifying or deleting existing provisions or (b) adding new provisions)" by a $7/12^{th}$ vote of Ownership Interests. (CF, p.47). Finally, paragraph 18 of the 2007 Agreement provided: "This Agreement supersedes and replaces the Original Agreement," defined to be the one recorded in 1988. (CF, p.47, par.18).

Although it is unknown whether all owners signed the 2007 Agreement, it was signed by the Affected Owners.

The 2007 agreement specifically recognized a change in ownership at newly added paragraph 4.2, where it was acknowledged that Bullmasters, LLC, a Colorado limited liability company, now owned a $3/12^{ths}$ interest in the ranch, and that the membership interests in Bullmasters itself were owned by seven individuals. (CF, p.42) The agreement provided that "Each of these individual members of Bullmasters may use the ranch subject to the terms and conditions of this agreement," and further provided that each member of Bullmasters would pay the same share of ranch expenses as did each individual owner. The Affected Owners are these seven individuals.

The agreement at paragraph 12.3 expressly limited the right to access only of guests of owners, but expressly recognized the rights of the members of Bullmasters to use the ranch.

A First Amendment to the Amended and Restated Agreement of 2007 was recorded on September 29, 2011 (CF, p.24) and only addressed payment of assessments and use by unaccompanied guests of owners. The First Amendment provides that no "guest" could visit the ranch without an owner, which was the same provision found at paragraph 12.3 of the 2007 agreement, but added that "in the future, if the Owners consider it advisable to limit the number of Owner-accompanied guests that may visit the ranch at any one time, such limitation may be adopted by written agreement of those owners holding at least 7/12^{ths} of the Ownership Interests." (CF, p.25) This amendment would seem to be superfluous if hunting and access could be addressed by amendment utilizing paragraph 15 of the 2007 Agreement. The First Amendment did not purport to limit the access, hunting or use rights of any owner/co-tenant.

On October 21, 2011, some three weeks later, a Second Amendment to the Amended and Restated Ownership Agreement was recorded (CF, p.11). This Second Amendment, approved by fewer than all owners, for the first time purported to limit owner/co-tenant access, and thus hunting, without all owners/co-tenants having agreed to such limitation. When adopted and recorded, the owners held title as tenants-in-common. Several of the attached signature pages to this Second Amendment purport to have been signed and acknowledged even before the recording of the First Amendment on September 29, and the references to that

recording date at "Background, Section C," on the first page of the Second Amendment. (CF, p.13, 14, 17 and 20).

The Affected Owners had been given notice that a meeting would be held on July 16, to discuss "limiting hunting days per fraction of ownership." (CF, p.23). The Affected Owners sent an email addressing this issue and opposing it, in part because of the impact on the value of their interests. (CF, p.21-22). Because all of the owners were tenants-in-common, the Affected Owners contend that fewer than all owners cannot legally restrict their right to access and thus, their hunting rights, without their consent.

Consistent with a Modified Case Management Order, the parties filed their respective opening briefs, based on the stipulated and agreed facts, with the District Court on September 5, 2013, and their reply briefs on September 19/20, 2013. (CF, p.86).

Thereafter, the District Court requested that the parties address two questions as follows:

> Question No.1: Assuming, without deciding at this point, that tenants-in-common may contractually agree to restrict their rights to occupy the entire real estate, was the Original Agreement a personal covenant, or was it intended to run with the land?
>
> Question No.2: With the same assumption, does the scope of the Original Agreement envision the kind of restriction on use and occupancy of the property that is now represented by the regulation of hunting which is the subject of this case?

Supplemental briefs on these questions and replies were filed on March 10, 2014 and March 14, 2014, respectively.

On May 4, 2015, the District Court entered its declaratory judgment that the Second Amendment was "valid and binding upon all ownership interests" in this case. (CF, p.204). This appeal followed.

