

Ditch Easements

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Presentation Outline

- How easements are created
- Scope of Easement
 - Ditch owners' rights
 - Burdened property owners' rights
- Alteration and Relocation of Easements

C.R.S. § 37-86-102

- “Any person owning a water right or conditional water right shall be entitled to a right-of-way through the lands which lie between the point of diversion and point of use...”
- Does not mean what you might be thinking

How Ditch Easements Are Created

- Condemnation
- Express Conveyance or Reservation
- Implied
 - Prescription
 - Estoppel / Acquiescence
 - Easement by Prior Use

Condemnation

- Colorado Constitution Art. XVI, § 7
 - All persons and corporations shall have the right-of-way across **public, private and corporate lands** for the construction of ditches, canals and flumes...upon payment of just compensation
- Colorado Constitution Art. II, § 14
 - Private property shall not be taken for private use ...except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

Express Conveyance or Reservation

- Deed
- Easement Agreement
- Other
 - 1866 Act Right of Way (Public Domain)

Easement by Prescription

- Open and notorious use
- Continuous (without interruption) for 18 years
- Adverse or pursuant to an ineffective grant

Estoppel / Acquiescence / Irrevocable License

Landowner consents to construction

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Action taken in reliance on the consent

- Existence of ditch for “any appreciable time” → consent is presumed

Implied Easement by Prior Use

- (1) unity and subsequent separation of title;
- (2) benefit to the dominant tenement and a burden to the servient tenement at the time of the conveyance;
- (3) evidence that the use was intended to be permanent; and
- (4) continued use of the easement is reasonably necessary for enjoyment of the benefitted parcel.

Scope of the Easement

- For an express easement, the terms of the instrument will control
- For implied easements, or when the express easement is silent, many common law and statutory rules come into play.

Scope of Easement

- Ditch owner cannot place greater burden on land than existed at time ditch was constructed or was reasonably necessary to operate it properly
- Ditch easement generally non-exclusive: burdened property owner can use the ditch easement area if it does not unreasonably interfere with the easement owner's use

C.R.S. § 37-86-103

- “a ditch right-of-way includes the right to construct, operate, clean, maintain, repair, and replace the ditch and appurtenant structures, to improve the efficiency of the ditch, including by lining or piping the ditch, and to enter onto the burdened property for such purposes, with access to the ditch and ditch banks, as the exigencies then existing may require, **for all reasonable and necessary purposes** related to the ditch”

What is reasonably necessary?

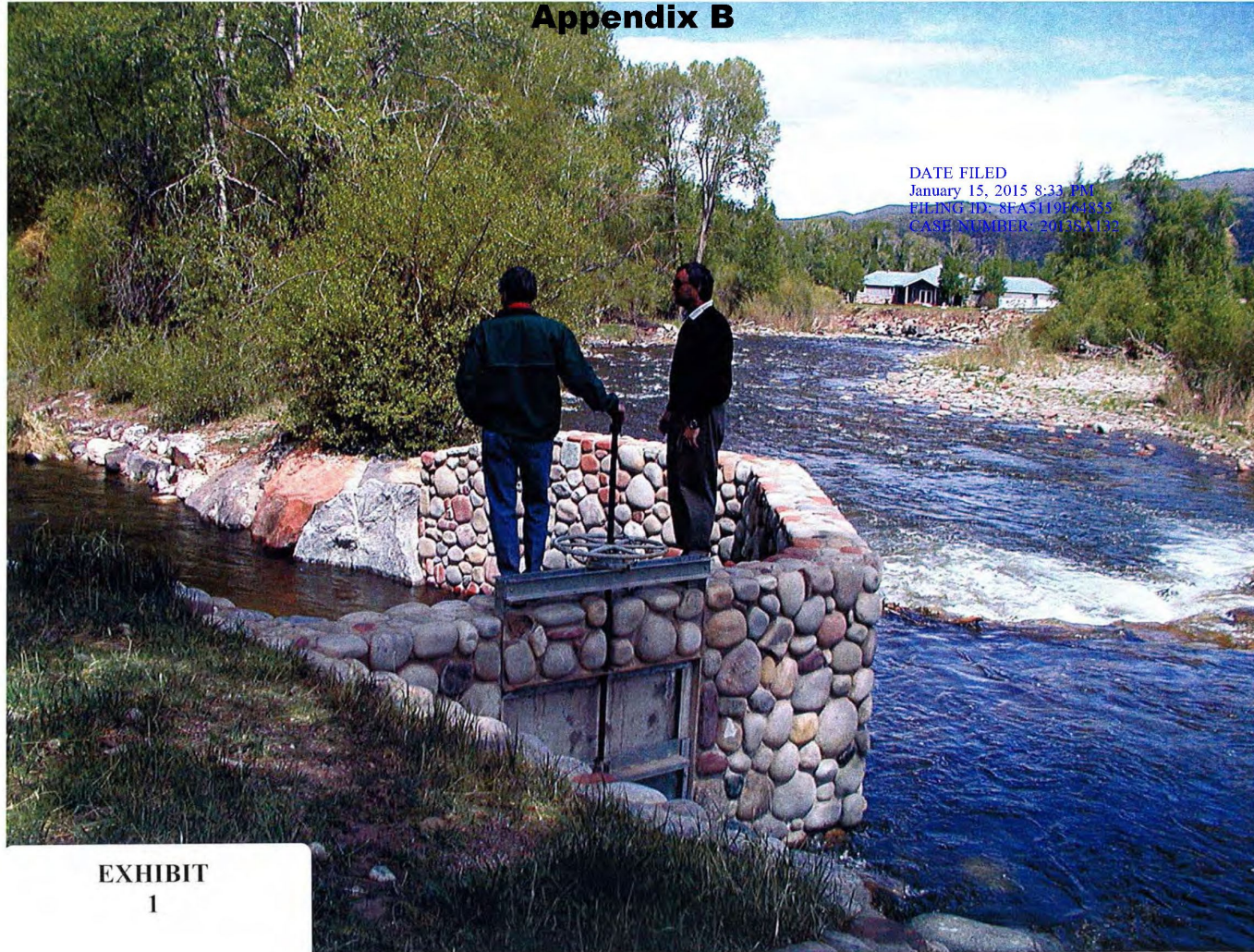
- Leaving spoils on the ditch bank?
- Using explosives?

