DATE FILED: November 6, 2018

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 Appeal from the District Court, Water Division No. 2, Case. No. 17CW3033, Honorable Larry C. Schwartz	
Plaintiffs-Appellees: **THOMAS KLUN & JOSEPH KLUN, JR.** v. Defendant-Appellant: **MICHAEL KLUN**	
Attorneys for Appellant Michael Klun: Karl D. Ohlsen, Reg. No. 32497 Katrina B. Fiscella, Reg. No. 46343 Carlson, Hammond & Paddock, LLC 1900 Grant Street, Suite 1200 Denver, CO 80203 (303) 861-9000; Fax (303) 861-9026 Email: kohlsen@chp-law.com kfiscella@chp-law.com	Case Number:
APPELLANT'S NOTICE OF APPEAL	

I. Nature of the Case

A. Nature of the Controversy

This is an appeal from a post-trial order denying defendant's request for attorney fees pursuant to a contractual fee-shifting provision.

The parties are brothers and former partners of Klun Farm & Cattle. In October 2011, Michael Klun (defendant-appellant here) sued Thomas and Joseph Klun (plaintiffs-appellees here) for dissolution of the Partnership. The proceedings terminated with entry of judgment against plaintiffs in June 2014. Soon after, plaintiffs filed bankruptcy petitions and defendant participated in the bankruptcy proceedings as plaintiffs' largest unsecured creditor. To resolve the bankruptcy cases and discharge the outstanding judgment, the parties entered into a settlement agreement ("Bankruptcy Settlement"), which required plaintiffs to convey three parcels of land, unencumbered, to defendant. Plaintiffs conveyed the parcels to defendant by general warranty deed.

In this case, plaintiffs sought access to, or claimed ownership of, real property conveyed to defendant pursuant to the Bankruptcy Settlement. Defendant argued that the relief sought was contrary to the Bankruptcy Settlement. Defendant prevailed on all of plaintiffs' claims and requested attorney fees pursuant to the fee-shifting provision in the Bankruptcy Settlement, which states:

> Nothing in this Agreement will be construed so as to impair any legal or equitable right of either Party hereto to enforce any of the terms of this Agreement by any means, including without limitation, an action for damages or a suit to obtain specific performance of any or all of the terms of this Agreement. In the event of such action, the prevailing Party shall be awarded all costs of the action, including reasonable attorneys' fees, in addition to any other relief to which such Party may be entitled.

The trial court determined that defendant was the prevailing party but denied defendant's request for contractual attorney fees based on a finding that the litigation did not involve enforcement of the Bankruptcy Settlement.

B. Order Being Appealed and Appellate Jurisdiction

Defendant appeals the portion of the trial court's order on defendant's motion for attorney fees and costs in which the court declined to award attorney fees under the Bankruptcy Settlement. Defendant does not appeal the trial court's prevailing party determination. This Court has jurisdiction under section 13-4-102(1), C.R.S.

This is not an appeal of a water matter. *See Humphrey v. Sw. Dev. Co.*, 734 P.2d 637 (Colo. 1987). The matter below did not involve adjudication or priority of water rights and this appeal does not seek review of a judgment or decree concerning water rights. *See* C.A.R. 1(a)(2); § 13-4-102(1)(d), C.R.S. Accordingly, jurisdiction is proper in this Court pursuant to section 13-4-102(1), C.R.S.

C. Whether Order Resolved All Issues

The order on attorney fees and costs resolved all issues pending before the trial court after entry of the post-trial Findings of Fact, Conclusions of Law, Judgment and Order on July 13, 2018. The trial court's July 13, 2018 Findings of Fact, Conclusions of Law, Judgment and Order was not appealed by any party.

D. Whether Order Made Final Pursuant to C.R.C.P. 54(b)

All issues before the trial court have been resolved; thus, C.R.C.P. 54(d) is inapplicable.

E. Date of Order Being Appealed

Although the order being appealed is dated September 18, 2018, the electronic register of actions and e-filing date stamp reflect that the order was entered and served on counsel on September 17, 2018.

F. Motions for Post-Trial Relief

No party filed a motion for post-trial relief. No party requested an extension of time to file a motion for post-trial relief.

G. Notices of Appeal

No party requested an extension of time for filing a notice of appeal.

II. Advisory Listing of Issues to be Raised on Appeal

A. Whether the trial court erred in construing the fee-shifting provision contained in the Settlement Agreement.

B. Whether the trial court erred in concluding that the fee-shifting provision does not provide a basis for an award of attorney fees under the facts of this case.

C. Whether the trial court erred in concluding that plaintiffs did not

contend that defendant breached the Settlement Agreement.

D. Whether the trial court erred in concluding that plaintiffs' claims did not violate the Settlement Agreement.

E. Whether the trial court erred in concluding that the litigation did not involve enforcement of the Settlement Agreement.

III. Transcript

The trial in this matter was electronically recorded. A transcript is not necessary to resolve the issues raised by this appeal. This appeal seeks interpretation of a contract, and factual issues, if any, can be decided based on the parties' written filings and the written orders of the trial court.

IV. Orders by a Magistrate Requiring Consent

The order on review was not issued by a magistrate.

V. Counsel for the Parties

A. Counsel for Appellees Thomas Klun and Joseph Klun, Jr.

Jeff A. Massey, Reg. No. 39880
Stinnett Masters & Massey LLP
2 N. Cascade Suite 1400
Colorado Springs, CO 80903
719-999-5121
jmassey@stmmlaw.com

B. Counsel for Appellant Michael Klun

Karl D. Ohlsen, Reg. No. 32497
Katrina B. Fiscella, Reg. No. 46343
Carlson, Hammond & Paddock LLC
1900 Grant Street Suite 1200
Denver, CO 80203
303-861-9000
kohlsen@chp-law.com
kfiscella@chp-law.com

VI. Appendices

A. Order Re: Defendant's Motion for Attorney Fees and Costs

B. Findings of Fact, Conclusions of Law, Order and Judgment

Respectfully submitted,

CARLSON, HAMMOND & PADDOCK, L.L.C.

/s/ *Karl D. Ohlsen / Katrina B. Fiscella*
Karl D. Ohlsen
Katrina B. Fiscella

ATTORNEYS FOR APPELLANT MICHAEL KLUN

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2018, a true and correct copy of the foregoing **APPELLANT'S NOTICE OF APPEAL** was electronically filed via CCES and electronically served on the clerk of the trial court and counsel of record in the trial court (Case No. 17CW3033) as follows:

Division Engineer
Water Division No. 2
310 E. Abriendo Ave, Suite B
Pueblo, CO 81004

State Engineer
Division of Water Resources
1313 Sherman Street, Room 818
Denver, CO 80203

Jeff A. Massey
Stinnett Masters & Massey, LLP
2 N. Cascade, Suite 1400
Colorado Springs, CO 80903

/s/ *Katrina B. Fiscella*_____

THIS DOCUMENT WAS E-FILED PURSUANT TO C.A.R. 30.
A DULY SIGNED ORIGINAL IS ON FILE AT THE OFFICES OF
CARLSON, HAMMOND & PADDOCK, L.L.C.