SUMMARY OF THE ARGUMENTS

I. THE RIGHTS OF A GROUP OF CO-OWNERS, OWNING AND HOLDING TITLE TO A PARCEL OF REAL PROPERTY AS TENANTS- IN-COMMON, ARE GOVERNED BY THE COMMON LAW. EACH CO-TENANT HAS A RIGHT TO POSSESSION OF THE ENTIRE PARCEL REGARDLESS OF THE FRACTIONAL INTEREST OWNED. WHILE ALL OWNERS MAY ENTER INTO ONE OR MORE AGREEMENTS REGARDING THE USE OF THE PROPERTY, A GROUP OF CO-OWNERS MAY NOT AMEND THE AGREEMENTS TO RESTRICT USE AND POSSESSION OF THE PROPERTY BY OTHER CO-OWNERS WITHOUT THE EXPRESS AGREEMENT OF THOSE AFFECTED CO-OWNERS. SUCH ACTION IS PROHIBITED BY THE COMMON LAW AND BY THE OBLIGATION OF GOOD FAITH THAT EXISTS AMONG ALL CO-OWNERS.

II. A PROVISION IN AGREEMENTS BETWEEN CO-OWNERS PERMITTING AMENDMENTS BY A SUPERMAJORITY OF THE CO-OWNERS IS NOT A PROVISION THAT RUNS WITH THE LAND OR THAT PERMITS THE MAJORITY TO RESTRICT THE ACCESS AND USE OF THE MINORITY WITHOUT THE EXPRESS AGREEMENT TO SUCH A RESTRICTION BY THE MINORITY. IF THE RESTRICTION ITSELF EXISTED IN AN AGREEMENT BETWEEN ALL CO-TENANTS, IT WOULD RUN WITH THE LAND. HOWEVER A RESTRICTION, NOT APPROVED BY ALL CO-OWNERS DOES NOT RUN WITH THE LAND, NOR DOES THE PROVISION PERMITTING AMENDMENT.

ARGUMENTS

I. ONE GROUP OF TENANTS-IN-COMMON MAY NOT RESTRICT THE ACCESS AND HUNTING RIGHTS OF ANOTHER GROUP OF TENANTS-IN-COMMON WITHOUT THE EXPRESS CONSENT OF THE LATTER.

Standard of Review

This court reviews *de novo* the district court's application of governing legal standards, *Loveland Essential Group, LLC v. Grommon Farms, Inc.*, 251 P.3d 1109 (Colo. App. 2010), and this court is not bound by the trial court's conclusions of law. *Ocmulgee Properties, Inc. v. Jeffrey*, 53 P.3d 665 (Colo. App. 2001). Where all of the facts are stipulated, the matter is one of law, not binding on this court. *Hutchison v. Mullins,* 491 P.2d 71, 74 (Colo. App. 1971). Likewise, the interpretation of a contract, deed or written agreement is a matter of law, not binding on this court. *Gilpin Inv. Co. v. Blake*, 712 P.2d 1051 (Colo. App. 1985).

Whether the Issue was Preserved and Where

The issue was preserved in the Affected Owners' Answer (CF, p.84), and in their Opening Brief (CF, p.98). The issue was ruled on by the District Court (CF, p.204; CF, p.206).

Contention

This case is governed by the common law that governs the relationship between tenants-in-common owning real property. This matter could have a different outcome and could be governed by different legal principles if the

property were owned by a corporation, or by a partnership, or by a limited liability company. The real property here was purchased by owners taking title as tenants-in-common and this fact has never changed, although the owners and their respective interests have changed over the years.

Possession is the essential element of tenancy in common. A tenancy in common is a form of ownership in which each co-tenant owns a separate fractional share of undivided property with all co-tenants owning a single right to possession of the entire interest. *Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004). The property may be owned in equal or unequal, undivided shares, with each person having an equal right to possess the whole property. *Am. Jur. 2d, Co-tenancy and Joint Ownership, Section 32.*

Unlike joint tenancy, tenancy in common is characterized by a single essential unity-that of possession, or of the right to possession, of the common property. While their possession is by a moiety, or share, and not by all, each tenant, as to his or her share, is deemed the owner of an entire and separate estate. *Am. Jur. 2d, Co-tenancy and Joint Ownership, Section 35*; *People v. Milan*, 5 P.2d 249 (Colo. 1983). Unity of possession is the very essence of a tenancy in common.

