DATE FILED: August 10, 2020 4:44 PM

SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
Appeal from District Court, Water Division No. 1 Case No. 18CW3166 The Honorable James F. Hartmann	
Appellant: Mollie J. Peters, Personal Representative of the Estate of Robert Kint Glover, deceased; Friday LLC; Gerald Kiefer, the Marjorie R. Kiefer Marital Trust; Jane Raeleen Dunn; and the Blair A. Kiefer Family Trust. v. **Appellees:** Resource Land Holdings, L.L.C.; Serratoga Falls, LLC; and Jesse McDowell; Kitchel Lake Development Corporation; Kitchel Lake Partners LLC; James Righeimer; Lee Lowrey; Kenneth Mitchell, and The Town of Timnath;	**▲COURT USE ONLY▲**
Attorneys for Appellants: Porzak Browning & Bushong LLP Kevin J. Kinnear (#28704) 2120 13th St. Boulder, CO 80302 Tel: (303) 443-6800 Fax: 303-443-6864 Email: kkinnear@pbblaw.com CORONA WATER LAW Craig V. Corona, No. 38207 1018 Lauren Ln. Basalt, CO 81621 (970) 948-6523 cc@craigcoronalaw.com	Supreme Court Case No.:
NOTICE OF APPEAL	

Appellants, Gerald R. Kiefer, Mollie J. Peters, as Personal Representative of the Estate of Robert Kint Glover on behalf of Robert Kint Glover, deceased,[1] Friday LLC, Jane Raeleen Dunn, the Marjorie R. Kiefer Marital Trust, and the Blair A. Kiefer Family Trust submit the following Notice of Appeal pursuant to C.A.R. 3 and 4(a):

I. Description of Nature of Case and Disposition in Trial Court

A. General Statement of the Nature of the Controversy

Appellants initiated this case as dominant estate owners of certain ditch easements by filing a complaint sounding in tort for trespasses to their irrigation ditches by certain of the Appellees who are the owners and developers of the servient estate lands on which the ditches are located (the "Servient Estate Appellees"). Appellants also sought determinations pursuant to *Roaring Fork Club v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001) relating to certain threatened ditch modifications to be made by Servient Estate Appellees. On the advice of former counsel, Appellants also stated other non-trespass claims. The Servient Estate Appellees counterclaimed for declaratory judgment to establish all parties' interests in the easements in question and to seek a determination that their plans to alter the easements met the Restatement test announced in *Roaring Fork Club*.

[1] Peters, as personal representative of the Estate of Robert Kint Glover moved for substitution as the real party in interest in the Water Court on August 10, 2020. The Water Court has not entered an order on that motion as of the time of this filing. Peters files this Notice of Appeal pursuant to C.A.R. Rule 43.

Servient Estate Appellees included the Town of Timnath as counterclaim defendants because Timnath owns a road right-of-way affected by the easements in question.

The Water Court dismissed some of Appellants' claims before trial and, at trial, dismissed the remainder of Appellants' claims after Appellants' case in chief by granting Appellees' C.R.C.P., Rule 41 motions. After Servient Estate Appellees' case in chief on their counterclaims, the Water Court failed to declare the interests of all parties to the easements in question, but agreed that Appellees' planned alterations to the easements meet the Restatement test and granted their requests to modify the ditches. In addition, the Water Court granted Appellees' requests for attorney fees and sanctions on some of Appellants' claims that had been dismissed.

The Water Court ruled from the bench at the close of evidence on February 19, 2020 and entered a signed copy of the transcript of that ruling as the final judgment on March 24, 2020. Appellants and Appellants' former counsel filed motions for post-trial relief pursuant to C.R.C.P., Rules 59 and 60 as noted below. The Water Court denied those motions.

B. Judgment and Order Being Appealed and the Basis for Appellate Court Jurisdiction

Appellants appeal the Water Court's rulings on dispositive motions, the Water Court's ruling granting Appellees' C.R.C.P. Rule 41 motion at trial, the Ruling and Judgment of the Court dated March 24, 2020, the Order Denying Plaintiffs' and Third-Party Defendants' Motion for Relief Under Rule 59, C.R.C.P. dated June 23, 2020 and the Order Denying Plaintiffs' Motion for Relief from Judgment Under Rule 60(b)(3), C.R.C.P. dated June 25, 2020 (collectively, the "Water Court Rulings"). The Colorado Supreme Court has jurisdiction pursuant to C.A.R. 1(a)(1), 4(a), and C.R.S. § 13-4-102(1)(d).

By filing this appeal in the Colorado Supreme Court pursuant to C.R.S. § 13-4-102, Appellants do not admit that the Water Court had jurisdiction over the claims in this case. As noted below, Appellants' position is that the Water Court did not have jurisdiction because no water matter was presented to the Water Court; and, to the extent that there was a water matter, no other claim that was presented was necessary to the adjudication of a water matter.

C. Whether Judgment or Order Resolved All Issues Pending Before the Trial Court

The Water Court Rulings resolved all claims raised in the pleadings. However, the proceeding to determine the amount and reasonableness of the attorney fees is still pending before the Water Court. That determination does not impact the finality of the Water Court's judgment because the attorney fees in this

case are considered costs, not damages, as they are not the logical consequence of the behavior for which suit was brought. *Ferrell v. Glenwood Brokers, Ltd.*, 848 P.2d 936, 941–42 (Colo. 1993).

D. Statement Regarding Whether the Judgment Was Made Final for Purposes of Appeal pursuant to C.R.C.P. 54(b)

The Water Court Rulings were not made final for purposes of appeal pursuant to C.R.C.P. 54(b), but the Water Court Rulings fully and finally resolved all of the claims raised in the case except as noted above for the determination of the reasonableness and amount of attorney fees which remains before the Water Court.

E. Date Judgment or Order Was Entered, and Date of Mailing to Counsel

The Water Court Rulings being appealed were entered as follows:

1. Rulings on dispositive motions, entered prior to trial as follows:
    a. Order Granting Town of Timnath's Motion for Summary Judgment, entered January 13, 2020.
    b. Order Re: Motions for Summary Judgment and Determination of Questions of Law Regarding Plaintiffs' Paige Brothers Reservoir Water Rights, and Plaintiffs' Motion for Determination of Question of

Law Regarding their Historically Irrigated Land and Crop Irrigation Requirements, entered February 4, 2020.

2. Ruling and Judgment of the Court, entered March 24, 2020.
3. Order Denying Plaintiffs' and Third-Party Defendants' Motion for Relief Under Rule 59, C.R.C.P. entered June 23, 2020.
4. Order Denying Plaintiffs' Motion for Relief from Judgment Under Rule 60(b)(3), C.R.C.P., entered June 25, 2020.
5. Order granting Rule 41 Motions and dismissing Appellants' claims, entered orally from the bench February 14, 2020.

The above-listed orders were transmitted to counsel for the parties electronically on the same day they were entered with the exception of the Water Court's order from the bench granting Rule 41 Motions and dismissing Appellants' claims on February 14, 2020. That order is recorded in the transcript of trial which has been made available to all parties and is included in the appendix filed with this Notice of Appeal.

F. Whether Extension was Granted for Filing Motions for Post-Trial Relief

Appellants sought an extension of time to file post-trial motions for new counsel to come up to speed on April 3, 2020. The Water Court granted that request and ordered post-trial motions to be filed by April 21, 2020.

G. Date Motions for Post-Trial Relief Were Filed

Motions for post-trial relief were filed on April 21, 2020.

H. Date Motions for Post-Trial Relief Were Denied

Orders denying post-trial relief were entered as follows:

1. Order Denying Plaintiffs' Motion for Relief from Judgment Under Rule 60(b)(3), C.R.C.P., entered June 25, 2020.
2. Order Denying Plaintiffs' and Third-Party Defendants' Motion for Relief Under Rule 59, C.R.C.P. entered June 23, 2020.
3. Order Re: Mr. Cucarola's Motion for Relief Under Rule 59, C.R.C.P., entered on June 23, 2020.

I. Whether Any Extensions Were Granted for Filing a Notice of Appeal

No party sought an extension of time in which to file a notice of appeal, so none has been granted.

II. Advisory Listing of Issues to be Raised on Appeal

1. Did the Water Court err in determining that the Water Court had jurisdiction over this matter?
2. Did the Water Court err in determining, if there was a water matter, whether the other claims were necessary to the determination of the water matter.

3. Did the Water Court err in finding that Servient Estate Appellees had not trespassed on Appellants' ditch easements and dismissing Appellants' trespass claims?
4. Did the Water Court err in ruling that Appellants' trespass claims lacked substantial justification and were substantially frivolous, groundless and vexatious and awarding attorney fees and sanctions on the trespass claims?
5. Did the Water Court err by failing to determine and declare all of the parties' interests in the easements in question and the scope, size, and extent of those easements?
6. Did the Water Court err in ruling that Servient Estate Appellees will have total control over operation, maintenance, repair and replacement of the KG Lateral easement once it is piped to the exclusion of Appellants thus depriving the Appellants of their right to undertake such activities on their easement?
7. Did the Water Court err by determining that Appellants Kiefer and the Kiefer entities failed to establish an easement for the Prospect Lateral vis-à-vis the underlying landowners, subject to the Town of Timnath's pre-existing road right-of-way?

8. Did the Water Court err by holding that Appellants Kiefer and the Kiefer entities were required to have a decreed right to divert water from the KG Lateral to the Prospect Lateral in order to establish an easement for the Prospect Lateral vis-à-vis the underlying landowner?

III. Whether a Transcript of Evidence is Necessary

There was a seven-day trial held in this case starting on February 10, 2020. Appellants believe that a transcript of the hearing is necessary for the Supreme Court to consider and issue a decision in this case.

IV. Whether the Order on Review was Issued by a Magistrate Where Consent was Necessary

The order on review was not issued by a magistrate.

V. Counsel for the Parties

Attorneys for Appellants Gerald R. Kiefer, Robert Kint Glover, deceased, Marjorie R. Kiefer Marital Trust, Blair A. Kiefer Family Trust, the Estate of Kint Glover, Jane Raeleen Dunn, and Friday LLC:

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VI. Appendix

The attached Appendix contains copies of the Water Court Rulings.

DATED this 10th day of August, 2020.

PORZAK BROWNING & BUSHONG LLP

/s/ Kevin J. Kinnear

Kevin J. Kinnear (#28704)

CORONA WATER LAW

Craig V. Corona (#38207)

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2020, a true and correct copy of the foregoing **NOTICE OF APPEAL** in the above-captioned matter was served via the Colorado Courts E-Filing System addressed to the following:

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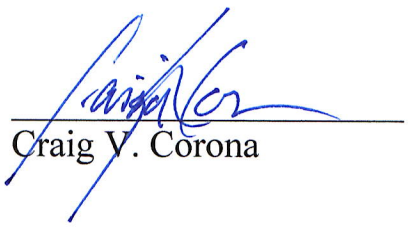


Craig V. Corona

Appendix Ex. 1

WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631-1113 (970) 475-2400	DATE FILED: January 13, 2020 4:44 PM CASE NUMBER: 2018CW3166
Plaintiffs: Robert Kint Glover; Friday LLC; and Gerald Kiefer v. **Defendants:** Resource Land Holdings, LLC; Serratoga Falls, LLC; Jesse McDowell; Kitchel Lake Development Corporation; Kitchel Lake Partners LLC; James Righeimer; Lee Lowrey; and Kenneth Mitchell and **Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff:** Serratoga Falls, LLC v. **Third-Party Defendants:** The Town of Timnath; the Marjorie R. Kiefer Marital Trust; Jane Raeleen Dunn; and the Blair A. Kiefer Family Trust	**▲COURT USE ONLY▲** **Case No. 2018CW3166**
ORDER GRANTING TOWN OF TIMNATH'S MOTION FOR SUMMARY JUDGMENT	

This matter comes before the court on a motion by third-party defendant, the Town of Timnath ("Timnath"), requesting summary judgment in its favor. In the alternative, Timnath seeks a determination of certain questions of law regarding its right of way for Prospect Road and relocation of a borrow ditch in the right of way. Plaintiffs Robert Glover, Friday, LLC, and Gerald Kiefer ("Plaintiffs") oppose the relief requested.

Applying the standard for summary judgment set forth in C.R.C.P. 56(d), the court finds that Timnath is entitled to judgment as a matter of law.

I. Background

Plaintiffs are shareholders of the Larimer and Weld Irrigation Company ("LWIC") and they receive their water through a lateral ditch known as the K-G Lateral. Serratoga Falls and Kitchel Lake Partners ("Defendants") are also shareholders in LWIC and likewise receive water through the K-G Lateral, which runs between Defendants' two adjoining parcels and southward toward Plaintiffs' farms. Serratoga Falls is under contract to sell its property to Kitchel Lake, which plans to develop both the Serratoga and Kitchel parcels for residential use.

Plaintiffs assert that they and their predecessors in interest have been diverting water from the K-G Lateral since the 1970s to a borrow ditch located on the north side of Prospect Road, at which point the water flows west in the borrow ditch to a culvert running north and south under Prospect Road. Plaintiffs' farms are located on the south side of Prospect Road. Plaintiffs refer to the borrow ditch as the "Prospect Lateral," although when asked by this court whether the borrow ditch was ever decreed as a diversion point or a structure in the water court, Plaintiffs confirmed that this has never occurred.