Appendix A

DISTRICT COURT, WATER DIVISION NO. 2 STATE OF COLORADO Court Address: 501 North Elizabeth Pueblo, CO 81003	DATE FILED: September 7, 2018 2:36 PM CASE NUMBER: 2017CW3033
Plaintiffs: **THOMAS AND JOSEPH KLUN, JR.** v. Defendant: **MICHAEL KLUN**	**COURT USE ONLY** Case Number: 17CW3033 Courtroom: 406

ORDER RE: DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS

THIS MATTER is before the Court on Defendant's Motion for Attorney Fees and Costs, filed on August 3, 2018, Plaintiffs Response filed August 24, 2018 and Defendants Reply filed August 31, 2018. The Court has reviewed the pleadings the file herein and now being fully advised in the matter, finds and orders as follows:

1. Defendant requested an award of attorney fees and costs pursuant to the parties' Settlement Agreement (Exhibit A to the Motion), section 13-17-102, C.R.S., and Rule 54(d).

2. The Court finds that defendant is the prevailing party. Defendant prevailed on all of plaintiffs' claims, which were numerous. The Court's dismissal of defendant's counterclaims does not affect this determination given that plaintiffs did not present any evidence regarding defendant's counterclaims and the Court's dismissal was based on a *sua sponte* legal determination.

3. The Court finds that Section 13(a) of the parties' Settlement Agreement does not provide a basis for an award of attorney fees to Defendant under the facts of

this case. Plaintiffs did not contend that Defendant breached the settlement agreement, did not pursue a breach of contract or specific performance claim. Plaintiffs sought only a declaratory judgment and injunctive relief. Therefore, Plaintiffs' claims in this matter did not violate the Settlement Agreement. The litigation in this case did not involve enforcement of the Settlement Agreement.

4. The Court has considered the factors contained in section 13-17-103, C.R.S. Plaintiffs' claims were not substantially groundless and frivolous, further pursuit of those claims were not substantially vexatious. The Court finds that each of plaintiffs' claims had substantial justification, therefore an award of attorney fees pursuant to section 13-17-102(4), C.R.S. is unwarranted.

5. The Court finds that the costs requested by Defendant are reasonable and properly awarded under C.R.C.P. Rule 54(d). The Court therefore awards defendant costs in the amount of $5,710.88 pursuant to C.R.C.P. Rule 54(d).

IT IS THEREFORE ORDERED that each party shall pay their own attorney fees.

IT IS FURTHER ORDERED that judgment shall enter against plaintiffs Thomas Klun and Joseph Klun, Jr. in the amount of **$5,710.88**, for defendant's reasonable costs in this matter.

Dated this 18th day of September 2018.

BY THE COURT:

LARRY C. SCHWARTZ,
WATER JUDGE
WATER DIVISION 2

Appendix B

DISTRICT COURT, WATER DIVISION NO. 2 STATE OF COLORADO Court Address: 501 North Elizabeth Pueblo, CO 81003	DATE FILED: November 13, 2018 2:30 PM CASE NUMBER: 2017CW3033
Plaintiffs: **THOMAS AND JOSEPH KLUN, JR.** v. Defendant: **MICHAEL KLUN**	**▲COURT USE ONLY▲**
	Case Number: 17CW3033 Courtroom: 406
FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT	

I. Findings of Fact

A. Procedural History

1. This matter is before the Court on Plaintiffs Thomas Klun and Joseph Klun, Jr.'s Verified Complaint for Declaratory and Injunctive Relief, filed June 26, 2017, and Defendant Michael Klun's Verified Answer, Defenses, and Counterclaims, filed August 3, 2017. A hearing on Plaintiffs' request for a Preliminary Injunction was held on July 6, 2017, addressing and resolving Plaintiffs' First and Second Claims for Relief.

2. The parties filed motions for summary judgment pursuant to Rule 56. The Court entered an order on the motions on April 13, 2018, granting summary judgment in favor of Defendant on those portions of Plaintiffs' Third Claim (Declaratory Judgment) that sought mandatory injunctive relief in the form of restoration of property.

3. Trial was held on May 7 and 8, 2018. Following the close of Plaintiffs' evidence, the Court granted Defendant's Rule 41(b)(1) motion for dismissal as to Plaintiffs' claim for conversion of water and a related declaratory judgment request. The

Court also dismissed Plaintiffs' request for declaratory judgment related to their claim for conversion of personal property. This ruling addresses Plaintiffs' remaining claims for relief and Defendant's counterclaims.

B. Background

4. The relief requested in Plaintiffs' Complaint centered on Plaintiffs' desire to access Defendant Michael Klun's land ("Parcel C") for purposes of using irrigation infrastructure located on Parcel C to irrigate a portion of Plaintiffs' adjoining parcel (the "Patterson Parcel") consisting of approximately 2.5 acres (the "Affected Parcel"). Plaintiffs requested access to an air vent, shut-off valve, Alfalfa valve, and underground pipeline located on Parcel C ("disputed fixtures"). Plaintiffs broadly requested declaratory judgments regarding "historical easements affecting Plaintiffs' Farm Operation," but the only specific request in the Complaint was for access to the disputed fixtures on Parcel C. The general locations of the Patterson Parcel, the Affected Parcel, and Parcel C are shown in Plaintiffs' Exhibit GG.

5. The Patterson Parcel and Parcel C are located in the West 1/2 of Section 9, Township 21 South, Range 63 West of the 6th P.M. in Pueblo County, Colorado. The boundary between the two parcels is the quarter section line separating the NW 1/4 and SW 1/4 of Section 9, with the Patterson Parcel occupying the majority of the N 1/2 of the SW 1/4, and Parcel C immediately north, in the S 1/2 of the NW 1/4 of Section 9.

6. From the early 1990s through 2011, the Plaintiffs and Defendant farmed Parcel C and the Patterson Parcel as a single unit as general partners in Klun Farm & Cattle ("the Partnership"). During that time, the Partnership farmed the parcels pursuant to lease until the Partnership purchased Parcel C in 2002. The Partnership continued

leasing the Patterson Parcel until Plaintiffs purchased it in their individual capacities in April 2011.

7. In October 2011, Michael Klun filed suit against Plaintiffs for dissolution and winding up of the Partnership. The parties reached a mediated settlement on January 5, 2012, in which Plaintiffs agreed to buy out Defendant's interest in the Partnership, including Defendant's interest in Parcel C. Def.'s Ex. M. As consideration for entering into the mediated settlement, Defendant agreed to waive any claim to the Patterson Parcel or arising out of Plaintiffs' purchase of the Patterson Parcel. *Id.* at 2.

8. Plaintiffs did not fulfill their obligations under the mediated settlement. Def.'s Ex. P. More than two years later, on June 18, 2014, the court entered judgment against Plaintiffs in excess of $1.6 million and awarded attorney fees to Defendant based on Plaintiffs' groundless and frivolous defense and obdurate litigation behavior. *Id.* at 4. Upon payment of the judgment, Defendant was to convey title to the real property as provided by the January 5, 2012, mediated settlement. *Id.*

9. On July 8, 2014, Plaintiffs filed petitions in bankruptcy seeking reorganization pursuant to Chapter 11. Def.'s Ex. A at 1. As Plaintiffs' largest unsecured creditor, Defendant participated in the bankruptcy proceedings. Def.'s Ex. TT at 2 ¶ 10. On April 6, 2015, the parties reached a second settlement agreement intended to resolve the bankruptcy cases in the form of a memorandum of understanding ("MOU"). *Id.* at 6–16. The April 6, 2015, MOU was finalized into a formal settlement dated June 4, 2015. ("Bankruptcy Settlement"). Both agreements expressly required Plaintiffs to convey to Defendant their "entire interest" in various parcels of real property, including

Parcel C. *Id.* at 7; Def.'s Ex. A at 2. Plaintiffs were to retain the adjoining Patterson Parcel.