A co-tenant who conveys his or her interest to a third party ceases to be a co-tenant, but the purchaser of the undivided share becomes a co-tenant with the remaining owners.

Any co-tenant of real property has a right to enter upon the common estate and to take possession of the whole. This right is subject to the equal right of the other co-tenants with whose right of possession the co-tenant may not interfere. *Am. Jur. 2d, Co-tenancy and Joint Ownership, Section 41.*

This right may be restricted by agreement among all of the co-tenants and in the absence of an agreement, one co-tenant may occupy and utilize every portion of the property at all times and in all circumstances. *Cleveland Trust Company v. Hart,* 131 NE.2d 841841 (Ohio App. 1955). The District Court recognized that co-tenants can enter into agreements which "limit the exclusive possession of the subject property by any co-tenant," (CF, p.206) citing *Keith v. El-Kareh*, 729 P.2d 377 (Colo. App. 1986) and *Niles v. Carlton's Estate*, 75 A. 266 (Vt. 1910).

In *Keith, supra*, each of the co-tenants signed an agreement that expressly gave possession and responsibility for upkeep, repairs and utilities to one co-tenant. In *Niles, supra*, a co-tenant sought to recover sums spent for repairs, improvements and insurance from the estate of a deceased co-tenant based on a "distinct understanding" with the deceased co-tenant that she would pay one-third of the expenses. The estate was liable not because of the co-tenant's relation to the property as a co-tenant, but because of her agreement to pay. *Niles*, 75 A. at 266.

Because tenancy in common is a joint interest in property where the only essential element is a unity of possession, each tenant-in-common has a separate and distinct title which is held independently of the other co-tenants.

"One who stands in a co-tenancy relation to another may not act or claim 'in derogation of' the latter's interest. This means that a co-tenant is not allowed to lessen or diminish the value or effect of the other co-tenant's right, title, interest or status in the land." *Matthews v. Matthews*, 961 P.2d 831, 834 (Okla. 1998). While a co-tenant may contravene the rights of another co-tenant with the consent of his co-tenant, one tenant may not prejudice the rights of the others "without their unanimous consent." *Beesley v. Hanish*, 521 A.2d 1235, 1240 (Md. App. 1987). While a fiduciary relationship does not exist between co-tenants unless other facts show that one party reposed special confidence in the other, tenants-in-common have a good faith obligation in their dealings in regard to jointly owning property. *Turkey Creek LLC v. Rosania,* 953 P.2d 1306, 1312 (Colo. App. 2008). Thus one group of tenants may not take away rights of a group of co-tenants, without their express consent, particularly when those rights had been specifically confirmed and ratified by an amendment recorded, and thus effective, barely three weeks earlier.

A co-tenant has no right without the prior consent of all co-owners, to exclude them or to appropriate through his or her sole use, any particular portion of

the common property. *Am. Jur. 2d, Co-tenancy and Joint Ownership, Section 42.* A co-tenant is not entitled to exclusive possession because each tenant is entitled to occupy the whole in common with the others. *Corpus Juris Secundum, Tenancy in Common, Section 3.* A co-tenant may not act or claim in any manner so as to lessen or diminish the value or effect of the other co-tenant's right, title, interest or status in the commonly owned land. *Corpus Juris Secundum, Tenancy in Common, Section 18.* A group or co-tenants cannot do what a single co-tenant may not do.

Here, the fact that one co-tenant may own a larger fractional share does not change the common law rights of all co-tenants. As noted above, the rights of tenants-in-common are governed by the common law. As also noted above, the parties agreed that they did not have a partnership, but recognized that they were tenants-in-common. Where co-tenants gave up specific common law rights such as the right to partition, it was with the consent of all. The limits placed on the rights of certain co-owners in the jointly owned property by the Second Amendment go to the very essence of rights implicit in tenancy in common. The fact that the "agreement" could be amended by a majority does not permit the majority to amend away the right to possession and access of the minority because all owners did not specifically agree that such possessory rights could be modified or taken away. It would be no different than if 7/12^{ths} of the owners decided that

only they, and not the remaining 5/12^{ths}, could utilize or have access to the property during hunting season. There is nothing in any of the documents or agreements preceding the Second Amendment to suggest that any of the co-tenants was giving up a right to access or hunting, or authorizing others to take away or limit those rights, particularly when hunting was acknowledged to be the reason each was a co-owner.