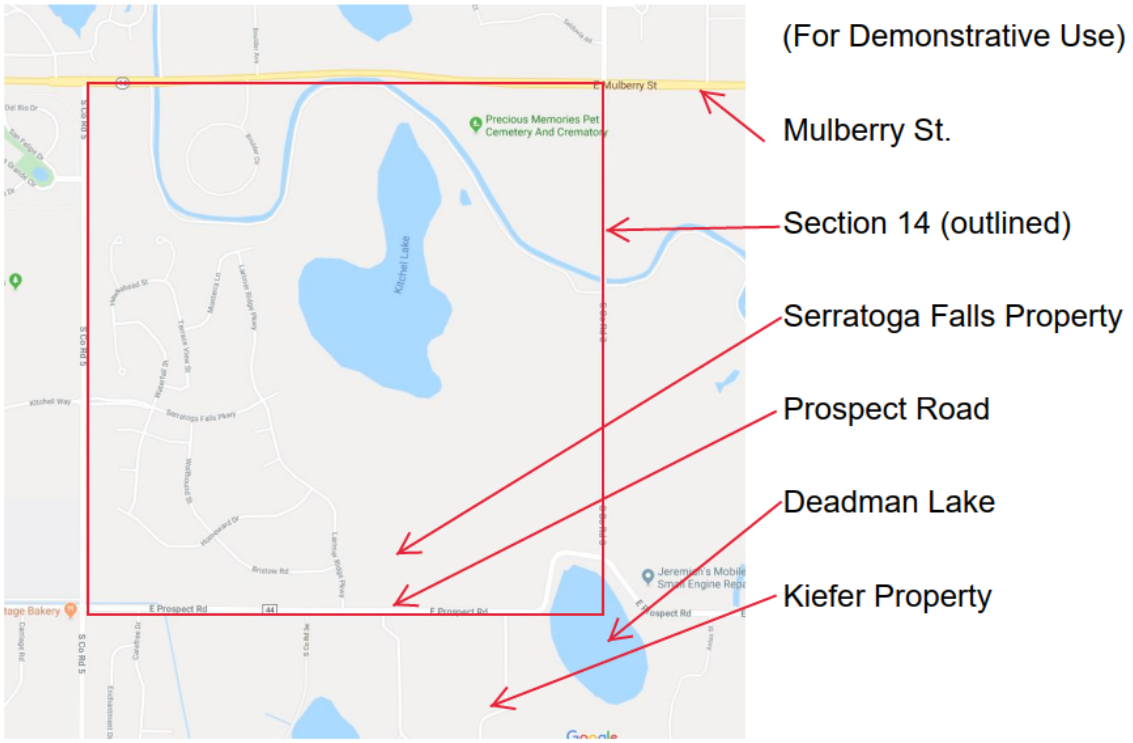
Timnath annexed the relevant stretch of Prospect Road into the town's boundaries in 2005. As part of the approval process of Defendants real estate development project, Timnath will require Serratoga and/or Kitchel to widen Prospect Road in this area to meet the needs of the town and the residents of the neighborhood.

Relying on the holding of *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), Plaintiffs oppose the widening of Prospect Road in this area and claim that this would negatively impact their water rights. Plaintiffs claim to have an easement on Defendants' land on the north side of Prospect Road to deliver water from the K-G Lateral through the borrow ditch adjacent to Prospect Road, and they seek to enjoin Defendants from destroying, modifying, or moving the borrow ditch.

Defendants filed counterclaims and third-party claim against several persons and entities, including Timnath, seeking declaratory relief that Defendants may relocate the

borrow ditch. Timnath's participation in this case is limited to the question of the relocation of the borrow ditch.

Below is a diagram tendered by Timnath showing the location of Prospect Road, Section 14, and Plaintiffs' and Defendants' properties, as well as a photograph submitted by Timnath of the borrow ditch and Prospect Road.



Timnath filed a motion for summary judgment arguing that the borrow ditch is located within Timnath's right of way that was established for Prospect Road in 1889,

and therefore, Plaintiffs have no legal basis to enjoin Timnath from exercising authority over the right of way under a theory that Plaintiffs have a superior easement right to use the borrow ditch. Timnath does not oppose Defendants relocating the borrow ditch to the new north side of Prospect Road after the road is widened. Timnath also does not object to Defendants constructing an irrigation structure for Plaintiff's use on Defendants' land, provided the irrigation structure is separate from Timnath's borrow ditch.

II. Legal Standard

Summary judgment is proper "when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law." *West Elk Ranch, L.L.C. v. U.S.*, 65 P.3d 479, 481 (Colo. 2002); *See* C.R.C.P. 56(c). A genuine issue of material fact "is one which, if resolved, will affect the outcome of the case." *City of Aurora v. ACJ Partnership*, 209 P.3d 1076, 1082 (Colo. 2009). "The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *West Elk Ranch*, 65 P.3d at 481. But "once this initial burden of production is met, the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact." *Aurora*, 209 P.3d at 1082. The opposing party is required to "adequately demonstrate by relevant and specific facts that a real controversy exists. A litigant cannot avoid a summary disposition of his case by merely asserting a fact without evidence to support it." *Id. (*internal citations omitted*).*

III. Analysis

The court has considered the information in the pleadings (including the sur-replies filed by Plaintiffs and Timnath) and the exhibits to the pleadings filed by the parties.

As pertinent here, Defendants' lands are located in Section 14 and Plaintiffs' land is situated in Section 23, Township 7 North, Range 68 of the 6th Principal Meridian. Prospect Road, a paved roadway running generally east and west, divides the parties' parcels.

In the late 1880s, thirteen persons owning land in this area petitioned the Larimer County Commissioners requesting the construction of an east-west public road along the south section line of Section 14. These landowners pledged a right of way north into Section 14 of fifty-six (56) feet from the south edge of the Section 14 line. This request was assigned Number 32507 by the Larimer County Clerk and Recorder and recorded at 10:00 a.m. on December 18, 1889. The grantor was listed as the State of Colorado and the grantee was listed as Larimer County. The nature of the instrument was for construction of a public highway. Not only was this grant recorded with the Larimer County Clerk and Recorder, but it also appears in the Larimer County Book of Roads.

The parties agree that Prospect Road has existed in its present location for many decades prior to Plaintiffs' commencing use of the Prospect borrow ditch in the 1970s, and that Prospect Road is a public highway. Nor do the parties contest that Timnath annexed this section of Prospect Road into the town's boundaries in 2005. Timnath now holds the fifty-six foot right of way dedicated to construct Prospect Road in 1889.

Steve Humann is an engineer for Timnath. He located the section line pin and determined that the south edge of Prospect Road extends 5.3 feet south of the Section 14 southern section line into Section 23; therefore, the right of way extends 50.7 feet north of the southern edge of the Section 14 boundary. Mr. Humann measured from the north edge of Prospect Road and determined that Timnath's right of way extends over 33 feet north of the north edge of Prospect Road into Section 14. The borrow ditch[1] is located entirely within the 33 feet area to the north of Prospect Road. A function of the borrow

[1] Mr. Humann explained in his affidavit that his understanding is that "borrow ditch" was coined because early road construction involved moving the material adjacent to the road to raise the elevation of the road, thereby "borrowing" the material to construct the road.

ditch is to divert water away from the road, which reduces road damage caused by erosion and makes the roads safer for motor vehicle travel.

Plaintiffs assert they have been diverting water from the K-G Lateral into the borrow ditch since the 1970s, and therefore, they have established an easement along this stretch of Prospect Road to use the borrow ditch. Pursuant to C.R.S. §38-41-101(1), conclusive ownership of land is established by eighteen years of adverse possession; however, no possession by any person, firm, or corporation, regardless of the length of possession, of any land, water, water right, easement, or other property dedicated to or owned by the state of Colorado, or any county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation shall ever ripen into any title, interest, or right against the state of Colorado, or any county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation. C.R.S. §38-41-101(2).

Plaintiffs argue that because "the State of Colorado" was listed as the grantors in 1889, rather than the landowners that requested the road and pledged the easement, that the dedication of this land to construct Prospect Road was invalid, and thus, the provisions of C.R.S. §38-41-101(2) are inapplicable to their claim of an easement against Timnath for the use of the borrow ditch. Plaintiffs further assert that the public was not placed on notice of the recording of the Prospect Road right of way because the State of Colorado being listed as the grantor. Plaintiffs cite to *Lakewood v. Mavromatis* to support their argument that they were not placed on actual or constructive notice of the right of way. 817 P.2d 90 (Colo. 1991). Plaintiffs believe genuine issues of material fact exist on these issues, so summary judgment cannot be entered. The court is not persuaded by Plaintiffs' arguments.

In *Mavromatis*, a petition for a public road was presented to the Jefferson County Commissioners and was placed in the Jefferson County road book by the county recorder. There was a notation on the petition that it was filed in the office of the county clerk on April 2, 1888, but it was not filed or recorded elsewhere in the county clerk's records. In addition, although there was a place for the county clerk to sign the notation to confirm that the petition was filed with the county clerk, the clerk did not sign the form. There

was a strip of land adjacent to the road (West Alameda Avenue) that was built in 1901, and that strip of land was included in the petition for public roadway that was filed in 1888. The land adjacent to the road—which was also part of the land dedicated to construct West Alameda Avenue but was not utilized for the road—was purchased by a person in 1972.

In 1986, Lakewood sought to widen West Alameda Avenue and brought condemnation proceedings against the owner of record. It was then discovered that this strip of land was part of the petition for public roadway filed in 1888, and Lakewood asserted that it was the actual owner of the land. Lakewood conceded that the owner did not have actual notice of the petition that was filed in 1888 when the land was sold in 1972, but that the owner had constructive knowledge because the dedication of the land to the public roadway was listed in the Jefferson County road book.

The Colorado Supreme Court ruled that merely delivering the petition for public roadway to the county clerk and listing that petition in the road book, without also including the instrument in the grantor and grantee index, did not satisfy the recording requirements existing in 1888. *Id.* at 95. The Court further found that placing the petition in the road book completed the process of creating the road, but in the absence of adherence to the recording act requirements, merely placing the petition in the road book did not provide constructive notice to subsequent purchasers of the land. *Id.* at 96.

Chapter 95, Section 4 of the 1885 General Statutes of Colorado authorized the county commissioners to alter, widen, or change any established road, or lay out a new road in their county upon the petition of ten freeholders residing within two miles of the road proposed to be modified or the new road constructed. In addition, this statute authorized the county commissioners to declare any section line to be a public road, and upon order of the commissioners and recorded by the clerk and recorder, the road shall be laid out as a public highway.

Thirteen landowners signed the petition to establish the roadway and the petition was submitted to the Larimer County Commissioners, through the county clerk and recorder, on December 18, 1889. The legal description of the property by section,

township, and range, along with a map of the area, were included in the petition. The location and width of the right of way were specified in the petition. These documents clearly described the location of the requested road.

Unlike the circumstances presented in *Mavromatis,* the petition establishing Prospect Road was signed by the county clerk, who also assigned a reception number. The petition for Prospect Road was recorded not only in the Larimer County road book, but also in four separate entries of the Larimer County Clerk and Recorder records: the Larimer County Clerk and Recorder Reception Book; the Larimer County Clerk and Recorder Grantee Index; Larimer County Clerk and Recorder Grantor Index; and the Larimer County Clerk and Recorder's Book.

Moreover, there is no claim by Plaintiffs that they or their predecessors in interest ever researched whether Larimer County (prior to 2005) or the Town of Timnath (after 2005) held a right of way in the area containing the borrow ditch before they began utilizing the borrow ditch to move water. Nor do Plaintiffs claim that they or their predecessors in interest constructed the borrow ditch. Plaintiffs concede that the borrow ditch is not a structure that was decreed in water court to deliver Plaintiffs' water from the K-G Lateral.

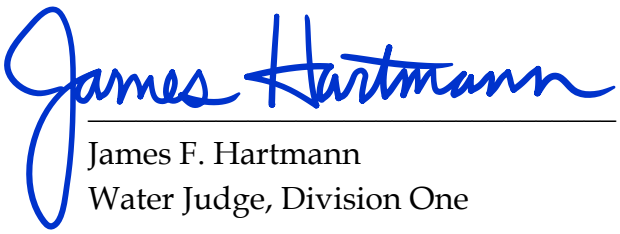
It was not until after the disagreements with Defendants arose, and Timnath's requirement that Defendants widen Prospect Road, that Plaintiffs began looking into the possibility that a governmental easement existed adjacent to Prospect Road on the land containing the borrow ditch. The fact that the person Plaintiffs hired to conduct a title search may not have located the recording does not overcome the fact that the petition was duly recorded in 1889, nor does this raise a genuine issue of material fact that would preclude entry of summary judgment in Timnath's favor.

The court finds as a matter of law that Timnath has a right of way extending 50.7 feet north from the south boundary line of Section 14. The court further finds, pursuant to C.R.S. §38-41-101(2), that Plaintiffs cannot maintain an action in adverse possession against Timnath, by asserting an easement to use the borrow ditch located in Timnath's right of way, to require Timnath to retain the current location of the borrow ditch. And

finally, the court finds that the Defendants as the owners of the land at issue, and not Timnath, are the proper parties to address Plaintiff's claims for relief under the mandates of *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001). Defendants' land ownership is, of course, subject to Timnath's right of way for Prospect Road.

Dated: January 13, 2020.

BY THE COURT:



James F. Hartmann
Water Judge, Division One

WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631-1113 (970) 475-2400	
Plaintiffs: Robert Kint Glover; Friday LLC; and Gerald Kiefer v. **Defendants:** Resource Land Holdings, LLC; Serratoga Falls, LLC; Jesse McDowell; Kitchel Lake Development Corporation; Kitchel Lake Partners LLC; James Righeimer; Lee Lowrey; and Kenneth Mitchell and **Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff:** Serratoga Falls, LLC v. **Third-Party Defendants:** The Town of Timnath; the Marjorie R. Kiefer Marital Trust; Jane Raeleen Dunn; and the Blair A. Kiefer Family Trust	**▲COURT USE ONLY▲** **Case No. 2018CW3166**
ORDER RE: MOTIONS FOR SUMMARY JUDGMENT AND DETERMINATION OF QUESTIONS OF LAW REGARDING PLAINTIFFS' PAIGE BROTHERS RESERVOIR WATER RIGHTS, AND PLAINTIFFS' MOTION FOR DETERMINATION OF QUESTION OF LAW REGARDING THEIR HISTORICALLY IRRIGATED LAND AND CROP IRRIGATION REQUIREMENTS	

This matter comes before the court on motions filed by each side regarding the Paige Brothers Reservoir water rights. Plaintiffs also request a determination of question of law regarding their historically irrigated acreage and crop irrigation requirements. The parties request the following:

1. Defendants Resource Land Holdings, LLC, Serratoga Falls, LLC, Jesse McDowell, Lake Partners LLC, James Righeimer, Lee Lowrey, and Kenneth Mitchell ("Defendants") request an order that they are not required to maintain a particular volume of waste water and seepage into the Paige Seep collection ditches for the benefit of the Paige Brothers Reservoir water rights;

2. Defendants seek an order that they may alter the natural drainage conditions of the land, including the area encompassing the two Paige Brothers seepage water collections ditches;

3. Defendants argue that Plaintiffs did not plead a claim for damages related to the Paige Brothers Reservoir, and therefore, Plaintiffs must be precluded from arguing monetary damages in this action;

4. Defendants request a ruling that injury and damages to the Paige Reservoir rights are speculative because the actions Plaintiffs claim will cause injury have not yet occurred;

5. Plaintiffs seek a ruling that the installation of subdrains on Defendants' land will intercept groundwater that would otherwise accrue to the Paige Brothers seepage water collection ditches and flow to the Paige Brothers Reservoir, which would require Defendants to first obtain a well permit and augment the amount of groundwater diverted out-of-priority;

6. Plaintiffs request a finding that the water remaining after Defendants' predecessors in interest irrigated their lands is return flow and not waste water, and thus, Defendants must maintain return flows at their historical levels to prevent injury to Plaintiffs' Paige Brothers Reservoir rights;

7. Plaintiffs seek a legal ruling from the court that evidence pertaining to their historically irrigated acreage and crop irrigation requirements for water diverted through the Kiefer-Glover Lateral Ditch ("K-G Lateral") from the Larimer and Weld Irrigation Company ("LWIC") Ditch is irrelevant to the question of Plaintiffs' easement claims for the K-G Lateral.