10. Defendant's unrebutted testimony was that the Bankruptcy Settlement was intended to be a complete split of the assets of the Partnership to ensure no interaction between Plaintiffs and Defendant. Defendant further testified that he would not have agreed to the Bankruptcy Settlement if it meant the Plaintiffs would have continued access to the land conveyed to him; he would have elected for liquidation of the Partnership assets instead.

C. Klun Farm & Cattle's Irrigation of Parcel C and Patterson Parcel

11. For the duration of the parties' joint farming operation (beginning in the early 1990s), the Partnership held either a leasehold or ownership interest in the Patterson Parcel and Parcel C, which the parties treated as one farm. The Partnership farmed other properties as well, including the parcel immediately south of the Patterson Parcel ("South Road Parcel") and a parcel located in the SW 1/4 of the SE 1/4 of Section 8, Township 21 South, Range 63 West of the 6th P.M. in Pueblo County, Colorado ("Parcel A"). Plaintiff Thomas Klun owned Parcel A, individually, during the time it was farmed by the Partnership. He conveyed Parcel A to Defendant by general warranty deed pursuant to the MOU and Bankruptcy Settlement. Def.'s Ex. A at 2; Def's Ex. B at 2; Def.'s Ex. TT at 7.

12. Prior to dissolution, the Partnership irrigated the South Road Parcel, Patterson Parcel, and Parcel C with Bessemer Irrigating Ditch Company water. The Partnership used Bessemer water leased from the owners of these parcels; until the Partnership bought Parcel C and the Bessemer shares associated with Parcel C in

2002, the Partnership did not own any shares used to irrigate Parcel C, and it has never owned the shares associated with the Patterson Parcel or the South Road Parcel.

13. Water was taken out of the Bessemer Ditch at Headgate 47 approximately 3/4 mile south of the Patterson Parcel and conveyed north first through an underground pipeline and then through a cement ditch parallel to 36th Lane (the Megrue Lateral). At the intersection of 36th Lane and South Road, water was either diverted into an east-west pipeline or left in the Megrue Lateral to continue north for delivery along the parcels' western edges. The east-west pipeline runs east to the Middle Road (a private access road shown on Plaintiffs' Exhibit GG), where it turns and continues north, bisecting the South Road Parcel, the Patterson Parcel, and finally Parcel C. Testimony of M. Klun; Def.'s Ex. UU.

14. The Parties used water from the north-south pipeline along Middle Road to irrigate the east half of the South Road Parcel, the Patterson Parcel, and Parcel C. The pipeline runs downhill from north to south toward Parcel C. Water was taken out of the pipeline at Alfalfa valves evenly spaced throughout the pipeline (approximately every 300 feet) and used for irrigation through gated pipeline. Testimony of M. Klun; Def.'s Ex. UU; Def.'s Ex. C (depicting Alfalfa valves in north-south pipeline on Parcel C); Pls.' Ex. GG (depicting approximate locations of Alfalfa valves in north-south pipeline on all three parcels).

15. Water that continued north in the Megrue Lateral was used to irrigate the west half of each parcel directly, with the exception of the Affected Parcel and a similarly situated area on the northern edge of Parcel C, both of which are separated from the Megrue Lateral by residential lots. Testimony of M. Klun; Def.'s Ex. C

(depicting exceptions in northwest corner of Parcel C); Pls.' Ex. O (home on Patterson Parcel). There are two residential lots near the northwest corner of Parcel C that are owned by third parties. The area between the Affected Parcel and 36th Lane is part of the Patterson Parcel and owned by Plaintiffs. Def.'s Ex. Q.

16. The Partnership irrigated the Affected Parcel using water conveyed through the north-south pipeline across the property line into Parcel C where it was then diverted west into the disputed pipeline, and finally rediverted south to the Affected Parcel. Testimony of M. Klun.

17. Defendant irrigates the landlocked portion of Parcel C using a gravity flow ditch, shown in the northwest corner of Parcel C in Defendant's Exhibit C, that proceeds east from the Megrue Lateral just south of the residential lots in the same fashion as it has been historically irrigated. Def.'s Ex. C (showing ditch); Testimony of M. Klun.

D. Installation and Use of Disputed Pipeline by the Parties' Predecessors-in-Interest

18. The parties testified regarding their understanding of their predecessors' irrigation practices and use of the parcels, but none of the predecessors-in-interest to Parcel C or the Patterson Parcel testified.

19. The parties' testimony indicated that the Parcel C, the Patterson Parcel, and the South Road Parcel were, at one time, commonly owned and later conveyed by the common owner to three of his children, Mildred Patterson, Orville Hartmann, and Marie Seeley. For the most part, the parcels were farmed together as a single unit, except for an unknown period of time when the three children farmed them separately.

20. The parties testified that, prior to installation of the disputed pipeline, the only method for irrigation of the Affected Parcel was by gravity flow from the Megrue Lateral at a point near that shown in Defendant's Exhibit W, located uphill from and west of the Affected Parcel. Testimony included statements from the parties that ditch remnants remained on and adjacent to the residential lot between the Megrue Lateral and the Affected Parcel. Testimony also included statements that, given the elevation of the Megrue Lateral and the Affected Parcel, the only way to irrigate the Affected Parcel prior to installation of the disputed pipeline was from the Megrue Lateral through a ditch that carried water east, in the same fashion as Defendant now irrigates his landlocked parcel in the north of Parcel C.

21. Plaintiffs testified that the disputed pipeline was installed in the 1960s, although Plaintiff Joseph Klun testified that he does not know who installed the pipeline. Defendant essentially agreed as to timing, recalling either the late 1960s or early 1970s. In any event, the parties were children or pre-teens when the pipeline was installed and they did not personally irrigate the parcels or use the disputed pipeline until the early 1990s.

22. Plaintiffs testified that the disputed pipeline had only been used to irrigate the Affected Parcel. Defendant testified that the pipeline had also been used to irrigate Parcel C, and further, that the pipeline was installed contemporaneously with and used as part of a recirculation system in conjunction with a tailwater pond in the northeast corner of Parcel C. Defendant's testimony regarding the construction and configuration of the recirculation system was unrebutted. Further, Defendant testified that he intended to use the disputed pipeline as part of his own recirculation system once he acquired

Parcel C, and doing so was a strong factor in entering into the Bankruptcy Settlement.

E. Conveyance of Parcel C

23. Although Plaintiffs ultimately conveyed their interest in Parcel C to Defendant in 2015, that was not the outcome contemplated by the 2012 mediated settlement or the 2014 judgment, both of which required Plaintiffs to purchase Defendant's interest in Parcel C. Def.'s Ex. M; Def.'s Ex. P. Ultimately, had Plaintiffs complied with the 2012 settlement or the 2014 judgment, they would have acquired Defendant's interest in all real property farmed by the Partnership, as well as Defendant's entire interest in Partnership assets. *Id.* Defendant testified that he planned to move away from the former family farm, retire from farming, and have a complete separation from Plaintiffs.