The ownership agreements were intended to allow for the management and day-to-day operations of the ranch, including yearly dues for road maintenance, organizing voluntary get-togethers to improve property conditions, establishing annual meetings to communicate among owners, and appointing ranch managers, and the management of the access described in the 1983 Deed and the agreement recorded in 1983. No agreement other than the 2011 Second Amendment addressed or purported to address or limit owner access or owner use for hunting. The 2011 Second Amendment unlawfully allows certain co-owners to interfere with the property rights of other owners, without compensation or their consent, and is invalid.

II. THE AMENDING PROVISIONS OF THE VARIOUS AGREEMENTS DO NOT RUN WITH THE LAND.

Standard of Review

This court reviews *de novo* the district court's application of governing legal standards, *Loveland Essential Group, LLC v. Grommon Farms, Inc.*, 251 P.3d

1109 (Colo. App. 2010), and this court is not bound by the trial court's conclusions of law. *Hutchison v. Mullins,* 491 P.2d 71, 74 (Colo. App. 1971); *Ocmulgee Properties, Inc. v. Jeffrey*, 53 P.3d 665 (Colo. App. 2001). Likewise, the interpretation of a contract, deed or written agreement is a matter of law, not binding on this court. *Gilpin Inv. Co. v. Blake*, 712 P.2d 1051 (Colo. App. 1985).

Whether the Issue was Preserved and Where

The issue was preserved in supplemental and reply briefs filed by the parties in response to questions posed by the District Court (CF, p.177; CF, p.185; CF, p.193; and CF, p.199) and was ruled on by the District Court (CF, p.204).

Contention

Covenants may be personal covenants or real covenants. Unlike personal covenants which operate like a general contract provision and bind only the actual parties to the covenant, real covenants "run with the land" and burden or benefit successors in interest. *Cloud v. Association of Owners,* 857 P.2d 435 (Colo. App. 1992). In order for a covenant to run with the land, not only must the parties to the covenant intend that it do so, *Brown v. McDavid*, 676 P.2d 714 (Colo. App. 1983) but the covenant must "touch and concern" the land. *Bigelow v. Nottingham*, 833 P.2d 764, rev'd in part, *Haberl v. Bigelow*, 855 P.2d 1368 (Colo. 1993). To bind successor parties, a real covenant must satisfy certain criteria, including the

requirement that the covenant touch and concern the property. *Farmer's High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 92 P. 290 (Colo. 1907).

The touch and concern requirement is fulfilled when the covenant operates to benefit the physical use of the land. *Bigelow, Id.* Even if there is an intent to make a covenant run with the land, the covenant must still "touch and concern" the land. *Cloud, Id.* Merely recording an instrument is not dispositive as to whether the covenant therein will run with the land. *Department of Transportation, State of Colorado v. First Interstate Commercial Mtg., Co.,* 881 P.2d 473 (Colo. App. 1994).

The 1988 Ownership Agreement did not address hunting, rights to hunt or limitations on hunting on the property at all. It stated only that: "The intent of purchase is to provide land for possible construction of mountain homes by the individuals named below for their personal use, and for the retention or sale of some portion of the land." It also stated that: "This agreement, or any term included herewith may be amended or deleted by simple majority of the individual owners at any time." (Note: This Agreement stated that there were five owners when that was not in fact the case).

The 1990 Agreement purported to revise the 1988 Ownership Agreement, but is not signed or recorded. Again, the expressed "intent" was the same as in the 1988 Ownership Agreement.