I. Background

Plaintiffs hold water rights in the Larimer and Weld Irrigation Company ("LWIC") and they receive their water through the K-G Lateral, which is a concrete-lined, open air irrigation ditch. Plaintiffs also possess water rights in the Paige Brothers Reservoir, which receives its water through seepage water collected through two ditches near the reservoir.

Serratoga and Kitchel Lake Partners are engaged in a residential property development in the Town of Timnath involving a variety of design, construction, and platting activities. The K-G Lateral runs through the property being developed by Serratoga and Kitchel Lake Partners. Due to high groundwater tables in certain areas of the development, Defendants assert they must install subdrains to redirect water from entering the basements of homes to be built in those areas.

II. Legal Standards

Summary judgment is proper "when the pleadings and supporting documentation demonstrate that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law." *West Elk Ranch, L.L.C. v. U.S.*, 65 P.3d 479, 481 (Colo. 2002); *See* C.R.C.P. 56(c). A genuine issue of material fact "is one which, if resolved, will affect the outcome of the case." *City of Aurora v. ACJ Partnership*, 209 P.3d 1076, 1082 (Colo. 2009). "The nonmoving party is entitled to the benefit of all favorable inferences from the undisputed facts, and all doubts as to the

existence of a triable issue of fact must be resolved against the moving party." *West Elk Ranch*, 65 P.3d at 481. But "once this initial burden of production is met, the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact." *Aurora*, 209 P.3d at 1082. The opposing party is required to "adequately demonstrate by relevant and specific facts that a real controversy exists. A litigant cannot avoid a summary disposition of his case by merely asserting a fact without evidence to support it." *Id. (*internal citations omitted*).*

Colorado Rule of Civil Procedure 56(h) provides a mechanism for a court "to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds." *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995) (internal citation omitted). "If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question." C.R.C.P. 56(h). "[T]he nonmoving party is entitled to all favorable inferences from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party." *Coffman v. Williamson*, 2015, 348 P.3d 929.

III. **Analysis**

A. Defendants' obligations concerning the Paige Brothers Reservoir water rights

The water rights for the Paige Brothers Reservoir were decreed in 1972 in Water Division One Case No. W-1028. The source of water is listed as seepage collected by the Paige Brothers No. 1 and No. 2 ditches, and such water was found by the water court to be tributary to the South Platte River. The decreed amount of water is 276.5 acre feet annually, which the court infers was the original holding capacity of the reservoir. There is no right to refill the reservoir included in the decree. The sole decreed beneficial use of the water stored in the reservoir is the irrigation of lands in Sections 13, 14, 23, and 24, Township 7 North, Range 68 West of the 6th P.M., in Larimer County, Colorado. Pursuant

to the decree, the right to capture seepage water in the Paige Brothers ditches, store the water in Paige Brothers Reservoir, and to use the water for irrigation will be administered under Colorado's priority of water rights system.

Defendants assert the water rights for Paige Brothers Reservoir have not been closely administered by the Division Engineers' Office, but information obtained by Defendants shows that water is "spilled" from the reservoir each year. The court infers there are no measuring devices to confirm the amount of water flowing into or out of the reservoir, or to measure the amount of water stored in the reservoir.

Defendants' predecessors in interest irrigated agricultural land with various water rights. Relying on the holding in *Tongue Creek v. Orchard City*, Defendants argue that once Defendants stop farming the land, Plaintiffs have no continued right to the water that historically left Defendants' lands as part of past irrigation practices. 280 P.2d 426 (Colo. 1955). Defendants characterize this water as "seepage" or "waste water." Defendants plan to continue to use some, but not all, of their water rights for lawn and landscape irrigation for homes in the neighborhood.

Tongue Creek involved the change of diversion point and place of use of 1 cubic foot per second of water, which amounted to approximately 80% of the allotment of water under the water right. A portion of the water historically used for irrigation at the original place of diversion made its way to Happy Hollow Gulch, which had no headwaters and relied entirely on waste water from irrigators as its source of supply. Objectors argued that their decreed water rights in Happy Hollow Gulch would be injured if the application was granted, due to the reduction of water through the loss of return flows. Objectors sought to maintain the stream conditions that existed when they began diverting water from Happy Hallow Gulch.

The Colorado Supreme Court held that the objectors were not entitled to future maintenance of the waste water and explained:

> We know of no law which compels a party to use his water right, and if the Johnson water right were to be abandoned, and none of it used, the return waters thereof would flow into Kiser Creek and Ward Creek, tributaries of the Forked

> Tongue Creek and not into Happy Hollow Gulch, and therefore the loss of the return waters from the Johnson place would not be part of the alleged stream upon which objectors' appropriations from Happy Hollow Gulch were made and to which they urge they would be entitled to have conditions maintained upon the stream as of the time of their appropriation.

280 P.2d at 183.

Plaintiffs, relying on *Boulder v. Boulder & Left Hand Ditch Co.*, assert the seepage water should be classified as return flows that they, as junior appropriators, have the continued right to rely upon under the Paige Brothers Reservoir decree. 557 P.2d 1182 (Colo. 1976).

A year prior to the *Tongue Creek* decision, the Colorado Supreme Court, in *Farmers Highline Canal v. Golden*, reiterated the long-standing Colorado legal principle that junior appropriators under Colorado's priority system are entitled to continuation of the stream conditions that existed at the time of their appropriations, and that before a change of use of water or changed location of use may be approved the junior appropriators may contest the application if they believe injury to their water rights would result from the change. 272 P.2d 629, 631 (Colo. 1954).

It cannot be debated that Defendants' right to the water decreed for irrigation use is limited to the historical consumptive use on their farm and does not include the amount of water that historically returned to the stream after the initial decreed use for irrigation. *Danielson v. Jones,* 698 P.2d 240, 245 (Colo. 1985). This is because "water native to the stream system is limited to one use in that system and return flows belong to the stream system as part of the public's resource, subject to appropriation and administration." *Burlington Ditch v. Metro Wastewater,* 256 P.3d 645, 663 (Colo. 2011). Return flows after the first use of the water are "waters of the state" and subject to "diversion and use to supply existing and future appropriations on the stream." *Water Supply & Storage Co. v. Curtis*, 733 P.2d 680, 685 (Colo. 1987). "When waters natural to the watershed are released from the appropriator's control by seepage from the ditch or field irrigation, for example, … they belong to the stream system and cannot be captured or reused except through a

lawfully made decreed appropriation." *Ready Mixed Con. Co. v. Farm. Res. And Irr.*, 115 P.3d 638, FN 4 (Colo. 2005). This legal principle assures that the river conditions that existed when other water users secured their water rights are maintained after the use of the water is changed. "One of the basic tenets of Colorado water law is that junior appropriators are entitled to maintenance of the conditions on the stream existing at the time of their respective appropriations." *Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 80 (Colo. 1996).

The distinction between return flows, which belong to the river and provide junior appropriators security to maintenance of stream conditions, and waste water, which do not provide an actionable source of supply for junior appropriators, was addressed by the Colorado Supreme Court in *Boulder*. 557 P.2d at 1185. Relying on the holding of the *Tongue* decision, the trial court in *Boulder* dismissed the claim for injunctive relief, which alleged injury by a junior appropriator if return flows were not maintained after the change of place of use, after finding the plaintiff had failed to allege a claim upon which relief could be granted. The Supreme Court reversed. The Supreme Court made clear that "[r]eturn flow is not waste water. Rather, it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function." *Id.* The Court drew a distinction between a change of place of use proceeding, where return flows result from the use, versus the facts in *Tongue* where water was carried in surface ditches and then wasted in the stream. *Id.* at 1186.

Although Defendants assert that they are not changing the use of the water or the place of use, it certainly appears that this is precisely what they are attempting to do by proposing to utilize the water rights historically used to irrigate crops for future lawn and landscape irrigation after houses are constructed on the property. The water court, when decreeing the Paige Brothers Reservoir rights, ruled that seepage water accruing to the two Paige Brothers ditches and delivered to Paige Brother Reservoir are waters tributary to the South Platte River. Clearly, these were treated then as they must be now as return flows, giving rise to the subsequent appropriation through the actions of Plaintiffs' predecessors in interest. It remains in dispute what volume of water attributable to the

historical use of the Defendants' water rights for crop irrigation made its way as seepage to the Paige Brothers Reservoir. Defendants will be required to maintain an amount of water, to be determined at trial, to account for the historical return flows to the Paige Brothers Reservoir after the water was used for crop irrigation.

Defendants responsibilities may not end with the return flows from past irrigation use on the property, as a presumption exists that the groundwater beneath Defendants' land is tributary to the surface stream, unless otherwise provided by statute or proved by Defendants. *Board of County Com'rs v. Park County Sportsmen's Ranch,* 45 P.3d 693, 702 (Colo. 2002). A presumption further exists that the removal of groundwater through well pumping results in material injury to senior appropriators and such removals must be augmented by the junior appropriator. *Englewood v. Burlington Ditch, Reservoir & Land Co.*, 235 P.3d 1061, 1070 (Colo. 2010).

It is not known to the court whether water in the alluvial aquifer beneath Defendants' property derives its supply from sources other than the historical irrigation of Defendants' parcels, and whether this groundwater contributes to the Paige Brothers ditches and is ultimately deposited in the Paige Brothers Reservoir.[1] If so, Defendants must quantify the amount of water that would otherwise make its way to the Paige Brothers Reservoir, but for the subdrain system proposed by Defendants to dewater their land, and then replace the amount of water necessary to satisfy the provisions of Plaintiffs' Paige Brothers Reservoir decree.

The parties should understand that the court will be strictly applying the provisions of the decreed water rights in Case W-1028 when determining Defendants' obligations to replace historical return flows to ensure not only that Plaintiffs will receive the amount of water decreed to them under the Paige Brothers Reservoir decree when in priority, but also to ensure that Plaintiffs do not expand their decreed rights. This may

[1] The court is not addressing in this order whether material injury to the rights of other senior water users may be injured if Defendants remove or redirect groundwater from their property, as that question is not presented in the motions. It does raise a question, however, whether Defendants are required to provide resume notice to other water users that might be affected by this dewatering plan, which the court will address with Defendants at some point during the trial.

result in additional requirements being placed on Plaintiffs and/or Defendants to ensure that once the decreed volumetric limits are met, as measured in way acceptable to the State and Division Engineers, that Plaintiffs return all excess water to the South Platte River system or that diversions to the Paige Brothers Reservoir cease for the remainder of the year. This may be necessary to protect the rights of other water users from injury resulting from an expansion of use by Plaintiffs.

B. Plaintiffs' claim for monetary damages in connection with the Paige Brothers Reservoir

Defendants argue that Plaintiffs did not plead monetary damages in connection with the Paige Brothers Reservoir in either the original or amended complaint, and Defendants did not learn of the potential for monetary damages until receiving Plaintiffs' expert witness's supplemental/rebuttal report on October 11, 2019. Plaintiffs assert that they provided ample notice to Defendants that they would be seeking monetary damages related to the potential diminishment of seepage water flowing into the Paige Brothers Reservoir, should Defendants install subdrains on Defendants' property in the future. The court agrees with Defendants that Plaintiffs did not allege monetary damages concerning the Paige Brothers Reservoir in either their initial or amended complaint, and thus, Plaintiffs will be precluded from seeking such monetary relief in this action.

Plaintiffs' original Claim 1 requested adjudication of diversion amounts Plaintiffs are entitled to take from the Weld and Larimer Irrigation Company headgate, as well as the amount of water attributable to the Paige Brothers seep ditches and reservoir rights. Original Claim 5 requests declaratory relief enjoining Defendants from interfering in the future with Plaintiffs' decreed water rights in the Paige Brothers ditches and reservoir. Claim 1 in the amended complaint contains identical language to original Claim 1. Amended complaint Claim 5 adds allegations that: (1) "Defendant McDowell 'hides the ball' and evades on Defendants … plans to build on and obstruct the Paige Brothers Seepage Ditches and Reservoir," and Mr. McDowell instead places blame on Defendant Kitchel Group; and (2) Defendants refuse to disclose their activities and plans that would

impact the surface and subsurface water flows to the Paige Brothers ditches and reservoir. Other than these two additions, Claim 5 in the amended complaint contains identical language as found in original Claim 5 seeking injunctive relief to prevent future actions by Defendants. There is no reference to monetary damages in Claims 1 and 5 related to the Paige Brothers Reservoir rights or the two seepage collection ditches.

The only specific claims for monetary damages listed in Plaintiffs' amended complaint are Claim 15 for special damages and Claim 16 for exemplary damages, although section (p) of their prayer for relief in the amended complaint[2] refers generally to payment of all damages and special damages suffered by Plaintiffs. Claim 16 was dismissed by the court on August 4, 2019, upon the motion of Defendants. Plaintiffs' Claim 15 requesting special damages remains at issue.

Rule 8, C.R.C.P, requires the party filing a claim for relief to include a short and plain statement of the claim showing that the pleader is entitled to relief, as well as a demand for judgment for the relief the pleader claims to be entitled. Rule 8 does not require the dollar amount to be stated in a prayer or demand for relief. *Id.*

As correctly noted by Defendants, a claim for relief may not be asserted through motion, but instead, must be set forth in a pleading contemplated by the rules of civil procedure, so that appropriate defenses can be raised in the answer. *Pima Financial Service Corp. v. Selby*, 820 P.2d 1124, 1126 (Colo. App. 1991).

Plaintiffs seek to enjoin Defendants from taking future actions that could negatively impact the seepage water collected in the two ditches and the Paige Brothers Reservoir. Plaintiffs have not, however, alleged in their original or amended complaint that Defendants previously engaged in conduct that resulted injury to Plaintiffs' Paige Brothers Reservoir rights, or that Plaintiffs suffered monetary damages as a result of the past conduct of Defendants. To the contrary, Plaintiffs' assertion for monetary damages concerning the Paige Brothers Reservoir is based entirely on what their expert opined in a supplemental expert report might occur if Plaintiffs did not receive their full allotment

[2] Plaintiffs included a similar general reference to payment of all damages and special damages in the original complaint in section (n) of their prayer for relief.

of water in the reservoir in the future. Even applying the liberal rules of notice pleading, Plaintiffs did not alleged any basis to support any claim for monetary damages related to the Paige Brothers Reservoir water rights, and the court will preclude Plaintiffs from seeking an award of monetary damages concerning the Paige Brothers Reservoir or the two Paige Brothers collection ditches.