24. Plaintiffs failed to pay the judgment and filed for bankruptcy soon thereafter, ultimately preventing the separation contemplated by the 2012 settlement. To resolve the bankruptcy cases, Plaintiffs agreed – twice – to convey their "entire interest" in real property, including Parcel C, to Defendant. Def.'s Ex. TT at 7–8; Def.'s Ex. A at 2. Neither the MOU nor the final Bankruptcy Settlement state that Plaintiffs would retain any rights to the transferred property, or that they intended to do so. *Id.* The Bankruptcy Settlement expressly states that the property to be transferred, including Parcel C, is not encumbered. Def.'s Ex. A at 5.

25. In the course of negotiating the MOU and Bankruptcy Settlement, Defendant began developing plans to modify the irrigation system on Parcel C based on the understanding that Plaintiffs would not retain any interest in or rights to use Parcel C. Prior to the Bankruptcy Settlement and at the time it was executed, Defendant knew

the location of the property line between the Patterson Parcel and Parcel C; based on the location of existing survey markers and monuments, Defendant knew that the disputed fixtures were part of Parcel C. Testimony of M. Klun; Def.'s Ex. WW; Def.'s Ex. XX. He planned to modify the existing recirculation system, which would involve continued use of the disputed pipeline, air vent, and valves for that purpose.

26. To that end, Defendant went to the Natural Resources Conservation Service (NRCS) for a design within days of receiving the warranty deed for Parcel C. Defendant commissioned a survey of Parcel C to confirm his knowledge of the location of the property line before undertaking modifications to the irrigation system. The survey took place in July 2015 soon after the conveyance. Testimony of M. Klun; Testimony of R. Reeves; Def.'s Ex. C.

F. Survey of Parcel C

27. The survey was conducted by professional land surveyor Randy Reeves. Mr. Reeves has been conducting surveys in Pueblo since 1977. He received his professional land surveyor license in 1983 and has served as the elected surveyor for Pueblo County since 2010.

28. Mr. Reeves prepared a Land Survey Plat of Parcel C, dated August 3, 2015 ("the Plat"). Def.'s Ex. C. As stated on the Plat, Mr. Reeves surveyed the property described in the May 21, 2002, warranty deed by which the Partnership took title to Parcel C from grantors Bruce H. Albrecht, Marie A. Seelye, and Karen A. Herrle ("Albrecht Deed"). Def.'s Ex. R. The legal descriptions for Parcel C in the Albrecht Deed and Defendant's June 4, 2015, Warranty Deed (labeled in the 2015 deed as Parcel III) are the same. Testimony of R. Reeves.

29. To create the Plat, Mr. Reeves reviewed the legal descriptions contained in various deeds for Parcel C and adjoining properties. He researched and located existing monuments identifying each of the four corners of the NW 1/4 of Section 9, which were placed in 1990 (NW Corner), 1992 (W 1/4 Corner), and 2000 (N 1/4 Corner, Center 1/4 of Section 9). He located a building and old foundation on the property line that extend south into the Patterson Parcel and do not cross into Parcel C. Mr. Reeves obtained, located, and verified GPS coordinates for five corners within Section 9. Mr. Reeves reviewed two prior surveys, both conducted in 2000, one of which identified the NW 1/4, NW 1/4 of Section 9, the other identified land in the E 1/2 of Section 9. He independently confirmed the locations in the prior surveys and concluded that his findings were consistent with both surveys, neither of which had been challenged or altered at any time. Testimony of R. Reeves.

30. The Plat identifies the southern boundary of Parcel C as the quarter section line separating the NW 1/4 and SW 1/4 of Section 9. The Plat locates the disputed fixtures on Parcel C as follows: (1) irrigation valve 4.1'± north of property line; (2) air vent at pipe 3.3'± north of the property line; (3) underground irrigation line; (4) irrigation valve 2.0'± north of the property line; and (5) air vent at pipe 8.0'± north of the property line. Def.'s Ex. C.

31. In January 2016, Defendant began modifying his irrigation system. As relevant here, Defendant moved some of the disputed fixtures slightly farther north in order to construct a road for access to Parcel C without entering into the Patterson Parcel. Testimony of M. Klun; Pls.' Ex. CC (depicting new road). Defendant built the new road because Plaintiffs had denied him access across the northwest corner of the

Patterson Parcel in order to reach Parcel C, the location where Parcel C had historically been accessed before the Bankruptcy Settlement. Testimony of M. Klun; Def.'s Ex. U.

32. Although Plaintiffs have never had either Parcel C or the Patterson Parcel surveyed, they dispute the location of the property line as represented by the Plat. Plaintiffs claim a different boundary was acknowledged or acquiesced in since the 1950s, but none of the parties' predecessors-in-interest testified, and Defendant – who, like Plaintiffs, has had an ownership interest in Parcel C since 2002 – testified that his pre-survey understanding of the property line was consistent with the Plat. Moreover, Defendant testified that he had never acquiesced to a property line other than that shown on the Plat. Plaintiffs did not present a map identifying the location of their claimed property line in relation to the surveyed property line. And while the Court acknowledges Plaintiffs' Exhibit GG, marked by each of the parties during trial, the hand-drawn locations on Plaintiffs' Exhibit GG are too approximate to meaningfully identify the actual location of Plaintiffs' claimed property line.

33. Plaintiffs testified that the property line proceeded east from a cedar post to a broken divider box. The cedar post can be seen in Plaintiffs' Exhibits R and CC[1] just north of a telephone pole. Plaintiff Joseph Klun testified that the cedar post is "inches from the GPS line" and Mr. Reeves testified that the cedar post in Plaintiffs' Exhibit CC is "near" the western corner. Plaintiffs did not present a photograph or other depiction of the broken divider box or its location.

34. Plaintiffs' Exhibit W shows the approximate center point of the claimed and surveyed property lines. Testimony of J. Klun, T. Klun. The photograph shows the

[1] Photographs look east across 36th Lane from southwestern corner of Parcel C.

east half of the southern boundary of Parcel C (facing east from the Middle Road). To the north (left side of the photograph) is Parcel C; to the south is the Patterson Parcel. The parties agree that the photo depicts the locations of the disputed fixtures at the time of the Bankruptcy Settlement, listed here from north to south (left to right): the shut-off valve (marked by the yellow stake), air vent, Alfalfa valve. Exhibit W also shows a wooden survey stake south of the disputed fixtures. Plaintiffs claim that the wooden survey stake marks the surveyed property line and the yellow stake marks the claimed property line. Testimony of J. Klun, T. Klun.

35. The Court cannot accept Plaintiffs' theory that the yellow stake marks the property line. A line proceeding east from a point at or near the cedar post would not intersect with the yellow stake. Plaintiff Joseph Klun testified that the cedar post is inches from the surveyed western corner, a discrepancy that inexplicably increases, under Plaintiffs' theory, to more than eight feet in the center of the property. *See* Def.'s Ex. C (locating air vent 8.0'± north of the property line in center of Parcel C); Pls.' Ex. W. (wooden survey stake south of yellow stake marking shut-off valve north of air vent); Pls.' Ex. CC (cedar post). In other words, Plaintiffs claim a property line that proceeds northeast, as opposed to east.

36. Further, although Plaintiff Joseph Klun initially described the eastern corner with reference to a broken divider box, he later referred to a "monument in the lateral." His second description of the eastern corner is consistent with Defendant's testimony. Defendant testified that he understood the eastern corner of the property to be near a nail or marker in a concrete ditch. Def.'s Ex. WW; Def.'s Ex. XX (photograph looks west from southeastern corner of Parcel C). Defendant acknowledged that the

marker does not identify the precise location of the corner, which is underneath or within the concrete ditch shown in Exhibit XX, but which is in line, west to east, with the marker. The Plat shows a ditch intersecting the southeast corner of Parcel C. There is a note on the Plat indicating that the monument locating the southeast corner (No. 6 rebar) is located five feet east of the southeast corner of Parcel C (center 1/4 corner of Section 9) on the center 1/4 line of Section 9. Def.'s Ex. C.