Unilateral Alterations by Ditch Owner

- C.R.S. § 37-86-103 authorizes some changes (like piping)
- But, cannot relocate the ditch or expand burden without landowner consent
- C.R.S. § 37-86-111(1) authorizes relocating headgate in response to changing stream conditions, but recognizes condemnation may be required

Unilateral Alterations by Landowner Roaring Fork Club v. St. Jude's Co. (2001)

Appendix B



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**EXHIBIT
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Appendix B

24. 2016's 3rd. 50pp. Disclosures
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EXHIBIT
248



St. Jude's Property

Grace & Shehi Lateral to the John Cerise Ditch

John Cerise Ditch Easement

Waterman Property

Waterman Bridge

7th Fairway Lateral Take-out

Pond 7

Original John Cerise Ditch Point of Diversion

Old John Cerise Ditch Channel

River Cabin/Fishing Lodge

Old John Cerise Ditch Access

Old John Cerise Ditch Point of Diversion

Pond 12

Spring Creek/John Cerise Ditch Easement

Grace and Shehi Ditch Pipeline Easement

Spring Creek/John Cerise Ditch (aka RFC Ditch) Headgate

Red Rock Bluff Ditch Easement

Roaring Fork Club Property

Old John Cerise Ditch Access

Unilateral Alterations by Landowner

- New Rule (2001):
- “the owner of property burdened by a ditch easement has no right to move *or alter* the easement without consent of the benefitted owner unless he first obtains a declaration of a court that such alterations will cause no damage to the benefitted owner.”

Restatement (Third) of Property § 4.8(3) (adopted in *Roaring Fork Club*)

- Unless expressly denied by the terms of an easement, ... the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
 - significantly lessen the utility of the easement,
 - increase the burdens on the owner of the easement in its use and enjoyment, or
 - frustrate the purpose for which the easement was created.

Potential Remedies for Alteration that Violates Restatement Test

- Damages (actual, exemplary)
- Restoration of the easement to its prior condition
- Shift maintenance burdens and responsibilities
- Other equitable relief

Harmless Self Help

- Alterations that satisfy Restatement test, but were completed without permission or Court Order
- Still a “trespass,” Glover v. Serratoga Falls LLC (Colo. 2021)
- But, “Roaring Fork Club does not bar a burdened estate owner from engaging in self-help measures” Ute Water Conservancy Dist. v. Fontanari (Colo. Ct. Appeals, 2022)
- Damages: Nominal? Exemplary?

Freese v. Tidd (Colo. 2015)

- Owner of property burdened by irrigation ditch easement obtained declaratory judgment before making alterations
- Used irrigation water in ditch for hydropower purposes
- Terms and conditions in Decree sufficient to satisfy Restatement test.