C. *Presentation of evidence concerning Plaintiffs' use of the K-G Lateral and historical agricultural practices under this ditch*

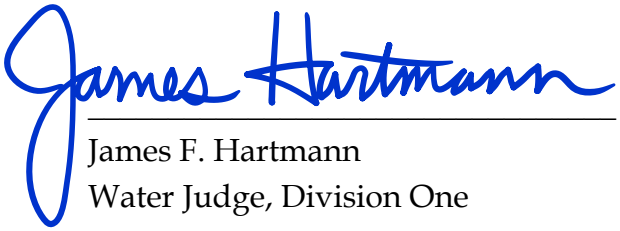
Plaintiffs request a ruling that the amount of water they historically delivered through the K-G Lateral and the historical consumptive use of the crops irrigated under the K-G Lateral are irrelevant to their easement rights; rather, the focus must be limited to the easement necessary to maintain the ditch based on Plaintiffs' maximum decreed rate of diversion and other water carried in the ditch. Defendants counter that information regarding Plaintiffs' historical use of the ditch, as well as their irrigation practices and crop water requirements, are relevant to the question of whether Defendants' proposed alterations to the K-G Lateral will result in damages to Plaintiffs' water rights benefits or increase Plaintiffs' maintenance obligations. *See Roaring Fork Club v. St. Jude's Co.*, 36 P.3d 1229, 1235-36 (Colo. 2001) (under the Restatement (Third) of Property (Servitudes) test, the owner of servient estate may make reasonable changes to the location or dimensions of an easement if the changes do not significantly lessen the utility of the easement, increase the burdens on the easement owner's use and enjoyment of the easement, or frustrate the purpose for which the easement was created).

The court agrees with Plaintiffs. This action involves neither a change of use of Plaintiffs' water rights, which would require a historical consumptive use analysis, nor an action seeking an abandonment of a portion of Plaintiff's water rights. The Colorado Supreme Court clearly stated that the water provided to the ditch easement holder "must be of the same quantity, quality, and timing as provided under the ditch owner's water rights and easement rights in the ditch." *Roaring Fork*, 36 P.3d at 1238 (emphasis added).

Therefore, it is the quantity, quality, and timing of Plaintiffs' water rights that are decreed for transportation through the K-G Lateral that must be considered when deciding whether a proposed change in location of the ditch or easement will result in damages, and not the Plaintiffs' historical delivery amounts carried through the ditch or the historical crop irrigation requirements.

Dated: February 4, 2020.

BY THE COURT:



James F. Hartmann
Water Judge, Division One

DISTRICT COURT, WATER DIVISION I
STATE OF COLORADO
Court Address:
901 9th Avenue
Greeley, Colorado 80631
(970) 475-2520

DATE FILED: August 10, 2020

Case No: 2018CW3166

Plaintiffs:
ROBERT KINT GLOVER; FRIDAY, LLC; GERALD KIEFER,

vs.

Defendants:
RESOURCE LAND HOLDINGS, LLC; JESSE MCDOWELL; KITCHEL LAKE DEVELOPMENT CORPORATION; KITCHEL LAKE PARTNERS, LLC; JAMES RIGHEIMER; LEE LOWREY; KENNETH MITCHELL,

and
Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff:
SERRATOGA FALLS, LLC,

v.

Third-Party Defendants:
THE TOWN OF TIMNATH; The MARJORIE R. KIEFER MARITAL TRUST; JANE RAELEEN DUNN; and THE BLAIR A. KIEFER FAMILY TRUST.

REPORTER'S TRANSCRIPT
February 14, 2020
VOLUME V

The above-entitled trial was conducted at Courtroom 1, Weld County Courthouse, 901 9th Avenue, Greeley, Colorado 80631, on Friday, February 14, 2020, at 8:18 a.m., before HONORABLE JAMES F. HARTMANN, JR. These proceedings were reported by Wendy McCaffrey, Registered Professional Reporter and Notary

Public.

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INDEX

PLAINTIFFS' EXHIBITS

NUMBER	OFFERED	RECEIVED
A-301I	60	--
A-342	50	52
A-343	46	49
A-344	51	--
B-362	212	212
A-804	134	134
A-836	55	58
A-843	57	58
A-1065	126	126
A-1066	126	126
A-1067	127	127
A-1068	127	127
A-1069	127	127
A-1070	127	127

Finally, their entire case -- their entire case relies on Town of Timnath approval for the modifications they made. Well, that's not what Roaring Fork says.

Our rights arise organically, and Roaring Fork does not say that an applicant to a Town or City in an entitlement process, once it gets the entitlement process, over the objection of the objecting ditch owner, the objecting ditch owner has no rights.

That's the theory. That's their whole case. That's complete bad faith, from the standpoint that Roaring Fork does not say that, and they never cited any law to indicate that a Town, in its entitlement process, can simply approve lands and change the easements.

Finally, there was testimony as to the individuals involved in the request and the signs of Mr. Kiefer and Mr. Glover not to damage their property. And, overall, we ask that the dismissal be denied. Thank you.

THE COURT: Thank you, Mr. Cucarola. Let me begin my ruling with the applicable law that the Court will be considering. Under Rule 41(B)(1)of the Rules of Civil Procedure, after the Plaintiff in an action tried without a jury has completed the presentation of

evidence, the Defendants, without waiving their right to offer evidence, in the event that the motion is not granted, may move for dismissal on the grounds that, upon the facts in the law, the Plaintiffs have shown no right to relief.

The Court, the trier of facts, may then determine them and render judgment against the Plaintiff or may decline to render judgment until the close of all evidence.

Under the City of Aurora case, found at 105 P.3d, 595, beginning at page 614 into 615, Colorado Supreme Court case from 2005, the standard is not whether the Plaintiffs have established a prima facia case, but whether judgment in favor of Defendants is justified on the evidence presented.

Citing to the Denver versus Snake River Water District Case, 788 P.2d 772, Colorado Supreme Court case from 1990, at page 776, the way to be assigned to the evidence is for the water court to decide.

Like most cases tried in the court, the Court is given the first opportunity to hear Plaintiffs' facts to support their claims of relief in the Complaint.

During pretrial motions, including summary judgment, the Court may get snippets of what the

evidence will be at trial, but it isn't nearly as comprehensive as at trial when the evidence is presented.

I'm going to address each of the claims individually and also talk about the evidence that's been presented and also touch upon evidence that has not been presented, which is equally important in the Court' analysis.

Quite clearly, the parties throughout the course of time have faced challenges communicating. We have two farmers, Mr. Glover and Mr. Kiefer, who have leased their land and who have been drawing water from this lateral ditch that finds its source of water from Headgate 34 along the Weld and Larimer Canal.

That's also been referred to as the Eaton Ditch, although I believe that, over the course of time, that was known primarily as the Eaton Ditch from where the Windsor Reservoir is located, going east into the west, where the water draws on the west side of Fort Collins from Cache la Poudre River, has been designated as the Larimer and Weld Canal.

It's the same structure. There are a number of water rights that Mr. Kiefer and Mr. Glover divert from Larimer and Weld Canal through the 34 Headgate. And those water rights have been conveyed through that

ditch for over a hundred years.

Recently, although it's not entirely clear, but likely around the time that development began, someone started referring to that ditch as the K-G Lateral, which is how the Court has been referring to the ditch in various orders and throughout the course of this hearing.

The ditch very likely, prior to Mr. Kiefer's family purchasing their land and Mr. Glover purchasing his land, may have been referred to as something else. Be that as it may, this structure has existed for over a hundred years in the location.

There have been two significant modifications to that ditch prior to any real estate development, and that was lining the ditch with concrete in the upper portion and inserting an underground pipe in the lower portion, across the Smith property, to avoid having an open-air ditch through the yard of the farmhouse.

What is quite clear to the Court is that, prior to Mr. Kiefer operating this water right, that the entirety of the water that was diverted under decrees for application on the south side of Prospect in Section 23, primarily, was delivered to the area of the southern splitter box, and that until Mr. Kiefer began diverting water from what he calls is the

northern splitter box along Prospect Road, that that was not used as any type of irrigation structure.

Equally clear from the diagrams and the testimony presented is that Lewis Lakes did not divert their water from the location where Mr. Kiefer diverts water through a splitter box that he installed to his center pivot pond that was installed by his father.

The evidence clearly shows that there was no way for water to be diverted down Prospect Road to that culvert through the corrugated steel pipe under Prospect Road and then make its way back up naturally to Lewis Lakes.

There was no evidence that anyone diverted water into Lewis Lakes from the north side. There is an established channel that leads along the ditch that we are talking about here that makes its way south from Prospect then turns to the west and provides an inlet source of water to Lewis Lake Number 1.

Lewis Lake Number 2 was filled in some time ago. But there's no indication that, number one, there's a decreed water right that could be transported along the north side of Prospect and the borrow ditch, or Prospect Lateral, however you want to characterize it; number two, that -- that anyone, Mr. Kiefer, or anyone else, for that matter, before he began utilizing

the water, filed any type of condemnation action to utilize this location.

And Colorado law is abundantly clear that if a water user needs to divert water from the source across another's property to deliver the water, they have the right to seek condemnation. They do not have the right to seek self-help. There was no condemnation done at any time.

Furthermore, that right to condemnation relies on the need to use someone else's property to deliver the water right.

What the Court heard is that the full extent of the water right for Mr. Kiefer and his predecessors and interest for Mr. Glover could be delivered to the property through that K-G Lateral to the south side of Prospect, and there was no need, and there is no need, to utilize any side channel off the K-G Lateral to deliver water west and then again south to get to the west side of the property.

As the Court ruled previously, this land, when it was pledged by the landowners in the late 1880s for construction of a road, it was a main Prospect Road at the time, it was a county road, and I must profess that I only know it's County Road 80 when you go on the Weld County side. I don't know the county road -- 44?

MR. SIMS: 44.

THE COURT: Mr. Rau, thank you. He just flashed me a 44. Okay. I do know it's County Road 80 as you're coming west from Highway 257.

That there was no reservation for any type of structure in these documents that were recorded. Larimer County built the road.

Up until the time Timnath purchased that property, it was maintained by Larimer County, and as the Court has previously ruled, the Plaintiffs have no right -- Kiefer has no right; Mr. Glover's not asserting the right today -- to that structure to claim any type of easement.

And it wouldn't have been an easement action. It would have had to be condemnation, and that was never done. And therefore, judgment must be entered in favor of Defendants -- Timnath, Serratoga Falls, the Kitchel Group -- regarding any claims related to the Prospect Lateral.

And those parties have no duty to place a structure there to allow Mr. Kiefer to continue his practice, which was unauthorized, in this Court's view.

I think it goes without saying that, once the evidence was presented, in looking at the aerial photography, that this was, for many years, perhaps,

since the road elevation was first cut at that location as a natural drainage source of water, whether that be runoff from properties to the north, the accumulation of water which is going downhill from naturally occurring weather phenomenon, snow melt, rain, et cetera, and would traverse its way down the north side of Prospect, cut under, through that pipe, and then continue on a westerly direction on the south side of the road until it hit the Timnath Inlet Canal.

That natural water are waters of the State. And they belong to water users who are downstream from that location. And they do not belong to Mr. Kiefer.

And so I'm clear, he does not have a right to use any such structure on the north side of the road to convey his water on the north side of the road to his property.

And I'll just reiterate again that the entire water right that he's entitled to makes its way through the K-G Lateral to the south side of Prospect, where the decree authorizes the use. And the same holds true for Mr. Glover.

So all claims related to the Prospect Lateral, the borrow ditch, that structure on the north side of the road, judgment is entered in favor of Defendants.

With regard to Mr. McDowell, many allegations have been made against Mr. McDowell in his individual capacity. Yet there has not been one scintilla of evidence to show that he had any personal responsibility in this action.

That was made crystal clear throughout the course of the testimony. While there may have been some suspicions on behalf of Mr. Kiefer and Mr. Glover regarding the persons who they communicated with, they provided no evidence to, though, show that Mr. McDowell acted in any way outside of his employment with Serratoga and that group of the Defendants.

And all claims related to Mr. McDowell must be dismissed. And judgment is entered in his favor.

There have been many, many allegations made by Plaintiffs in this action regarding the Defendants hiding the ball and conspiring and acting with malice and intentionally, that the Defendants have purposely attempted to slander title and convey property fraudulently.

There just is no evidence to support any of those allegations. First, the easement that Mr. Glover and Mr. Kiefer enjoy with regard to the K-G Lateral is a prescriptive easement that goes back in time to the time when Mr. Weitzel and his neighbors would walk the

ditch with shovels when it was a dirt ditch.

And then, when it became a concrete-lined ditch, the neighbors would get together, like they did not so long ago, and walked the ditch, cleared it of weeds, cleared it of debris to ensure that the water would flow in irrigation season.

That changed over time, where the farms, as they oftentimes will do, utilize the neighbors' land to drive their trucks to make it a little bit easier to clean the ditch. The aerial photographs and the testimony show that those access points often changed from east or the west.

But where they never changed was the access from the south, on the east side of the lateral, and on the north, on both the east and the west side of the lateral.

There were times, perhaps, over the course of years, where, due to drainage in the area near Kitchel, there were pieces of property that you couldn't drive through because they were simply too waterlogged.

There were times when Mr. Glover and Mr. Kitchel could only access the ditch from the west or the east, so they needed access on both sides in different areas.

There were some farm roads that traversed

from approximately Larimer County Road 5 over towards the K-G Lateral that lined up naturally to diversion points for the farmers on the west side of the ditch to draw their water and move it to their land. And that was an access point at various times as well.

No one who has maintained this ditch has recorded an easement. Doesn't mean that an easement fails to exist; it absolutely exists. The question in this case is, what is the diameter of that easement going to be?

Going back years, there were communications between Mr. Glover, Mr. Kitchel, representatives of Timnath, representatives of Serratoga regarding, what does this easement look like?

What Roaring Fork requires is that -- and I'll read from 1231 of this decision, 36 P.3d, the Colorado Supreme Court case for 2001.

"We now hold that the owner of property burdened by the ditch, he is hereinafter burdened estate," in quotes, "may not move or alter that easement unless that owner has the consent of the owner of the easement hereinafter, benefited estate," in quotes, "or unless that owner first obtains a declaratory determination from a court that the proposed changes will not significantly lessen the

utility of the easement, increase the burdens on the owner on the easement, or frustrate the purpose for which the easement was created.

"We further clarify that the right to inspect, operate, and maintain a ditch easement is a right that cannot be aggregated by alteration or change to the ditch."

I won't go into the Court's analysis of the restatement of property regarding servitudes at this time.

So, Mr. Glover and Mr. Kiefer, through Mr. Sommermeyer, was providing information to the Defendants for a period of time.

The width of the easement changed, depending upon the email that was sent. It was 10 feet to the west, 25 feet to the east, from the concrete portion or from the edge of the ditch. The Court's not determining what the scope of the easement is, so that everyone is understanding.