37. The Court does not find the testimony regarding Plaintiffs' claimed property line credible. Plaintiffs' Exhibit W shows that Plaintiffs planted corn entirely south of the surveyed property line, and testimony indicated that the corn was approximately three months old. Testimony of M. Klun. The photograph was taken in July 2015, meaning the corn was planted in April, two months before Plaintiffs conveyed their interest in Parcel C to Defendant. As sole owners of the Patterson Parcel and with ownership and use of Parcel C in dispute due to the unresolved judgment and bankruptcy proceedings, the only apparent restriction on where Plaintiffs could plant corn would have been the property line with Parcel C. Plaintiffs planted corn only south of the yet-to-be-surveyed quarter section line, not along what they assert to be the acquiesced property line. The Court notes that this photograph was taken before Defendant built the road and berm described in Plaintiffs' Complaint.

38. It appears that Plaintiffs have changed their understanding of the property line recently, to include land north of the disputed fixtures.

39. The Court finds that the Plat accurately represents the locations of the property line and disputed fixtures. In preparing the Plat, Mr. Reeves performed extensive background research and independently verified his research. Plaintiffs did

not commission their own survey. Their challenge to the Plat was based on the assertion that GPS technology "moved" the property line in Defendant's favor. The Court notes that Plaintiffs frequently referred to the surveyed line as the "GPS line" during trial. However, GPS coordinates were only one of several resources Mr. Reeves used to prepare the Plat. And as Mr. Reeves testified, the Plat did not establish the property line; it identified the property line established by the government survey made in the late 1800s and restated in the 2002 and 2015 warranty deeds for Parcel C and the 2011 deed for the Patterson Parcel. Def.'s Ex. B; Def.'s Ex. Q; Def.'s Ex. R; Testimony of R. Reeves.

G. Property Line Between Parcel C and Patterson Parcel

40. The Court finds that the legal description in the Albrecht Deed describes the southern property line of Parcel C as the quarter section line and Plaintiffs accepted that description when they accepted the Albrecht Deed. Def.'s Ex. R. Further, the Patterson Deed, by which the Plaintiffs acquired the Patterson Parcel, describes its northern boundary as the quarter section line and Plaintiffs accepted that description when they accepted that deed. Def.'s Ex. Q. Finally, the Plaintiffs acknowledged the quarter section line as the southern boundary of Parcel C when they included it in the legal description in the warranty deed by which they conveyed their interest in Parcel C to Defendant. Def.'s Ex. B. They did not include any reservation or exception encroaching upon or encumbering Parcel C in that deed, and none of the deeds describe encroachment by the Patterson Parcel into the NW 1/4 of Section 9. *Id.*

H. Entire Interest in Parcel C Conveyed

41. At the time that Plaintiffs conveyed Parcel C, they owned the entire interest in the Patterson Parcel, as well as an undivided two-thirds interest in Parcel C. The June 4, 2015, Warranty Deed, signed by Thomas A. Klun, Joseph L. Klun, Jr., and Donna Klun (individually), as well as Thomas A. Klun and Joseph L. Klun, Jr. as general partners of Klun Farm & Cattle General Partnership, conveyed all interest held by all grantors in Parcel C, which included any interest they may have owned by virtue of their ownership of the Patterson Parcel. They made no reservations, nor were they allowed to under the Bankruptcy Settlement or memorandum of understanding.

42. The Court notes that Plaintiffs did not introduce or otherwise rely on the June 4, 2015, Warranty Deed. In fact, as Defendant pointed out in his Rule 41 argument, Plaintiffs actually removed the June 4, 2015, Warranty Deed from their exhibit list one week before trial.

I. Defendant's Counterclaims

43. Defendant's counterclaims arise out of Plaintiffs' alterations to the Megrue Lateral. Defendant contends that Plaintiffs did not have a right to alter the Megrue Lateral, or to dump tailwater and sediment into the Megrue Lateral, because they do not own any Bessemer shares entitling them to delivery of water through the Megrue Lateral.

44. It is undisputed that Plaintiffs receive water under Bessemer Ditch shares delivered through the Megrue Lateral pursuant to a lease with Pueblo Board of Water Works, and that they do not own, and never have owned, these shares.

45. Following the conveyances required by the Bankruptcy Settlement, the parties agree that Plaintiffs do not own any shares in the Bessemer Ditch delivered through the Megrue Lateral.

46. After the Bankruptcy Settlement, Plaintiffs installed two siphon structures in the Megrue Lateral. The first was installed near the southwest corner of the Patterson Parcel, shown by an orange line on Plaintiffs' Exhibit GG. Plaintiffs use this siphon to take tailwater from a field west of 36th Lane, under 36th Lane, and place it into the Megrue Lateral. Along with tailwater, the siphon structure brings sediment that then accumulates in a culvert on the Megrue Lateral adjacent to the southern corner of Parcel C, which may impede the flow of water to Parcel C. The accumulated sediment is flushed out of the culvert.

47. Plaintiffs also installed a second siphon structure located in the northwest corner of the Patterson Parcel and shown by a second orange line on Plaintiffs' Exhibit GG. Plaintiffs' installation of the second siphon created a hole in the bottom of the Megrue Lateral that, when open, prevents water from reaching Parcel C, draining instead to the river. Defendant testified that he and his agents have placed caps on the hole several times, but the structure used to anchor the caps in the concrete has been removed, and the caps have been removed and taken.

48. Plaintiffs did not offer any evidence or testify regarding the alterations to the Megrue Lateral.

II. Conclusions of Law

A. Plaintiffs' Claims for Trespass and Conversion

Plaintiffs' claims for trespass and conversion of the disputed fixtures turn on the

location of the property line. The Court finds that Plaintiffs failed to present any credible evidence supporting their theoretical property line. “It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or grant itself." *Spar Consol. Mining & Dev. Co. v. Miller*, 568 P.2d 1159, 1161–62 (Colo. 1977) (citing *Cragin v. Powell*, 128 U.S. 691 (1888)). *See also Smith v. Town of Fowler*, 333 P.2d 1034, 1036 (Colo. 1959); *Terry v. Salazar*, 892 P.2d 391, 393–94 (Colo. App. 1994) (when a deed “describes [a] parcel in terms of the nomenclature of the public land survey system as to the boundaries of the devised estate,” the conveyance of the deed “delimit[s] the boundary of the parcel in terms of the surveyed lines.”).

In accepting the Albrecht Deed and the Patterson Deed, and in granting the June 4, 2015, Warranty Deed, Plaintiffs have acknowledged the quarter section line as the boundary between the parcels on at least three separate occasions, most recently in 2015. Plaintiffs presented no evidence that an owner of either parcel agreed or acquiesced to an alternate property line. *See Hartley v. Ruybal*, 414 P.2d 114 (Colo. 1966) (“There must be mutuality in the fixing of a boundary in order for acquiescence to be found.”). Plaintiffs’ actions in 2015, planting corn up to but not over the quarter section line, further undermine Plaintiffs’ claim of acquiescence.