The 2007 Amended and Restated Ownership Agreement contains a statement of intent at paragraph 2 providing in part:

> The signers of the Original Agreement were of like mind with one goal, to have agricultural property that would also provide a quality hunting experience. To this end, they agreed to act as gentlemen and with consideration for each of the other Owners. It was understood that prior to any action being taken by an Owner, other owners would be consulted and an agreement reached. (Emphasis added). (CF, p.40-41, par.2)

Thus, the expressed intent of the owners was to allow the owners to hunt on agricultural property and to require all owners to reach agreement on existential terms.

This agreement placed restrictions on the individual ownership interests, limitations on dwellings and structures, provided for managers, and provided for certain use restrictions including limitations on guests of owners. However, there was no discussion of specific access or hunting rights or of limiting access or hunting rights.

Paragraph 14 stated that its provisions ran with the land and paragraph 15 provided for a process of amendment. However, the amendment provision itself is not a covenant running with the land because it does not touch and concern the land, and there is nothing to suggest an intent to authorize hunting restrictions which are now sought to be imposed. Thus, while certain portions of the

agreement "touch and concern" the land, the amendment provisions do not and there was no hunting limitation.

Thus, certain provisions of the Original Agreement were meant to run with the land, but the ability of a majority to add restrictive provisions relating to hunting was not discussed, or hinted on at all, and the ability to amend to add such is not a covenant running with the land.

As discussed, even if there is an "expressed intention" that covenants run with the land, the covenant must still touch and concern the land in order to do so. The amendment provisions do not itself touch and concern the land.

It is unclear why the District Court requested that the parties address this issue, especially in light of the acknowledgement that the Affected Owners had signed the 2007 Agreement containing the amending provision. (CF, p.48)

However, the District Court also appears to have attempted to discern the intent of the various owners through the various agreements over the years.

If a document is unambiguous on its face, the nature and extent of the interest contained in it must be determined without regard to extrinsic evidence. *Cloud, supra.* Whether a written document is ambiguous is a question of law. *Lake Durango Water Co., Inc. v. Public Utilities Comm'n,* 67 P.3d 12 (Colo. 2003). A contract is ambiguous if it is fairly susceptible to more than one interpretation. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996).

The amendment provision is a personal covenant at best, because it does not benefit or burden the land, and reading the agreement as a whole, there is nowhere an expressed intention to limit access or hunting by owners. The only way this was addressed at all was by limiting the number of owners and by prohibiting sales of smaller fractional interests.

Covenants and documents must be construed as a whole and interpreted according to their plain language in view of their underlying purpose. *Wilson v. Goldman*, 699 P.2d 420 (Colo. App. 1985). Any doubts as to the meaning of a restrictive covenant are to be resolved in favor of permitting the enjoyment and maximum use of the land and against the restriction. *Walker v. Wolfe*, 968 P.2d 179 (Colo. App. 1998). While the 2007 Agreement permits amendment, the argument of the Affected Owners is that their common law rights could not be eliminated by an amendment.

In this case, tenants-in-common owned land for the expressed purpose of having "a quality hunting experience," and the owners agreed that all would be "consulted and agreement reached." This was assured, in part, by prohibiting the sale of smaller functional interests, and by certain use restrictions, none of which limited hunting. However, limiting access to hunt by those who had acquired their interests for the expressed purpose of hunting was never contemplated by or

intended by the ownership agreements and a majority of co-owners cannot act to strip co-owners of these rights by non-unanimous amendment.

CONCLUSION

For the foregoing reasons, Defendants/Appellants, Bullmasters, LLC, Enrique Garcia, Jr, Gerardo Garcia, Gabriel A. Saenz, Adan Saenz and Bobby W. Woodall, Individually and as Members of Bullmasters, LLC, Bugle Basin Ranches, LLC and Kent Gordon, Individually and as a Member of Bugle Basin Ranches, LLC and Brent Biggs, pray that the Declaratory Judgment of the District Court be reversed and that this court declare that the provisions of the Second Amendment are void and unlawful, or remand the matter to the District Court for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Defendants'/Appellants' Amended Opening Brief* was filed via Integrated Colorado Courts E-Filing System (ICCES) on this ***23rd*** day of ***October, 2015***, and served via ICCES on the parties below:

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In accordance with C.R.C.P. 121, §1-26(9), a printed copy of this document with original signature is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.