That information was received by the Defendants. Whether that amounted to consent, I'm not ruling on, under the Roaring Fork analysis. Plaintiffs agree that Mr. Sommermeyer had the ability to negotiate on their behalf.

Plaintiffs claim that Timnath and Defendants

tried to do an end-around -- my words, not theirs -- by saying, We won't plat the Number 2 Filing until we work all this out.

They did plat Number 2, but they specifically held out that portion of the ditch, relying upon information that was presented. That's going to be part of Plat 3 at some point in time after all of these issues are fully resolved.

There was an adjustment to Plat 2 that accounted for the determination of what the easement would be, either through final agreement between the parties, if the final agreement is determined not to have been reached, or through this Court's final order.

There wasn't any attempt by Timnath or Defendants to try and take away the easement of Plaintiffs. To the contrary, they accounted for that easement at every step.

And when Plat 2 was filed, it didn't go up to the area where the easement would be located, necessarily. If the Court determines that the easement needs to be wider than what is accounted for, then the Plaintiffs will have that right.

Again, I'm not saying what the width is. But there have been accommodations for that easement in the plat and filing of Phase 2 of the construction project

.

With regard -- and I'm jumping around a little bit here -- with regard to the hazard lien, I'm going to again find that it's not applicable in this instance and render judgment in favor of the Defendants.

It's not at all unusual to have a ditch through a populated area. I could take you all a half mile from here and show you the Greeley Number 3, which makes its way from the northwest side of Greeley, meanders through Greeley as an open-air ditch, hiked in certain portions, and carries a lot more water than the K-G Lateral every single irrigation season. That abuts up to homes and businesses and parks.

The Whitney Ditch through Windsor, another example. The Lake Canal, which I talked about with Mr. Glover, there are backyards that come right up to that area. That's part of moving water through an arid area to maintain irrigation for agriculture and other purposes as the population grows.

With regard to the claims of trespass, the parties agree, albeit they may disagree as to the cause, but the parties agree that, in June of 2018, there was damage to the ditch that caused concrete portion to collapse.

There was an issue with the pipe that leads from the concrete portion of the ditch over to the pipe that leads under Prospect Road. Plaintiffs describe that as being a crisis for their water rights in the irrigation season.

Yet I have heard no evidence that it caused any damage to the crops or that water was not delivered when it was called for by the tenant farmers or Mr. Kiefer or Mr. Glover.

The ditch was repaired in its existing location with concrete to the same capacity and dimensions at no cost to Plaintiffs. The underground pipe was repaired -- again, at no cost to Plaintiffs.

There were water deliveries after those repairs were made, and the Court heard no evidence that the amount of water, because of the damage to the ditch, was interfered with or reduced or spilled during that irrigation season.

So although there was damage to the structure, there has been no evidence of damages to the water rights or to the holders of those rights. And those claims must also be dismissed.

With regard to the damage to the Prospect Lateral, I'm not going into that any further. The construction that occurred in that area was to the

borrow ditch, and Mr. Kiefer did not have any right to that. So there can be no damages to him from those activities.

The Court heard evidence that construction activities required that a portion of the ditch be removed so that graders and other equipment could be moved from the west side of the ditch to the east side of the ditch, and that concrete was poured.

Mr. Kiefer, who works extensively in concrete, has concerns as to the structural integrity, if that ditch will maintain over the course of time because of freezing after it was poured.

That remains to be seen. We don't know how it's going to hold up over the course of time. But for now, there was no costs to Mr. Kiefer or Mr. Glover to put the ditch back in its location.

I can't say that it's in the exact same condition because of the questions regarding the concrete and the timing of the pour. But there has been no damages shown with regard to that claim.

With regard to the slander of title and the conveyance, the platting for Phase 3 hasn't been recorded yet, to the Court's knowledge, and the easements still have to be determined.

I am going to make it, again, as clear as I

can, Mr. Kiefer and Mr. Glover have a right to an easement. The question is how is that easement going to be defined, and then once it is, the Defendants have never said that we won't include that with the Town of Timnath or the platting.

That will be recorded with Larimer County. They've never, never claimed that the Defendant or the Plaintiffs don't have a right to an easement. It's just a question of what that easement will look like. So there has been no slander of title.

The real issues in this case, as I see them, now that I've heard the evidence, is whether the K-G Lateral will remain an open-air ditch, as it has for many, many years; whether it will be piped entirely or in various locations; and the key there is whether or not the Plaintiffs will incur additional burdens.

Whether that's monetary, general maintenance, through their labor, whether their full entirety of the water right can continue to be delivered in the historical area of delivery.

And that's to the southern splitter box. That's the historical place of delivery once it goes under Prospect. Mr. Glover's is different because it has to go down a ditch. But that's -- that's the key area from the 34 Headgate down to where it's delivered

to Plaintiffs for their enjoyment.

What is their easement going to look like? That is going to depend upon what type of structure the Court finds is appropriate, applying the Roaring Fork analysis. If the Defendants said, We're just going to leave it as it is; it's going to be a concrete ditch with an underground pipe and feed the water into the elevation box, my turn, not Mr. Rau's turn, on the north side of Prospect, where the pipe enters and then it makes its way up in elevation about a foot, and then traverses south until it gets to the pipe, then they're not moving the ditch.

It's in its historic location in the condition that it was in, with the question being the concrete poured a couple of months ago in November, or between November 1st and the trial.

The other issue is the Paige Brothers Reservoir. As the Court attempted to make clear in its pretrial rulings, there is a decreed storage right for the seepage water in this location. Defendants have said they're not attempting to change the water rights.

This is not a change-of-use-action, although the Court said in its order, that appears to be what's occurring because it's changing from the historical use of irrigation of farmland to water features and

irrigation of lawns.

Did Plaintiffs -- Mr. Kiefer, in this instance, unless Mr. Glover also received some of the water that's pumped up from Paige, although it's not decreed to him -- has the right to the one fill of that reservoir each year during the irrigation season and may draw water from there for irrigation purposes.

And Defendants' activities may not interfere with the filling of the Paige Brothers Reservoir.

By filling, that can take a number of different avenues. The key here is the water getting into the Paige Brothers Reservoir in the amounts that historically accrued.

And that was part of the Court's previous order. And I think that the State Division of Engineers have an interest in that too with some of the deep-watering structures of the tributary groundwater in the area and permitting of those areas from the K-G Lateral to the east as it slopes the other direction.

Looking to the west side, the drainage areas in that area, there has been no evidence that any groundwater diverted through the drainage system on the west side of the ditch injured the Plaintiffs' water rights.

For example, that they have a seepage right in the K-G Lateral or any other structure. That hasn't been presented to the Court. And this is a line ditch that prevents water flowing down through seepage and water accruing from the ground up through seepage.

So all claims, I'm reserving the damages -- special damages claims at this point in time because Roaring Fork allows the Court to put on its equity hat to address this issue.

But all other claims besides the special damages, the location of the easement, what type of diversion structure will be in place going forward from Headgate 34, down underneath Prospect Road to the southern splitter box, and the water going into Paige Brothers Reservoir will be dismissed.

So only those aspects of the case remain. If I didn't make that clear, I'll try and clarify.

Mr. Weiss, you had raised the motion. Is my order clear?

MR. WEISS: I believe so, Your Honor. If I might try to restate it and make sure we're both on the same page. It is my understanding that the claims that you maintain are special damages, location of easement, what type of structure will be in place going forward, and water going into the Paige Reservoir, with all

other claims dismissed.

THE COURT: Correct. Yes. Do you have any questions for me, Mr. Weiss? Or Mr. Sims or Mr. Farbes? I'll allow any of the three attorneys to ask questions.

MR. WEISS: Just for clarification, are you referring judgment on the request for fees?

THE COURT: Yes.

MR. WEISS: Okay.

THE COURT: Mr. Sims?

MR. SIMS: As I understand, you're interested in water going into Paige that will continue on. In the next part, we will need to show that the water will continue to go into Paige as it did before? Is that what you're saying?

THE COURT: That the Plaintiffs' right will not be injured through the development of the property going east from the K-G Lateral down to the Paige Seep area and into Paige Reservoir. Paige Brothers Reservoir.

Mr. Farbes.

MR. FARBES: Just one further clarification, Your Honor. As I heard the order, you are also dismissing claims associated with the Plaintiffs' or Third-Party Defendants' allegation that the -- the

groundwater drains on the west side of the lateral are somehow impacting their water rights.

THE COURT: There has been no evidence to show that the interception of groundwater injures the Plaintiffs' water rights. The evidence focused on the installation of the drainage system and how that may have been the cause of the breach of the K-G Lateral, the -- the side of the K-G Lateral to collapse.

But as far as the injury to the water rights, it has not been shown that there was a hydrologic connection between that seepage area going down to Lewis Lakes.

MR. FARBES: That is the focus of my question. Thank you.

THE COURT: You're welcome. Mr. Rose, do you have any questions?

MR. ROSE: No, Your Honor. Thank you.

THE COURT: Mr. Massey?

MR. MASSEY: As I'm understanding the order, Your Honor, that all trespass claims are resolved, as are the claims for fraudulent conveyance, correct?

THE COURT: Correct. Yes.

MR. MASSEY: Okay.

MR. WEISS: That would include nuisance as well?

THE COURT: Yes.

MR. WEISS: Thank you, Your Honor.

THE COURT: Thank you. Mr. Cucarola, or Mr. Corona, any questions on the Court's order?

MR. CUCAROLA: Judge, I have been writing steadily. I'm not going to belabor this. I would -- I guess as we proceed I'll ask for some clarification, if I may, in the days forthcoming. Would that be okay?

THE COURT: Absolutely. If you have a question now about where we're going from this point, please feel free to do so.

MR. CUCAROLA: Well, it's going to take me a little bit to digest. I don't want to ask a simple question.

THE COURT: Okay. Thank you. Mr. Corona?

MR. CORONA: Nothing, Your Honor.

THE COURT: All right. Thank you. Wendy has been writing for a long time, very quickly. So why don't we take a recess for about 15 minutes and give her a break, and then we'll resume with Plaintiffs' -- I'm sorry -- Defendants' presentation of evidence after our break.

Thank you. We're in recess, ladies and gentlemen.

(Break from 3:21 p.m. to 3:37 p.m.)

THE COURT: Counsel, are you ready?

MR. FARBES: We are ready to begin.

THE COURT: Before you do, I had made two more notes on my ruling that I didn't touch upon. I'd like to just supplement.

First, there was no evidence that any of Plaintiffs' land was flooded as a result of the breach of the K-G Lateral. And second, when groundwater exposed during the test pours that were drilled by the contractor, and water was pumped by the subcontractor into the K-G Lateral, there's been no evidence that any of the Defendants approved of the practice or consented to that.

In fact, when they learned that this had occurred, they ordered that the practice cease immediately.

This wasn't wastewater. It was exposed groundwater that was put into the K-G Lateral, and there was no evidence that Plaintiff suffered any damages because of that, that the water was of such poor quality that it harmed the concrete of the ditch, or any cropland, or that they were cited to a cease and desist order by the division engineers. That were no damages that has been alleged because of that condemnation.

I'm just going to check my notes to make sure that I didn't miss anything else.

That's it. Thank you.

Mr. Farbes.

MR. FARBES: Thank you, Your Honor. I'd simply like to note that, in our previous discussions regarding the sequence of our witnesses, we had indicated to you that Tony Vienna might have -- might be called first.

We believe that, based upon your ruling on our Rule 41 motion, Tony Vienna's testimony is no longer required.

THE COURT: Thank you, Mr. Farbes.

MR. FARBES: The Serratoga Defendants call Jesse McDowell.

THE COURT: Mr. McDowell, if you'll come up to the witness stand, and please be seated, sir. Thank you.

JESSE MCDOWELL

was called as a witness on behalf of the Defendants and, having been sworn, was examined and testified as follows:

THE COURT: State and spell your last name, please.

THE WITNESS: Jesse McDowell, M-c-D-o-w-e-ll.

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, WENDY McCAFFREY, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the said proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form, consisting of 249 pages herein; that the foregoing is a true transcript of the questions asked, testimony given and proceedings had. I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature and seal this 26th day of February, 2020.

My commission expires January 31, 2024.

Wendy McCaffrey
Professional Court Reporter

Appendix Ex. 4

District Court, Weld County P.O. BOX 2038 Greeley, CO 80632 (970) 475- 2400	DATE FILED: March 24, 2020 8:41 AM CASE NUMBER: 2018CW3166
Plaintiffs: ROBERT KINT GLOVER, FRIDAY LLC, GERALD KIEFER v. Defendants: RESOURCE LAND HOLDINGS, L.L.C.; JESSE MCDOWELL; KITCHEL LAKE DEVELOPMENT CORPORATION; KITCHEL LAKE PARTNERS LLC; JAMES RIGHEIMER; LEE LOWREY; KENNETH MITCHELL; and Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff: SERRATOGA FALLS, LLC v. Third-Party Defendants: The TOWN OF TIMNATH; the MARJORIE R. KIEFER MARITAL TRUST; JANE RAELEEN DUNN; and the BLAIR A. KIEFER FAMILY TRUST.	▲COURT USE ONLY▲ Case No.: 2018CW3166 Courtroom: 1

RULING AND JUDGMENT OF THE COURT

The Court's verbal ruling and judgment entered on February 19, 2020, transcribed and attached hereto, is adopted and made the final judgment of the Court.

Dated: March 24, 2020.

BY THE COURT

James Hartmann

James F. Hartmann
Water Judge, Division One

DISTRICT COURT, WATER DIVISION I
STATE OF COLORADO
Court Address:
901 9th Avenue
Greeley, Colorado 80631
(970) 475-2520

Case No.: 2018CW3166

Plaintiffs: ROBERT KINT GLOVER, FRIDAY LLC, GERALD KIEFER,

vs.

Defendants: RESOURCE LAND HOLDINGS, LLC; JESSE McDOWELL; KITCHEL LAKE DEVELOPMENT CORPORATION; KITCHEL LAKE PARTNERS LLC; JAMES RIGHEIMER; LEE LOWREY; KENNETH MITCHELL,

and

Defendant, Counterclaim Plaintiff and Third-Party Plaintiff: SERRATOGA FALLS, LLC,

v.

Third-Party Defendants: The TOWN OF TIMNATH; The MARJORIE R. KIEFER MARITAL TRUST; JANE RAELEEN DUNN; and the BLAIR A. KIEFER FAMILY TRUST.

REPORTER'S TRANSCRIPT
EXCERPT OF TRIAL: RULING OF THE COURT
Wednesday, February 19, 2020
VOLUME VII

The above-entitled trial was conducted at Courtroom 1, Weld County Courthouse, 901 9th Avenue, Greeley, Colorado 80631, to begin at 9:00 a.m., on Monday, February 10, 2020, and concluded, on Wednesday, February 19, 2020, at 5:18 p.m., before the Honorable James F. Hartmann Jr. The proceedings of February 19, 2020, which began at 9:00 a.m., were reported by Wendy McCaffrey, Registered Professional and Notary Public.