The Court rejects Plaintiffs’ theory of acquiescence with respect to Plaintiffs’ claimed property line, finds that the property line is located as shown on the Plat, and finds that the disputed fixtures were located on Parcel C on June 4, 2015. As fixtures to

the real property, the disputed fixtures were conveyed to Defendant on June 4, 2015, as part of the realty comprising Parcel C. *See Rare Metals Min. & Mill. Co. v. W. Colo. Power Co.*, 213 P. 124 (Colo. 1923); *Int'l Paper Co. v. Cohen*, 126 P.3d 222 (Colo. App. 2005). As owner of Parcel C, Defendant's alteration of the disputed fixtures was lawful and did not amount to trespass or conversion.

B. Request for Declaration of Implied Easement

Plaintiffs ask the Court to declare the existence of two easements: (1) an easement allowing Plaintiffs access to Parcel C and use of the disputed fixtures to irrigate the Affected Parcel and (2) an easement permitting Plaintiffs to park a fertilizer nurse tank on Parcel A in order to add fertilizer to water flowing through Lateral 42.

Plaintiffs have asserted various theories in support of these requests, primarily relying on authority regarding ditch rights-of-way in Colorado. Like other implied easements, ditch rights-of-way may be established by prescription, estoppel, or implied by prior use. *In re Tonko*, 154 P.3d 397, 404 (Colo. 2007). The party claiming an easement must prove the existence of the easement by a preponderance of the evidence. *Strole v. Guymon*, 37 P.3d 529, 533 (Colo. App. 2001).

1. Ditch Rights-of-Way

Ditch rights-of-way are recognized in Colorado to promote the beneficial use of water rights in spite of the state's arid climate and relative dearth of riparian lands. *See In re Tonko*, 154 P.3d at 403. Because the majority of Colorado lands are not riparian, ditch rights-of-way allow the owner of a water right to convey water "across the land of another so that lands not immediately proximate to water [can] be used and developed." *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1231–32 (Colo. 2001). The

right to convey water "across public, private and corporate lands" appears in Article XVI, § 7 of the Colorado constitution and Section 37-86-102, C.R.S., similarly provides that the owner of a water right "shall be entitled to a right-of-way through lands which lie between the point of diversion and point of use or proposed use for the purpose of transporting water . . . ." § 37-86-102, C.R.S.

The requested easement for use of the disputed pipeline does not qualify as a ditch right-of-way. The pipeline is located on Parcel C, which does not "lie between the point of diversion and point of use," as required by Section 37-86-102, C.R.S. Further, the pipeline is not the means by which water is initially conveyed from the Bessemer Ditch to the Patterson Parcel. Water from the Bessemer Ditch is conveyed to the Patterson Parcel through the Megrue Lateral or the north-south pipeline along the Middle Road. Plaintiffs' leased Bessemer water must pass through the entirety of Patterson Parcel, including the Affected Parcel, before being piped west in the disputed pipeline and returned south – uphill – to irrigate the Affected Parcel. Plaintiffs irrigate the remainder of the Patterson Parcel (approximately 70 acres) without accessing Parcel C or using the pipeline, and they concede that, prior to installation of the pipeline, the Affected Parcel was irrigated using a gravity flow ditch located on the west side of the Patterson Parcel, taking water directly out of the Megrue Lateral. Plaintiffs concede that they could install a similar pipe or ditch across the Patterson Parcel to convey water from the Megrue Lateral to the Affected Parcel, in the same manner that Defendant irrigates his landlocked land in the north of Parcel C. *See* Def.'s Ex. C (depicting ditch from western boundary of Parcel C to landlocked area). They have made no attempt to do so.

Plaintiffs have not identified and the Court is not aware of any Colorado precedent recognizing a ditch right-of-way where the ditch or pipeline did not cross over lands between the point of diversion and point of use. Further, Plaintiffs have not identified any precedent authorizing the lessee of water rights, rather than the owner, to create or assert such an easement, and Plaintiffs have never owned the water used to irrigate the Patterson Parcel.

There is similarly no precedent authorizing a ditch right-of-way for purposes of parking on another's land in order to add fertilizer to a ditch. The requested easements are fundamentally different from and do not qualify as ditch rights-of-way as defined by Colorado law. The Court declines to declare the requested easements on that basis. *See, e.g.*, § 37-86-102, C.R.S.; Colo. Const. Article XVI, § 7; *Roaring Fork*, 36 P.3d at 1231–32.

2. Prescriptive Easement

An easement by prescription may arise where a prescriptive use is (1) open or notorious, (2) continuous for at least eighteen years, and (3) either adverse or pursuant to an attempted but ineffective grant. *Maralex Resources, Inc. v. Pub. Trustee, Garfield Cnty.*, 320 P.3d 399, 403 (Colo. App. 2014) (citing *Matoush v. Lovingood*, 177 P.3d 1262, 1270 (Colo. 2008); *Brown v. Faatz*, 197 P.3d 245, 249 (Colo. App. 2008)). A "use is not adverse if the landowner permits the use" and "use that is permissive at its inception cannot ripen into a prescriptive right." *Id.* at 404 (citing *Horne v. Hopper*, 211 P. 665, 666 (Colo. 1922); *Brown*, 197 P.3d at 250). Permissive use therefore "defeats the acquisition of a prescriptive easement." *Id.* (citing *Brown*, 197 P.3d at 250).

For the entire time that Plaintiffs used the disputed pipeline to irrigate the

Affected Parcel – from the early 1990s through no later than June 4, 2015 – they either owned or leased both Parcel C and the Patterson Parcel. Thus, if a prescriptive easement exists, it must have vested before the early 1990s when the Partnership began farming the two parcels and irrigating with the disputed pipeline. Plaintiffs must prove an adverse use of the pipeline that continued for at least 18 years by a predecessor-in-interest to the Patterson Parcel.

The parties testified that Parcel C, the Patterson Parcel, and the South Road Parcel were commonly owned and farmed together before the common owner conveyed the parcels to three of his children. The parties agreed that the pipeline was installed in the late 1960s or early 1970s. The testimony indicated that the three children farmed the parcels separately at some point after the conveyances from their father, but there was no evidence as to the timing or duration of the separate operations or what distinguished them from the former joint operation.

On the evidence presented, the Court cannot determine whether the owner of the Patterson Parcel used the pipeline to irrigate the Affected Parcel in an adverse manner – *i.e.*, without her sibling's permission – for at least 18 years. Testimony that the three children farmed the parcels separately for an unknown length of time, without more, is insufficient to show adverse use of the disputed pipeline for the statutory period.

Further, the testimony regarding the requested easement on Parcel A was limited to the period when Parcel A was owned by Plaintiff Thomas Klun. Accordingly, the Court does not find an easement by prescription has been established as to either request.

3. Easement by Estoppel

The Court can imply an easement created by estoppel when:

> (1) the owner of the servient estate permitted another to use that land under circumstances in which it was reasonable to foresee the user would substantially change position believing the permission would not be revoked, (2) the user substantially changed position in reasonable reliance on the belief, and (3) injustice can be avoided only by establishment of a servitude.