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P R O C E E D I N G S

WHEREUPON, the following proceedings were taken pursuant to the Colorado Rules of Civil Procedure.

* * * * *

(Beginning of the Court's ruling at 4:30 p.m.)

THE COURT: Thank you, Mr. Cucarola. The Court is prepared to enter a ruling at this time. Counsel is correct that, at various times in the case, the Court has described the issues in this case as really very simple.

And the heart of the matter is that the Plaintiffs, who own farmland on the lower end of the lateral, want to maintain their water rights. They want to ensure that the water continues to be delivered through the ditch, to which they have rights to convey that water after the Defendants engage in the construction project.

In addition, they want to ensure that their Paige Brothers Seep rights continue to accrue in the Paige Brothers Reservoir.

That's really the heart of the whole case is they want to make sure that, at least for the water that is delivered initially through the Larimer and

Weld Canal across another's land is continuing in the future and that they maintain their easement rights to maintain the conveyance structure so that there is no injury.

The parties have each all cited at various times to the Roaring Fork Club case. And as was noted by Mr. Cucarola, the water right itself is only a part of the equation. It includes an easement. It includes not only the decreed water right but any other benefits that may stem from that structure, including water that accrues naturally to the ditch. That's why we -- why I asked a lot of the questions that I did.

The K-G Lateral is a concrete-lined ditch for nearly its entire distance. There is a piped portion at the lower section of the ditch, installed in the early 1960s. We can debate the overarching reason why the pipe was installed.

Be that as it may, when both Mr. Kiefer and Mr. Glover acquired their property, it had long been in place. Mr. Kiefer's family purchased their farm beginning in 1975, Mr. Glover in 1991.

But that structure was there. And it was an integral -- is an integral part of the overall delivery system from the Larimer and Weld Canal to the properties on the south side of Prospect.

The Paige Brothers rights were from 1911. And quite clearly, those rights involve the accumulation of tail waters from irrigation seepage, et cetera, in this area that we've described as the Paige Seep, or the wetland area, clearly defined in everyone's mind, that begins on the north side of Prospect, north of Paige Brothers Reservoir, and spills through a tile or a pipe into the reservoir.

That decree is quite clear. It is defined first by the amount of storage. That's the capacity of the reservoir. And we won't quibble about this -- the amount of silt that's acquired over the past 109 years.

But it's also equally clearly defined by the structure, the reservoir, which has not been significantly modified since the decree was entered. It's defined by its -- its banks, and there's a structure that allows the reservoir to spill when it hits a certain capacity, and that water ends up in the Timnath Reservoir.

And, once again, Plaintiffs want to ensure -- Plaintiff Mr. Kiefer; Mr. Glover doesn't divert water from Paige Brothers -- but Mr. Kiefer wants to make sure that he's allowed to use that water.

So turning again to the Roaring Fork decision, it's not only the decreed amount of the water

that is diverted down the K-G Lateral from Larimer and Weld. It's also the free river conditions.

What hasn't been touched upon by the attorneys but is clearly known by them, I'm sure, is that even when there's free river, you can't divert unless you put it to beneficial use.

So even if water is available in addition to what would be available under their various shares, if they can't put that water into Lewis Lakes for Mr. Kiefer or apply the water to direct flow irrigation for Mr. Kiefer and Mr. Glover, it's academic. They can't divert that water.

Free river only applies if you can divert it for beneficial use. I say that because, even if the Court considered a free river condition and diverting at capacity for Mr. Glover and Mr. Kiefer's water rights, we're talking about 6 CFS, to a maximum of 12. And I think 12 is even stretching the limit here.

At a time when there was that much moving through the K-G Lateral, the evidence convinces me that there were water users on the north side of Prospect who were also diverting water.

As Mr. Becker candidly said, There are times I put too many wood gates and I caused some spillage, to get the water to the field he was irrigating on the

north side of Prospect.

That's really the reality when it comes to this type of a ditch configuration, where you have users from the headgate all the way down to where the -- where the lateral ends.

Mr. Glover and Mr. Kiefer could not divert water at the 34 Headgate if they weren't going to put it to beneficial use and simply allow that water to head all the way down to Timnath. Nor would I expect them to.

But, once again, that's an integral fact when it comes to the operation of this ditch over time and how much water was actually being conveyed.

Although I don't have a number as to how many shares equates to a certain CFS, what I did hear, again, convincingly, is that the velocity of the water as it's being released from the Larimer and Weld Ditch up at the headgate defines how much water the ditch rider can let in.

That gate was never fully opened, from the testimony I heard, because it would flood the ditch. And that's what the ditch rider does. That's what the water commissioner makes sure the ditch riders do, and that's what the division engineer ultimately has to maintain, is that there's not an expansion of the water

rights, there's not waste, there's water being placed to beneficial use. All of those things are part of that bundle of sticks that Mr. Cucarola referred to, the comment that Justice Kourlis made.

I'm using it more along the lines of what Justice Hobbs frequently placed in his opinions over time in the water court.

What's -- what's equally clear to me is that there was a significant level of difficulty in communication over the course of time by people involved in this case. When we talk about years elapsing, that's true, that the discussions occurred over the course of many years.

But what is also equally apparent is that, during the time where the negotiations and the communications hit an impasse or simply stopped, there were still other activities that were going on by Defendants.

They didn't have to wait for a final answer on, will this be piped the entire length of the ditch? to continue with their activities.

Mr. Sommermeyer, who was authorized to act on behalf of Mr. Glover and Mr. Kiefer, was negotiating the easement width. And it's important that we separate the various components of these negotiations

because they don't depend upon one another completely.

The easement width is a critical piece for setting up the lot lines. And that's where the reliance was, is, here's what the easement is going to look like, even if we haven't reached an agreement on how the water is going to be moved from the Larimer and Weld Canal down that mile-long ditch.

So while there was not an agreement whether the ditch would be a 4-by-4 box culvert or remain an open-air ditch with crossings or piped, it doesn't take away from the fact that the Defendants did, in fact, rely upon what that easement width would be.

If Mr. Sommermeyer had not provided over the course of time these dimensions, you-all would have been here much sooner because the Serratoga Group could not have proceeded with Timnath to map out what the plats were going to look like.

As I mentioned during my ruling on Defendants' 41-1 -- or, I'm sorry; 41 -- I spilled over into the criminal arena -- 41 -- Rule 41, and I did that inadvertently, they moved that second plat to take out the ditch from consideration so they could move forward with their plan based upon the representations of Mr. Sommermeyer.

Okay? Now, we know what the Plaintiffs are

requesting as far as the easement and what will suffice. So now we're going to lay out a plat, and we'll send it to Timnath.

Again, I'll reiterate, that wasn't an intent by the Defendants to try and cloud the title to the easement. The Defendants always knew there was going to be an easement. Always. It's just a question of how that would look.

It was the Defendants, through Mr. McDowell and his correspondence, who first brought up, If we can't reach an agreement, we're going to have to seek court intervention under Roaring Fork after conferring with Mr. Flanagan's firm or another attorney's office who's currently representing him.

It was only after that was broached that the Plaintiffs filed their lawsuit. And the initial Complaint was much more straightforward. Its declaratory relief, primarily, and injunctive relief -- and we want to make sure water rights are here -- and they amended that Complaint and made very specific allegations.

Frankly, when I read through these allegations, I had in my mind something much different than what was presented during the course of trial. Much different.

And it required the Defendants to take a different approach. If this had just been declaratory relief and injunctive relief regarding the ditch and the Paige Seep, Defendants would not have had to take the actions that they did, at great expense.

The trespass, which has been dismissed by the Court; the nuisance, the allegations of conspiracy, and slander of title, acting with malice and intent, there just simply was not any evidence to support that. And yet the Defendant went to great lengths to defend that.

And it was known at the time of the filing that the Plaintiffs didn't incur any costs. It was repaired by Mr. Massey's clients at their expense. There was no allegation -- I'm sorry -- no proof, even though there was an allegation that, at the peak of irrigation season, which, in the Court's mind, is there are crops withering in the field because water can't make its way down-ditch, there's no evidence that a single drop of water that was called for by the tenant farmers didn't make it down there to the fields.

This case was made so much more complex by Plaintiffs' allegations, unsubstantiated allegations, than it needed to be. It's a simple, simple case. How is that water going to get from Point A to Point B in the same quantity, quality, and timing, as it has

always been delivered in this existing structure?

Does the existing structure need to remain? Or, under the restatement of property, have the Defendants shown that there is another method that can be employed that will not significantly lessen the utility of the easement, increase the burden on the owner of the easement in its use and enjoyment, or frustrate the purpose for which the easement was created?

With regard to the Paige Brothers Reservoir and the Paige Seep, Defendants have shown that water will continue to be delivered after the development occurs. It hasn't been quantified.

When you put pavement down, it can actually increase the amount of water that makes its way down to the Paige, and that could cause injury too. I'm not here to decide whether or not putting water in that reservoir will cause the injury. It depends upon the amount of water that's making its way to the structure that diverts the water down.

What defendants have shown is that the footprint of the Paige Seep will remain, and the Paige Number 1 will remain.

There hasn't been any evidence shown that the reservoir won't fill. And under the one-fill rule,

during the year, when the water can accumulate, unless there's a refill right, you can use that amount of water. And once it's gone, you have to wait till the reservoir refills.

I'm not ordering that the engineers do any type of administration on this reservoir. That's their job already. The decree says what it says. And the engineers are tasked with their responsibility. The water court decrees the water right. The state division engineers administer those water rights.

With regard to the Prospect Lateral, I've already dismissed that claim, and, as Mr. Corona stated, that construction of the ditch isn't necessary, but having the ability to divert the water in that location hasn't existed.

There has been a diversion -- it's not a decreed diversion -- down the north side of Prospect, as I said in my order dismissing the Prospect Lateral.

And what was shown is that wasn't a Lewis Lakes diversion. The water never made it to Lewis Lakes from that pivot irrigation pond that was installed.

So now, turning to the K-G Lateral. One, again, I believe that it was only a matter of time

before Defendants were going to file their own request for declaratory relief. Plaintiffs just beat them to the courthouse doors by filing first.

And I'm convinced of that because of Mr. McDowell's email. Just, I can't remember how many months ahead of time, but it was a relatively short period of time between events.

This is what we have to do if we don't get an agreement because we're now at the point where decisions have to be made about the K-G Lateral. We could put it off for years while we're doing everything else. But now, we are at the point where the development and the widening of the road on Prospect, we're at that point.

I believe that you all would have been here eventually, whether it was the Defendants who filed or the Plaintiffs who filed, regarding the Paige Brothers water right and the K-G Lateral, and maybe the Prospect, if Plaintiffs would have added that and had the Defendants filed first.

So I -- I don't see that the litigation on those issues would have been avoided. I think you would have been here anyways because, as made clear by the Roaring Fork Club case, the preference is that the easement parties -- and I'll use the old-fashioned

terms of dominant and servient holders of the easement rights -- the dominant estate and the servient estate should try and work it out and agree. If they can't, then the option is to come to court and not utilize self-help.

The Defendants didn't use self-help. I asked that question specifically. Did you attempt to pipe this lateral without permission? And the answer was, No. There was no self-help regarding the conveyance structure. And there was reasonable reliance on the width of the -- of the easement from Mr. Sommermeyer to Mr. McDowell, et al.

With regard to the Plaintiffs' request that it be an open-air ditch, I understand, it's worked for a hundred years. There certainly are arguments in support of keeping this ditch as a concrete-lined structure.

Roaring Fork makes clear that the request of both the dominant and the servient estate holder must be reasonable. Or can't be unreasonable. I'll turn that around. And because the Defendants didn't use self-help, I'm not called upon to decide whether their actions in self-help by actually moving the ditch were reasonable under the equity principals.

Instead, I'm called upon to determine

whether, under the restatement of third -- restatement third of property, that there can be changes made to the location or the structure, considering whether or not each of the three criteria have been met: Does it lessen the utility of the easement? Does it increase the burden on the owner of the easement or use of enjoyment? Or frustrate the purpose for which the easement was created?

I'm going to start with the last one first. It doesn't frustrate the delivery of the water. The Court has heard that the 24-inch pipe will deliver more water than was historically delivered to Plaintiffs, once again, because all of the water being diverted down that pipeline will belong to Plaintiffs.

There won't be any diversions north of Prospect through the lateral if the Court approves the plan.

Does it lessen the utility of the easement? Well, the easement was relied upon by -- the easement width was relied upon by the Defendants, by Mr. Sommermeyer. They actually increased that to 50 feet.

The utility of the easement, the width, will not be significantly lessened. In fact, I think it will be enhanced because it will be continuous from

north to south along the Prospect -- north of the Prospect side of the ditch.

That really never existed in the past. There were portions where you could access it on the east, portions you could access it on the west, and some portions where it was really tough.

And I'm sure there was a lot of walking with shovels and walking and clearing out the sediment and the debris that had accumulated in the ditch between November 1st and March 31st, before irrigation water started running on April 1st.

So the question, does it increase the burden on the owner of the easement in the use and enjoyment? What Serratoga, through the Metro District, have pledged is that they will take care of the entire pipe. They'll flush it. They'll remove the sediment. They will ensure that it is maintained at their cost.

In essence, that's their pipeline. It's conveying water for another person, but what they've assured the Court is that they're going to be fully responsible for that portion.

That doesn't increase the burden on that stretch of the conveyance structure; it actually lessens the burden. I think it's still important that the owner of the water right, right now, Mr. Kitchel --

I'm sorry; Mr. Kiefer and Mr. Glover still have the ability to traverse the entire portion to make sure the thing's running right.

But they're not going to be financially responsible. They don't have to get the specialized vehicles with the forced water spray and the vacuum tubes. That's going to be paid for by the Metro District.

And that's something that they can share through the fees to all the homeowners once this is built out.

It's not unusual for developments such as this to share those costs amongst many. They recognize the cost. They are going to pay for that cost and go forward.

The Court simply proposed making it an open-air portion of the ditch on the lower portion to avoid the possibility of injury if there is water that accumulates.

And you don't find out that there is a crack until you start to run water, come spring. And then it may be too late. May not be, if that removal of the water occurs every year, and there wasn't specific information that it would be cleaned out in the fall, after the water starts running, before we get a hard

freeze, or, at least, freeze to the level of the pipe.

It was simply a question that I had as to whether this was an option. And that would make it very easy to apportion the responsibilities of the maintenance of the ditch.