Lobato v. Taylor, 71 P.3d 938, 950–51 (Colo. 2002) (citing Restatement (Third) of Property: Servitudes § 2.10 (1998)). An easement by estoppel is an equitable remedy that "recognizes when a landowner induces another to change position in reliance upon his promise, he is estopped from then denying the existence of the rights simply because they did not meet the formal conveyance rules." *Id.* at 951. The rule "is founded on the policy of preventing injustice." *Id.*

To give rise to an easement by estoppel, the underlying promise must have been made by the landowner against whom the easement is claimed. *Bolinger v. Neal*, 259 P.3d 1259, 1268 (Colo. App. 2010) (acknowledging absence of Colorado precedent recognizing easement by estoppel where "the current landowner did not have any role in the misrepresentations that induced the change of position"). Because the easement here is claimed against Defendant, Plaintiffs must prove a promise or representation by Defendant and that Plaintiffs substantially changed position in reasonable reliance thereon. *Id.* They have not done so.

Defendant became the sole owner of Parcel C – the alleged servient estate – on June 4, 2015. Any use of the pipeline prior to the conveyance did not require permission from Defendant (or anyone, for that matter). Subsequent to the conveyance, there is no

evidence that Defendant promised or represented that Plaintiffs would be permitted to continue using the pipeline to irrigate the Affected Parcel. Instead, immediately after the conveyance, Defendant went to the NRCS to request a design to reconfigure his irrigation system and use of the pipeline, and he commissioned a survey to confirm his knowledge that the infrastructure he planned to modify (including the pipeline) was, in fact, located on his land. Defendant testified that he would not have agreed to the terms of the Bankruptcy Settlement if he believed Plaintiffs would retain the right to access the land to be conveyed to him, and, in fact, required conveyance of Plaintiffs' entire interest in Parcel C prior to signing the Bankruptcy Settlement.

Plaintiffs' desire to maintain the irrigation practices of the former farm following dissolution of the Partnership is not based on any representation by Defendant, nor is it reasonable. Plaintiffs agreed to convey their "entire interest" in Parcel C to Defendant and, as to the requested access to Parcel A, Plaintiff Thomas Klun similarly agreed to convey his "entire interest" in Parcel A. The requested easements are contrary to the terms of the parties' express agreement. The Court declines to declare either easement under a theory of estoppel.

4. Easement Implied from Prior Use

An easement may be implied from prior use if (1) the servient and dominant estates were once under common ownership, (2) the rights alleged were exercised prior to severance of the estate, (3) the use was not merely temporary, (4) continuation of the use was reasonably necessary to enjoyment of the parcel, and (5) a contrary intention is neither expressed nor implied. *Lobato*, 71 P.3d at 951 (citing Restatement § 2.12; *Lee v. Sch. Dist. No. R-1*, 435 P.2d 232, 235–36 (Colo. 1967); *Proper v. Greager*, 827 P.2d

591, 593 (Colo. App. 1992)). This servitude "furthers the policy of protecting reasonable expectations, as well as actual intent, of parties to land transactions." *Id.* (citing Restatement § 2.12, cmt. a).

While the testimony established that Parcel C and the Patterson Parcel were once commonly owned and that use of the disputed pipeline, once installed, was not "merely temporary," the remaining elements were not proven. As previously discussed, the Court cannot determine when the parcels were conveyed to the three children or whether the disputed pipeline had already been installed and used to irrigate the Affected Parcel at the time of the conveyances. And, as noted, the parties were either children or pre-teens at the time the pipeline was installed.

As to the fourth element, the evidence established that the disputed pipeline is not reasonably necessary to the enjoyment of the Patterson Parcel. The entirety of the Patterson Parcel – including the Affected Parcel – can be irrigated without the disputed pipeline. The Affected Parcel occupies approximately 2.5 acres of the Patterson Parcel, approximately 75 acres total. It is undisputed that Plaintiffs irrigate the remainder of the Patterson Parcel without the disputed pipeline and that Plaintiffs could easily install a ditch or pipe to bring water directly from the Megrue Lateral by gravity, across their land, to the Affected Parcel. The Court finds that the disputed pipeline is not reasonably necessary to the enjoyment of the Patterson Parcel.

As to the fifth element, a contrary intent is, in fact, expressly stated in the Bankruptcy Settlement and the prior memorandum of understanding, in which Plaintiffs agreed to convey their "entire interest" in all lands to be transferred to Defendant, including Parcel C. Def.'s Ex. TT at 7; Def.'s Ex. A at 2. Black's Law Dictionary defines

"entire interest" as "A whole interest or right, *without diminution*," followed by "See FEE SIMPLE." Black's Law Dictionary 934 (10th ed. 2009) (emphasis added). In the Bankruptcy Settlement, Plaintiffs warranted there were no encumbrances or other interests on the property to be transferred to Defendant, including Parcel C. Def.'s Ex. A at 5. This is consistent with the June 4, 2015, Warranty Deed, in which Plaintiffs warrant, in their individual capacities and as general partners of Klun Farm & Cattle, that the properties conveyed are unencumbered except as stated in the Deed. Def.'s Ex. B; § 38-30-113(2)(b), C.R.S.

Plaintiffs did not identify the purported dominant estate for the easement requested on Parcel A. Thus, the evidence is not sufficient to establish even the first element as to common ownership of the servient and dominant estates.

The Court declines to declare an easement implied by prior use for use of the disputed pipeline or for the easement requested on Parcel A.

C. Request for Declaration of Express Easement

Plaintiffs claim that the final sentence of Section 7 of the Bankruptcy Settlement expressly reserves their right to continue accessing land conveyed to Defendant in order to maintain pre-dissolution irrigation practices. The Court does not agree.

1. June 4, 2015, Warranty Deed

To determine the existence of an expressly created easement, the Court must "look *first* to the deed or other conveyance instrument, construing it to ascertain the parties' intent." *City of Lakewood v. Armstrong*, 2017 COA 159, ¶ 11 (Dec. 28, 2017) (citing *Gold Hill Dev. Co. L.P. v. TSG Ski & Golf, LLC*, 378 P.3d 816, 829 (Colo. App. 2015)) (emphasis added). The conveyance instrument here is the June 4, 2015,

Warranty Deed. Def.'s Ex. B.

When a deed is unambiguous, "the intention of the parties thereto must be determined from the deed itself." *O'Brien v. Village Land Co.*, 794 P.2d 246, 249 (Colo. 1990) (quoting *Brown v. Kirk*, 257 P.2d 1045, 1046 (Colo. 1953)). Whether an ambiguity exists in a deed is a question of law. *Id.* (citing *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984)). Absent ambiguity, parol evidence is inadmissible for purposes of interpreting a deed. *Id.* The Court finds that the June 4, 2015, Warranty Deed is unambiguous. Plaintiffs have not argued that the Warranty Deed is ambiguous.

The Warranty Deed is expressly governed by section 38-30-113, C.R.S. The language used in the Warranty Deed must be interpreted according to the definitions set forth in this section. As relevant here, section 38-30-113(1)(c), C.R.S. provides:

> (c) Every deed in substance in the above form, when properly executed, shall be a conveyance in fee simple to the grantee, with covenants on the part of the grantor as set forth in subsection (2) of this section.

§ 38-30-113(1)(c), C.R.S. Fee simple title "imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it against all others." *Feit v. Donahue*, 826 P.2d 407, 408 (Colo. App. 1992) (quoting *Walpole v. State Bd. Of Land Comm'rs*, 163 P. 848 (Colo. 1917)). Further, the words "warrants the title," when used in a deed under section 113, mean that the grantor covenants that the property is "free and clear from all encumbrances, except as stated in the instrument." § 38-30-113(2)(b), C.R.S.