The open-air concrete portion would be maintained by Mr. Kiefer and Mr. Glover at the headgate area and the lower portion, where it feeds to the pipe that goes under Prospect. And the piped portion would be maintained by the Metro District.

Seems like it might be a workable solution. I'm not an engineer. I don't profess to be. And it may not be completely workable. I just put that on the table as a possible option.

What should be clear to everybody, given the history, is that if there was a continued attempt by the parties to divide the tasks, where one year it's Mr. Glover and Mr. Kiefer who maintain the pipeline, and the next year it's the Metro District, history has shown that's not going to be a workable solution.

There has been too many things that have occurred that have caused a divide between those groups, which was another reason why I was proposing having clear delineation of responsibilities.

And the fact that this lower portion of the

ditch, where it meets up with Prospect, isn't going to be developed because of the topography and the drainage may be a very suitable area to come up with alternative plans.

Right now, it's piped. And the structure that has been working actually works well enough to push the water upgradient a little ways underneath the Prospect Road.

So the Court further finds that it will not increase the burden if Serratoga and Kitchel are allowed to install the pipeline. The Court finds that the Defendants have met their burden to show that there will not be injury or a lessening of the utility of the easement or frustrating the purpose for the easement if they allow for the 50-foot easement and they pipe this portion of the ditch.

With regard to the possibility of the Metro District enjoying some immunity here, in that, if there was a breach, it would fall upon the Plaintiffs, that's why I have proposed that this pipeline is really on -- completely on the Serratoga property.

It's going to be their pipeline. They have the obligation to maintain that as an easement in favor of the Plaintiffs in this action. I cannot, of course, comment on what might happen in the future. But if

Plaintiffs didn't maintain the concrete portion, and it sits up higher, and there's a breach that occurs at night while water's running, and now all the property that is downgradient from the existing ditch gets flooded, whose responsibility would that have been? I'm not answering that question one way or the other.

So I don't think that the mere fact that the Metro District could assert some type of limited liability or immunity increases the burden on Plaintiffs in this action.

The Court further finds that special damages are not warranted in Plaintiffs' behalf. The Court is further finding that Plaintiffs are not the prevailing party. I'm not going to award attorneys' fees.

The Court will find that, for purposes of the claims that were dismissed, that Defendants are entitled to their attorneys' fees. I will grant leave to file an invoice and affidavit of attorneys' fees.

If there is a request for hearing on the reasonableness of these attorneys' fees, I will schedule a hearing after setting a status conference.

It should have been apparent early on in this case to Plaintiffs -- and that's a joint with the Plaintiffs and Mr. Cucarola. I can count on one hand with fingers left over how many times I've done this in

the 17 years I've been a judge. But I think this is a case that warrants such action.

Defendants were called upon to spend time and money on claims that lacked substantial justification and were frivolous, vexatious, and litigious.

Mr. Corona and Mr. Cucarola, are you asking that I make any additional findings for purpose of the appellate record? Mr. Corona first.

MR. CORONA: Your Honor, for clarification.

THE COURT: Yes.

MR. CORONA: For the claims that were dismissed -- excuse me -- the Defendants were entitled to attorney fees. Apparently, this is my pet subject area, but are you referring to the claims of a right and easement of the Prospect Lateral?

THE COURT: I'm sorry. Say that again.

MR. CORONA: Are you referring to a claim -- the claims regarding the Prospect Lateral?

THE COURT: I am not referring to the Prospect Lateral.

MR. CUCAROLA: Thank you, Your Honor.

THE COURT: No, I'm not. I'm referring to the claims of individual liability of Mr. Righeimer, and Mr. Lowrey, and Mr. Mitchell; the trespass to water rights, the trespass to easement and ditch and ditch

access, the claim of nuisance, acting with malice, violation of the statutes 7-42-109 and 37-89-101, the slander of title, the fraudulent conveyance, and the civil conspiracy.

So it's going to be passed to Defendants' counsel to separate those out because, as I said before, I think the parties would have been here on the issue regarding the Paige Brothers Seep, the Prospect Lateral, to be quite honest, and the K-G Lateral.

Mr. Sims.

MR. SIMS: Your Honor, you've mentioned the individual claims against Mr. Righeimer, Lowrey, and Mitchell.

THE COURT: Oh, and also Mr. McDowell. I'm sorry. Yes. Mr. McDowell's individual tort liability. There simply was no evidence presented for individual liability.

I left the door open just a crack, if the Court had awarded damages under piercing the corporate entity veil. But that was not asserted.

Mr. Cucarola, I jumped right over you. Do you have any request that I make further finding for the appellate record?

MR. CUCAROLA: At this time, I don't know of any requests. I haven't had time to analyze this.

THE COURT: Okay. Mr. Sims, Mr. Weiss, or Mr. Farbes? For purposes of the appellate record, would you like me to make any additional findings? Is there something that you think I missed?

MR. SIMS: No, Your Honor. We think your ruling was comprehensive.

THE COURT: Mr. Massey?

MR. MASSEY: I have nothing to add, Your Honor.

THE COURT: Thank you. So the Court is not awarding attorneys' fees in favor of Timnath in this action. Mr. Rose isn't here today to argue that. But his argument focused in on the Prospect Lateral. Okay.

Thank you, everyone, for staying late and spending the last seven days.

MR. MASSEY: Your Honor.

THE COURT: Yes, Mr. Massey.

MR. MASSEY: The attorneys' fees, I assume, will be, pursuant to Rule 121, we have 21 days to submit the affidavit?

THE COURT: I actually give 30 days.

MR. MASSEY: Thank you.

THE COURT: 14 days to file a response, and a request for hearing. There would not need to be a reply

if there's a request for a hearing on reasonableness because -- we'll set hearing.

And what I would do is I would set a status conference to discuss the amount of time necessary for a hearing. And that would be on the reasonableness issue only.

MR. MASSEY: Thank you, Your Honor.

THE COURT: And I should say that the Court's verbal ruling is the order of Court. You may request a transcript. If you would like me to sign that after it's been prepared so that it's in written form, I would be happy to do so.

MR. FARBES: Thank you, Your Honor. We may request one.

THE COURT: And then the time for appeal would run from that point in time that anyone is requesting that the transcript be prepared of the Court's ruling.

Otherwise, the time would commence as of today. Although, I suppose -- let me just rephrase. Because the issue of attorneys' fees is still open, it may not be a final judgment yet. My ruling has been entered. But that may be subject of an appeal as well.

I'd have to think about that further. I just want to make sure no one is misled as to when the clock

begins on filing appeal.

MR. FARBES: Thank you, Your Honor.

WHEREUPON, the within proceedings were concluded at 5:18 p.m. on the 19th day of February, 2020.)

* * * * *

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, WENDY McCAFFREY, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the said proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form, consisting of 27 pages herein; that the foregoing is a true transcript of the questions asked, testimony given and proceedings had. I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature and seal this 22nd day of February, 2020.

My commission expires January 31, 2024.

Wendy McCaffrey
Registered Professional Reporter

WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631-1113 (970) 475-2400	DATE FILED: June 23, 2020 5:22 PM CASE NUMBER: 2018CW3166
Plaintiffs: Robert Kint Glover; Friday LLC; and Gerald Kiefer v. **Defendants:** Resource Land Holdings, LLC; Serratoga Falls, LLC; Jesse McDowell; Kitchel Lake Development Corporation; Kitchel Lake Partners LLC; James Righeimer; Lee Lowrey; and Kenneth Mitchell and **Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff:** Serratoga Falls, LLC v. **Third-Party Defendants:** The Town of Timnath; the Marjorie R. Kiefer Marital Trust; Jane Raeleen Dunn; and the Blair A. Kiefer Family Trust	**▲COURT USE ONLY▲** **Case No. 2018CW3166**

ORDER DENYING PLAINTIFFS' AND THIRD-PARTY DEFENDANTS' MOTION FOR RELIEF UNDER RULE 59, C.R.C.P.

This matter comes before the court on a motion for post-trial relief pursuant to C.R.C.P. 59 filed by Plaintiffs Robert Glover, Friday, LLC, and Gerald Keifer, and Third-Party Defendants Marjorie Kiefer Marital Trust, Jane Raeleen Dunn, and Blair Kiefer Family Trust (collectively, "Plaintiffs"). The present motion was filed on April 21, 2020 at 6:51 p.m. The court calculates today—June 23, 2020—as the sixty-third day after the

motion was filed. See C.R.C.P. 59(j) ("The court shall determine the motion within 63 days (9 weeks) of the date of the filing of the motion.").

Plaintiffs request the court to amend the findings and judgment entered at the conclusion of trial and contained in orders issued by the court on pretrial motions in the following areas:

1. Setting aside the order dismissing Plaintiffs' trespass claims related to the KG Lateral, as well as amending the court's findings that Plaintiffs' KG Lateral trespass claims lacked substantial justification.
2. Clarify which of Plaintiffs' other claims lacked substantial justification.
3. Specify that the Prospect Road dedication was not recorded in the chain of title of the land where Prospect Road is located.
4. Clarify that Plaintiffs presented evidence that subdrains installed by Defendants as part of Filing 2 intercept groundwater that would otherwise flow to the Paige Brothers Reservoir, and that Defendants must obtain a well permit for the subdrains installed in Filing 2 and prior to installing additional subdrains in Filing 3.
5. Clarify that Defendants asserted that Plaintiffs did not own an easement in the KG Lateral in pretrial pleadings and that Plaintiffs prevailed on the claim that they own an easement.
6. Enter additional findings on the scope of Plaintiffs' easement to the KG Lateral and the Paige Brothers Ditch.
7. Entry of judgment against Defendants to indemnify Plaintiffs if there are any future damages to Plaintiffs' easement rights arising out of modifications to the KG Lateral and Paige Brothers Ditch, and that Defendants are responsible for any required repairs or replacement of the KG Lateral pipeline once it is installed.
8. Amend the order awarding attorney fees to Defendants against Plaintiffs and their former counsel, Mr. Cucarola, joint and several to simply several, after deciding how the attorney fees should be apportioned between Plaintiffs and

Mr. Cucarola. Plaintiffs assert Mr. Cucarola was primarily responsible for bringing the claims found by the court to lack substantial justification.

The court received responses from Defendants Resource Land Holdings, LLC; Serratoga Falls, LLC; and Jesse McDowell (collectively, "RLH Defendants"); Defendants Kitchel Lake Development Corporation, Kitchel Lake Partners, LLC, James Righeimer, Lee Lowrey, and Kenneth Mitchell (collectively, "Kitchel Lake Defendants"); Third-Party Defendant Town of Timnath ("Timnath"); and Mr. Cucarola. Plaintiffs filed a reply.

I. Legal Standard

Rule 59(a), C.R.C.P. permits a party to move for post-trial relief within fourteen days of the date judgment was entered. Post-trial relief may include an amendment of the court's findings, C.R.C.P. 59(a)(3), and amendment of judgment, C.R.C.P. 59(a)(4). Rule 59 affords the court with an opportunity to correct errors in its findings or the judgment rendered. *Harriman v. Cabela's, Inc.*, 371 P.3d 758, 761-763 (Colo.App. 2016).

II. Analysis

A. KG Lateral trespass claims

Plaintiffs request the court enter several additional findings regarding their trespass claims relating to the KG Lateral, all of which are premised on actions taken by Defendants on their land which Plaintiffs claimed were a trespass on Plaintiffs easement to access, maintain, operate, and receive their water rights from the KG Lateral. As stated by the court in its findings at trial, Plaintiffs, Defendants, and their predecessors in interest received their water rights through the KG Lateral for decades prior to this litigation.

Plaintiffs enjoy a non-exclusive, prescriptive easement. As pointed out repeatedly and convincingly by Defendants during these proceedings, they have the right to put their property to lawful use, provided they do not unreasonably interfere with Plaintiffs'

easement right-of-way. See *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380 (Colo.App. 1983).

The court entered detailed findings regarding the Defendants' construction activities on their land and the lack of evidence to support Plaintiffs' trespass claims. The court also entered specific findings regarding the lack of substantial justification of Plaintiffs' KG Lateral trespass claims. The court does not believe further findings are required in either of these areas.

B. Prospect Road and recording documents.

Plaintiffs' request additional findings regarding the absence of recording of the Prospect Road easement and dedication in any documents transferring the land upon which the Prospect Lateral is located.

Prior to trial, the court entered summary judgment in favor of Timnath on Plaintiffs' claim for a right-of-way against Defendants for a structure Mr. Kiefer referred to as the Prospect Lateral. As the court found at trial, the Prospect Lateral is an un-decreed channel along the north side of Prospect Road that Mr. Kiefer used to move water from the KG Lateral splitter box west to a culvert under Prospect Road, where the water was deposited into an un-decreed holding pond. One of Plaintiffs' claims was that they had acquired a right to use this channel through adverse possession. Plaintiffs asserted that the dedication and easement for Prospect Road was not properly recorded because their title searches of the underlying properties did not reveal any recordings.

The court included in its order detailed findings regarding the recording of the Prospect Road dedication in various Larimer County government documents. The court declines Plaintiffs' request to modify the findings.

C. Defendants' installation of subdrains.

The court considered the testimony of Mr. Rau, Plaintiffs' expert witness, regarding the Defendants' installation of subdrains in Filing #2 and the proposed installation of subdrains in Filing #3, as well as Plaintiffs' claims that injury will occur to

the Paige Brothers Ditch and/or the Paige Brothers Reservoir water rights through Defendant's capture of underground water. Water accumulating in the Paige Brothers Reservoir is pumped by Mr. Kiefer to irrigate his land west of the reservoir.

Mr. Kiefer does not have a water right to refill Paige Brothers Reservoir after the first fill, so injury will occur to Mr. Kiefer only if the reservoir does not fill each year due to actions of Defendants. There was no credible evidence to support a claim that the installation of these subdrains has or will in the future diminish the amount of water accumulating to the Paige Brothers Ditch or the Paige Brothers Reservoir. To the contrary, the evidence established that the Paige Brothers Reservoir has continued to fill to capacity to the point of spilling though the outlet structure after the installation of subdrains.

The court has also considered Plaintiffs' request to enter additional findings regarding Defendants' obligation to seek a well permit before continued use of the subdrains in Filing #2 and prior to installing subdrains in Filing #3. Defendants correctly note that Plaintiffs did not seek this relief in the complaint or amended complaint. The court agrees with Defendants that the mere fact they have agreed to file the necessary permitting documents with the State Engineer going forward is not an admission that the installation of subdrains has or will cause injury to the Paige Brothers water rights.

With regards to Mr. Kiefer's right to return flows to the Paige Brothers Ditch and Paige Brothers Reservoir, the court entered findings that water that historically accrued to these structures from upstream uses on Defendants' property will continue after Defendants' development is completed. There was no evidence presented during the trial quantifying the amount of water that accumulates to the Paige Brothers Ditch or Reservoir from any of the water users located up the ditch. This would include Defendants' water uses and uses by other water rights holders. Nor was there any evidence presented to quantify the amount of water Mr. Kiefer pumps from the Paige Brothers Reservoir each year to irrigate his fields.