The Warranty Deed – inclusive of Exhibit A – does not refer to an easement on any parcel for Plaintiffs' benefit or contain language suggesting an intent to encumber

any parcel for Plaintiffs' benefit. *See First Nat'l Bank of Denver v. Allard*, 513 P.2d 455, 457–58 (Colo. 1973) ("Generally, when grantors intend to reserve or retain something, they specifically say so."). Accordingly, the Warranty Deed unambiguously precludes the requested easements.

2. Section 7 of the Bankruptcy Settlement

The parties' agreement to settle the bankruptcy proceedings is set forth in the April 6, 2015, MOU, which was later finalized as the Bankruptcy Settlement. Def.'s Ex. TT at 3 ¶ h; 6–10. The MOU requires Plaintiffs to transfer their "entire interest" in the real properties to be conveyed to Defendant and states that "[a]ny additional documents, including the Settlement Agreement, may further clarify, but shall not change, the releases contemplated herein nor the property to be transferred to M. Klun. Any additional terms, not addressed herein, shall only address the mechanics of the settlement." Ex. TT at 8. The "entire interest" language is restated in the Bankruptcy Settlement. Def.'s Ex. A at 2.

The Court finds that Plaintiffs' continued reliance on the final sentence of Section 7 of the Bankruptcy Settlement is misplaced. It reads as follows.

> 7. Title Commitment and Warranty Deed. The M. Klun Parties do hereby acknowledge that they have received and reviewed a copy of the Title Insurance Policy commitment being issued by the Title Company with respect to the real property being transfer to any one or all of the M. Klun Parties. The M. Klun Parties further acknowledge that they are informed and aware that the exemptions provision of the Title Insurance Policy commitment at paragraph 10 provides "Lack of access to and From Public Road, Highway or Street" for what is identified thereon as Parcel III, and which language is also on the Warranty Deed for Parcel III. The M. Klun Parties shall not have any claim against the Debtor Entities under this Settlement Agreement, the Warranty Deed, or any other claim at law or equity, due to the lack of access from a public road, highway or street to or from Parcel III. The Parties acknowledge that all existing right away accesses remain unaffected.

Def.'s Ex. A at 4. As indicated by the title, "Title Commitment and Warranty Deed," this provision appears in the Bankruptcy Settlement because the title commitment revealed that the northern portion of Parcel C was landlocked or lacked access to or from a public road. This is consistent with the MOU's mandate that "[a]ny additional terms, not addressed herein, shall only address the mechanics of the settlement." Ex. TT at 8. The final sentence is unrelated to irrigation or maintenance of historical irrigation practices.

Even if the sentence could be construed as urged by Plaintiffs – contrary to its plain language, the MOU, and Plaintiffs' repeated agreements to convey their "entire interest" – Plaintiffs' failure to include in the June 4, 2015, Warranty Deed any indication or statement of intent to reserve access rights to the transferred property extinguished any right that could have been claimed under Section 7 of the Bankruptcy Settlement. Under the doctrine of merger, an antecedent contract merges into the final and formal contract executed by the contracting parties. *City of Westminster v. Skyline Vista Dev. Co.*, 431 P.2d 26, 28 (Colo. 1967). In the context of a real property conveyance, the contract to convey merges into the deed or other conveyance instrument. *Skidmore v. First Bank of Minneapolis*, 773 P.2d 587, 589 (Colo. App. 1988) (citing *City of Westminster*, 431 P.2d at 26). The effect of merger is "to extinguish those covenants in the antecedent contract that relate to the title, possession, quantity, or emblements of the land." *Id.* Following delivery of a deed, "the rights of the parties are determined by the covenants in the deed rather than by the language of the contract." *Feit v. Donahue*, 826 P.2d 407, 412 (Colo. App. 1992) (citing *Skidmore*, 773 P.2d).

Access easements affect title and possession. Thus, any covenant regarding access contained in Section 7 of the Bankruptcy Settlement was extinguished by

Plaintiffs' delivery of the Warranty Deed. Thereafter, the rights of the parties are governed by the Warranty Deed, not the Bankruptcy Settlement. And, as previously found in this ruling, the language of the Warranty Deed unambiguously precludes the requested easements.

D. Defendant's Counterclaims

Plaintiffs do not own any Bessemer shares entitling them to delivery of water through the Megrue Lateral; they lease such shares. Pls.' Ex. B; Pls.' Ex. C. The water lease grants to Plaintiffs "the right to use" the water attributable to the leased shares, but expressly states that the lease does not grant "any legal or equitable title in or to the Board's shares or the property rights evidenced by the shares." Pls.' Ex. B at 2 ¶ 1, 3 ¶ 7. As Plaintiffs do not own any shares for the Megrue Lateral and their contractual rights are limited to the right to use the leased water, Plaintiffs lack any ownership "interest in the structures by which the water right is beneficially used." *E. Ridge of Fort Collins, LLC*, 109 P.3d (citing *Jacobucci*, 541 P.2d at 672).

However, the evidence presented is insufficient for the court to conclude that Plaintiffs are committing a trespass upon the property of another without the proper permission from the person legally entitled to possession of that real estate. *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 389 (Colo. 2001). No Bessemer shareholders (other than Defendant) or the Bessemer Ditch Irrigation Company have asserted that Plaintiffs altered delivery structures, caused damage to down-ditch shareholders who rely on the delivery structures to receive water they own. Issues regarding physical alterations to the Megrue Lateral or the introduction of tailwater and sediment into the Megrue Lateral are issues properly brought by the Bessemer Ditch Irrigation Company.

Therefore, Defendant has not met the burden of proof to sustain the trespass counterclaim.

III. Order and Judgment

IT IS THEREFORE ORDERED:

A. Plaintiffs' Claims

As set forth in the preceding Conclusions of Law, judgment is entered against Plaintiffs and in Defendant's favor as to the following:

a. Plaintiffs' request for a declaration that the air vent, Alfalfa valve, and shut-off valve were located on the Patterson Parcel on June 4, 2015.

b. Plaintiffs' request for a declaration that Plaintiffs are the current legal owners of the air vent, Alfalfa valve, and shut-off valve.

c. Plaintiffs' conversion claim.

d. Plaintiffs' trespass claim.

e. Plaintiffs' request for declaration of an easement for use of the disputed pipeline.

f. Plaintiffs' request for declaration of an easement to park on Parcel A.

B. Pre-Trial Rulings

By order dated April 13, 2018, the Court entered judgment in Defendant's favor on Plaintiffs' requests for the following declaratory judgments:

g. Defendant return the irrigation pipe to the condition it was in prior to the 2016 planting season, including but not limited to returning Plaintiffs' air vent, Alfalfa Valve and shut-off valve where it was previously located, and repair the joint to the pipe that was damaged when he removed the valves.

h. Defendant must move the road from directly on top of Plaintiffs' pipeline forthwith.

i. Defendant may not padlock any common valves, or restrict reasonable historical access to irrigating the Plaintiffs' Farm Operation.

C. Rulings During Trial

Following the completion of Plaintiffs' evidence, the Court dismissed the following claims pursuant to Rule 41(b)(1):

j. Plaintiffs' claim for conversion of water.

k. Plaintiffs' request for a declaration that the diversion structure was not constructed by Defendant as designed by the NRCS.

l. Plaintiffs' request for a declaration that the air vent, Alfalfa valve, and shut-off valve are items of personal property and not fixtures.

D. Defendant's Counterclaims

Defendant's Counterclaims are Dismissed.

Dated this 13th day of July, 2018

BY THE COURT:

LARRY C. SCHWARTZ, WATER JUDGE
WATER DIVISION 2