The court declines to enter any additional findings regarding the installation of subdrains and the potential impact on Mr. Kiefer's Paige Brothers Ditch and Paige

Brothers Reservoir water rights, or on Mr. Kiefer's right to return flows as part of the Paige Brothers water rights.

D. Request for specific findings regarding Plaintiffs' easements.

At the conclusion of trial, the court ruled in favor of Defendants and authorized Defendants to modify the middle section of the KG Lateral from an open concrete ditch to piped ditch. There will continue to be open sections on the KG Lateral from the diversion point on the Larimer and Weld Canal and at the lower section of the ditch where the water travels south under Prospect Road to Plaintiffs' lands. The court specified that the width of the KG Lateral easement across Defendants' property is 50 feet, as proposed by Defendants. The responsibilities and costs of construction and maintenance of the piped section of the KG Lateral falls exclusively on Defendants. An integral component of the easement held by Plaintiffs is the continued delivery of their water through this pipeline in the same quantity, quality, and timing as Plaintiffs have historically been entitled to under their water rights. Plaintiffs are responsible for maintaining the open portions of the ditch, at their cost, absent an operating agreement between the parties in the future establishing a different arrangement. No additional findings by the court regarding the KG Lateral easement are necessary.

The court also concludes that additional findings pertaining to the Paige Brothers Ditch easement are not required. The Paige Brothers Ditch is a marshy, wetlands area that collects water and the water travels down gradient to a pipe, where it is channeled under Prospect Road into the Paige Brothers Reservoir. Defendants have committed to retaining the Paige Brothers Ditch in its present condition as a wetland area. Little to no maintenance of this "ditch" has occurred historically, except perhaps to ensure that there are not physical impediments (i.e. trash and debris) preventing the water from travelling its course to the reservoir. The ability of Mr. Kiefer and future owners of this water right to perform any necessary maintenance will continue. Moreover, the "feeder" waterways described by Plaintiffs' expert witness are not physical structures that have been maintained as a part of the ditch, but instead this is the natural landscape where water

flows into the Paige seepage collection area. Plaintiffs did not have an easement to these surrounding areas. The court previously made findings that water will continue to accumulate to the Paige Brothers Ditch after the neighborhood is developed and there is no need to expound on those findings.

E. Additional findings regarding Defendants indemnifying Plaintiffs for potential injury arising from the KG Lateral.

The court ruled that the Defendants will initially (and later by the metro district for this neighborhood) will bear the costs and responsibility for constructing and maintaining the piped portion of the KG Lateral, and Defendants must ensure that the pipeline is capable of fully delivering Plaintiffs' water rights when Plaintiffs are calling for water. The court rejected Plaintiffs' request for a broad indemnification clause at the completion of trial and Plaintiffs have not convinced the court through the present motion that this decision was incorrect.

F. Request to reconsider the finding that Plaintiffs and Mr. Cucarola are jointly and severally responsible for Defendants' attorney fees.

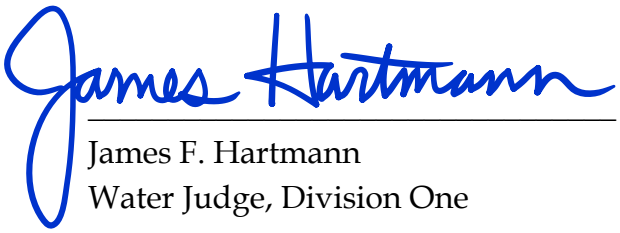
Plaintiffs request that the court reconsider its findings that Plaintiffs and their previous attorney, Mr. Cucarola, should be jointly and severally liable for Defendants' attorney fees. It is not surprising, given the court's rulings in favor of Defendants on claim after claim asserted by Plaintiffs and Mr. Cucarola, that they are now quick to cast the primary responsibility for presenting what the court found were substantially groundless, vexatious, and frivolous claims on the others seated around Plaintiffs' trial table. Mr. Glover, Mr. Kiefer, and Mr. Cucarola had ample opportunities, prior to and during the trial, to back away from the myriad of claims that they knew or should have known lacked substantial justification and stop the financial drain that Defendants were forced to endure to defend these claims. The court denies the Plaintiffs request to modify the findings of joint and several responsibly between Plaintiffs and Mr. Cucarola.

G. *Plaintiffs' request for clarification on which claims lacked substantial justification.*

The court entered detailed findings at the conclusion of trial regarding the claims that lacked substantial justification and the reasons for its findings, and no additional findings are necessary.

Dated: June 23, 2020.

BY THE COURT:



James F. Hartmann
Water Judge, Division One

WATER DIVISION NO. 1, STATE OF COLORADO DISTRICT COURT, WELD COUNTY 901 9th Avenue Greeley, CO 80631-1113 (970) 475-2400	DATE FILED: August 25, 2020 8:30 AM CASE NUMBER: 2018CW3166
Plaintiffs: Robert Kint Glover; Friday LLC; and Gerald Kiefer v. **Defendants:** Resource Land Holdings, LLC; Serratoga Falls, LLC; Jesse McDowell; Kitchel Lake Development Corporation; Kitchel Lake Partners LLC; James Righeimer; Lee Lowrey; and Kenneth Mitchell and **Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff:** Serratoga Falls, LLC v. **Third-Party Defendants:** The Town of Timnath; the Marjorie R. Kiefer Marital Trust; Jane Raeleen Dunn; and the Blair A. Kiefer Family Trust	**▲COURT USE ONLY▲** **Case No. 2018CW3166**

ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b)(3), C.R.C.P.

This matter comes before the court the motion for relief from judgment filed by Robert Glover, Friday, LLC, and Gerald Kiefer, and Third-Party Defendants Marjorie Kiefer Marital Trust, Jane Raeleen Dunn, and Blair Kiefer Family Trust (collectively, "Plaintiffs"). The motion is filed pursuant to C.R.C.P. 60(b)(3).

Plaintiffs assert that the Division One Water Court lacked subject matter jurisdiction because none of the claims involved "water matters," and therefore, the judgment entered in this case is void and must be vacated.

The court received responses from Defendants Resource Land Holdings, LLC, Serratoga Falls, LLC, and Jesse McDowell (collectively, "RLH Defendants"), and Defendants Kitchel Lake Development Corporation, Kitchel Lake Partners, LLC, James Righeimer, Lee Lowrey, and Kenneth Mitchell (collectively, "Kitchel Lake Defendants"). Plaintiffs filed a reply and RLH Defendants filed a sur-reply.

I. Legal Standard

The court may relieve a party from a final judgment if the judgment is void. Rule 60(b)(3), C.R.C.P. "Relief under C.R.C.P. 60(b)(3) is mandatory because a void judgment 'is one which, from its inception, was a complete nullity and without legal effect.'" *First Nat. Bank of Telluride v. Fleisher*, 2 P.3d 706, 714 (Colo. 2000) (citing *Lubben v. Selective Serv. Sys. Local Bd. 27,* 453 F.2d 645, 649 (1st Cir. 1972)). Plaintiffs have the burden of establishing jurisdiction. *Bush v. Winker*, 892 P.2d 328, 332 (Colo. App. 1994).

II. Analysis

This matter involves a multitude of disputes between adjacent landowners that are all tied to Defendants' residential development project. The parties' lands are located entirely within Larimer County (8th Judicial District), Colorado, and are separated by Prospect Road. Plaintiffs' lands are situated south of Prospect Road and Defendants' lands are north of Prospect Road. Plaintiffs hold decreed water rights that are diverted from the Larimer and Weld Canal, which is located on the north edge of Defendants' property. Water is delivered from the Larimer and Weld Canal through the KG Lateral[1]

[1] "KG Lateral" is the name coined by Plaintiffs for the ditch, although Defendants and others also receive water through this structure. This ditch was referred to in older water court documents as the "Big Dike

south to Plaintiffs' properties. Mr. Kiefer also owns decreed water rights in the Paige Brothers Ditch, which collects water on the north side of Prospect Road on Defendants' land, and the Paige Brothers Reservoir (also known as "Deadman Lake") located on the south side of Prospect Road. Water is delivered to Paige Brothers Reservoir through the Paige Brothers Ditch. Plaintiffs use their water for irrigation of agricultural land. Defendants are developing their property on the north side of Prospect Road primarily for residential use.

On October 4, 2018, Plaintiffs filed their initial complaint containing eleven claims for relief against Defendants in the Division One Water Court. The undersigned is the water judge for Water Division One and a district court judge in the 19th Judicial District (Weld County).

Plaintiff's Claim 1 is captioned "Adjudication of Diversion Amounts from Larimer & Weld Irrigation Co. Headgate and Paige Brothers Seep Ditches and Reservoir Rights." Plaintiffs elaborate that the relief they were seeking in Claim 1 was "to have the Court determine all quality, quantity and timing of irrigation flows for Plaintiffs use of water on Plaintiffs' Kiefer-Glover Lateral ("KG Lateral") and Kiefer's interest in decreed rights in the Paige Brother's Seepage Ditches and Reservoir, decreed in Colorado Water Division 1 Case W-1028, attached hereto as Exhibit 26."

Plaintiffs' Claim 4 is titled "Declaratory Judgment" and "Rights and Amounts of Plaintiffs' Water Use in the KG Lateral, and Any Modifications." Included in Plaintiffs' Claim 4 are assertions that they are "entitled to a declaration of the present and future amounts of water they may convey through the existing KG Lateral, any modification thereof, and the quality, quantity, and timing thereof," and that they are "entitled to a declaration that pursuant to Colorado law, they may divert water into their KG Lateral in accordance with all their rights, including without limits, historic rights under Colorado Law."

Ditch." Rather than using two different names for this structure, the court has opted to refer to the ditch as the KG Lateral.

Claim 5 is titled "Declaratory Relief Water Usage—Paige Brothers Seep Ditches and Reservoir." Mr. Kiefer states in Claim 5 that Defendants' construction project will occur on these water structures and construction activities will interfere with seepage flows accruing to the Paige Brothers Seepage Ditches and Reservoir. Mr. Kiefer requested as part of Claim 5 a "declaratory judgment from this Court addressing all rights to use water as associated with decreed rights to the Paige Brothers Seepage Ditches and Reservoir in view of Defendants' proposed construction on, or modification of these structures."

The remaining eight claims for relief in the original complaint include allegations of trespass to water rights, ditch easements, intentional and malicious conduct, nuisance, with requests for injunctive relief and damages.

Plaintiffs filed an amended complaint on April 19, 2019 listing seventeen claims for relief. Claims 1, 4, and 5 in the amended complaint contain almost identical averments and as those listed in Claims 1, 4, and 5 in the original complaint. The amended complaint contained similar language as found in Claims 2, 3, and 6-11 of the original complaint. Included in Plaintiffs' amended complaint were six additional claims against Defendants not found in the original complaint: fraudulent recording of documents in violation of C.R.S. §38-35-109(3); fraudulent conveyance in violation of C.R.S. §38-10-101, *et seq.*; civil conspiracy; special damages; exemplary damages; and joint and several liability for all defendants.

Several of the Plaintiffs' claims were either dismissed or resolved in Defendants' favor prior to trial; however, among the claims that survived the pretrial motions process were Plaintiffs' Claims 1, 4, and 5, and these three claims and several others were litigated at trial.

Plaintiffs now assert that they decision to file this action in the Division One Water Court was improper because none of their claims involved water matters. They seek to set aside the judgment as void for lack of jurisdiction in the water court. The court disagrees and finds that Plaintiffs' Claims 1, 4, and 5 all involve water matters. The court

further finds that it was proper for the water court to exercise ancillary jurisdiction over Plaintiffs' other claims.

The General Assembly established seven water divisions as part of the Water Right Determination and Administration Act of 1969, with each division assigned to preside over certain delineated waters of the state of Colorado. C.R.S. § 37-92-201. A water court has exclusive jurisdiction over all water matters arising in that water court division. C.R.S. § 37-92-203(1). A "water matter" is limited to those matters set forth in Title 37, article 92, C.R.S. and any other matters over which the jurisdiction of the water court is specified under Colorado law. The determination of a water right or a conditional water right, which includes the amount of water that may be appropriated and the priority of water under that right relative to other water users, is within the exclusive province of the water court. C.R.S. §§ 37-92-203(1), -302(1); *see Bijou Irrigation Dist. v. Empire Club*, 804 P.2d 175, 180 (Colo. 1991) ("an action for determination of a water right or a change of water right, each of which concerns the right to use water, is a water matter within the exclusive jurisdiction of the water judge." (citing *Humphrey v. Southwestern Dev. Co.*, 734 P.2d 637, 640-41, (Colo. 1987)). "Water courts retain exclusive jurisdiction over all water matters." *In re Tonko*, 154 P.3d 397, 404 (Colo. 2007) (citing C.R.S. § 37–92–203(1), C.R.S. (2006)). "Water matters involve determinations regarding the right to use water, the quantification of a water right, or a change in a previously decreed water right." *Id*. "The water court may examine documents and take evidence about the facts and circumstances surrounding entry of a decree, in order to determine the decree's setting, intent, meaning, and effect when adjudicating the applicant's water use right or ascertaining the existence of an undecreed invalid enlargement of the decreed water right." *Id.* at 405.

The water court's subject-matter jurisdiction over water matters extends to ancillary issues that "directly affect the outcome of water matters within the exclusive jurisdiction of the water court." *Crystal Lakes Water and Sewer Ass'n v. Backlund*, 908 P.2d 534, 543 (Colo. 1996). "Although the water court has jurisdiction over issues ancillary to water matters, that court does not have jurisdiction over real property issues only

tangentially related to a water matter." *Id.* The "resolution of what constitutes a water matter turns on the distinction between the legal right to *use* water (acquired by appropriation) and the *ownership* of a water right." *Humphrey*, 734 P.2d at 640 (emphasis in original).

Plaintiffs in Claims 1, 4, and 5 could only be presented in the water court because the findings and declarations requested by Plaintiffs related to their right to use water, rather than findings as to the ownership of the water rights. Plaintiffs sought a declaration as to quantity, quality, and timing of the water under their water rights, presently and in the future. These are water matters within the exclusive province of the water court.

Plaintiffs' claims pertaining to their easement for the KG Lateral and the alleged tortious and injurious conduct by Defendants were inextricably intertwined with Plaintiffs Claims 1, 4, and 5, and it was proper for this court to exercise ancillary jurisdiction to resolve those claims in this proceeding.

Plaintiffs' motion for relief under C.R.C.P. 60(b)(3) is denied.

Dated: June 25, 2020.

BY THE COURT:

James Hartmann

James F. Hartmann
Water Judge, Division One