

DITCH EASEMENT LAW IN COLORADO

By Scott C. Miller, Esq.

Patrick, Miller & Kropf, P.C.
730 East Durant Ave, Suite 200
Aspen, Colorado 81611
970-920-1028
miller@waterlaw.com

INTRODUCTION (and DISCUSSION OF *ROARING FORK CLUB* CASE)

The irrigation ditch stands as one of the last vestiges of an agricultural way of life. Early settlers of the arid west constructed irrigation ditches miles long in an effort to bring lifeblood water to cropland and thirsty livestock. Old 19th century irrigation ditches still in use today, twisting their way across the landscape, are a marvel. These ditches, constructed by hand, shovel and pick across rough, rocky terrain and hillsides, without benefit of surveys and other modern engineering, still managed to be on-grade and efficiently transport water over large distances.

Irrigation ditches also can represent easements across the land. As Colorado's agricultural and ranch land continues to fall to the pressures of development, ditch easement issues and disputes are on the rise. Because agricultural land relies heavily upon some form or other of ditch structures, laterals or pipelines to deliver water from stream sources for the irrigation of the land, it is hard to find rural property in Colorado that will not have some type of "ditch easement" running across it. An owner of land traversed by an open irrigation ditch may find itself needing to relocate, alter or make other changes to the ditch in order for development of the land to proceed as desired. Yet, there are vested easement rights of the ditch owners in the location, historic practice and use of the ditch. This can lead to confrontations when the up gradient landowner seeks to make changes to the ditch structure or location that the down gradient ditch owner does not consent to. A buyer of property seeking to change the use and character of the land by subdivision, development, or other, is well advised to pay careful attention to, and address early on, the ditch easement issues associated with the property.

In recognition of the importance of ditches to Colorado and its agricultural heritage, ditch easement law has been historically favorable to the ditch owners and protective of their vested rights. Yet recent case law has swung the pendulum somewhat to find a balance between the rights of ditch owners and the underlying landowners encumbered with the ditch easement. Seven years ago, the Colorado Supreme Court significantly clarified the law on ditch easements in the case of *Roaring Fork Club L.P. v. St. Jude's Company*, 36 P.3d 1229 (Colo.2001). Although no longer a "recent" case, it still stands as the latest seminal decision in this area of the law.

In *Roaring Fork*, the Court introduced the “accommodation doctrine” into Colorado’s ditch jurisprudence, refusing to apply the majority rule followed in most states that a ditch easement cannot be unilaterally moved or altered by the servient estate holder absent consent from the dominant estate owner. The Colorado high court held a property owner “burdened” with a ditch easement across its land may move or alter the easement so long as such alteration caused no damage to the benefited ditch owner. If the burdened owner could not obtain the consent of the benefited owner to the proposed alterations, it would need to seek a declaratory judgment from the court to allow or not allow such actions. In determining whether the proposed alterations would be permissible or cause damage, trial courts must now apply the new test pronounced by the Supreme Court, a three part test following the American Law Institute’s Restatement (Third) of Property (Servitudes).

Since declaratory judgment was not a common or available remedy at the time of the dispute in *Roaring Fork*, the Supreme Court remanded the parties back to trial court to determine whether the subject ditch alterations caused damage to the plaintiff under the Restatement test. The remand trial would have been the first opportunity in Colorado to litigate the application of the Restatement test to the particular ditch alterations in question. However, the case settled out of court. The trial court’s final dismissal included an Order to adhere to a Ditch Easement, Access and Maintenance Agreement negotiated between the parties as part of the settlement.

Background to Ditch Easements and Creation Thereof:

Very few ditches in Colorado are express, written easements. Rather, nearly all of these easements are created by implication, acquiescence or prescription.

A ditch easement or fee simple title to a ditch course can be created by *express grant*, contract or deed, in the ordinary fashion of these documents.

A ditch easement can also arise by *implication* in two ways: (1) If a ditch exists and the landowner divides a tract of land into separate ownerships, a ditch right of way will be implied across the servient estate;¹ (2) If the ditch has been constructed, maintained, and used for an appreciable period of time without interference from the owner of the land, then there is an implied right-of-way, sometimes also referred to as an easement by acquiescence.²

The most common method of ditch easement acquisition is by *prescription*. To establish ownership by adverse possession, the claiming owner must satisfy the typical elements of adverse possession: actual possession, adverse, hostile, under a claim of right, exclusive, and uninterrupted for the eighteen year statutory period.³

¹ *American Nat'l Bank v. Hoegger*, 70 P. 156 (Colo. 1902).

² *Leonard v. Buerger*, 276 P.2d 986 (Colo. 1954); *Kane v. Porter*, 235 P. 561 (Colo. 1925).

³ *Goodwin v. Theiman*, 74 P. 3d 526 (Colo. App. 2003); CRS 38-41-101(1).

Finally, a ditch easement can be acquired by *parol license and estoppel*. If the landowner gives a license to the licensee ditch user, and the licensee enters and makes construction improvements on the ditch in reliance on the permission to enter, then it becomes irrevocable and operates as a grant of a right of way. *Graybill v. Corlett*, 154 P. 730 (Colo. 1916). In *Graybill*, the court “examined a landowner's right to maintain a water ditch across the land of his neighbor. The owner of the servient estate had granted the owner of the dominant estate the right to establish a ditch across his land. This was an oral promise; the parties did not comply with conveyance and recording formalities. In reliance on the parol agreement, the owner of the dominant estate used the ditch as the irrigation source for his land and cleaned, repaired, and made improvements to the ditch. On these facts, [the court] noted that, “[i]t is too well settled to require discussion that under the circumstances above stated a licensee holds under an irrevocable license, and his right is as valid as if acquired by grant.” *Id.* In *Lobato v. Taylor*, the Colorado Supreme Court cited the Restatement of Property, stating, “a court can imply an easement created by estoppel when: (1) the owner of the servient estate ‘permitted another to use that land under circumstances in which it would be reasonable to foresee that the permission would not be revoked,’ (2) the user substantially changed position in reasonable reliance on that belief, and (3) injustice can be avoided only by establishment of a servitude. Whether reliance is justified depends upon the nature of the transaction, including the sophistication of the parties.” *Lobato v. Taylor*, 71 P.3d 938, 951 (Colo. 2002).

In addition, the Colorado Constitution and statutes embody the right of any person to obtain a ditch right of way for the conveyance of water across the lands of another, upon payment of just compensation. *Article XVI, Section 7; C.R.S. Section 37-86-102*.

Once the easement is established, following traditional concepts of easement law, the land traversed by the ditch is considered the “servient or burdened estate;” while the land benefited by use of the ditch is considered the “dominant or benefited estate,” relative to each other.

The ownership of a ditch structure and easement is distinct and separate from the ownership of the water rights carried by the ditch. *Monte Vista Canal Company v. Centennial Irrigation Ditch Company*, 123 p. 831, 833 (Colo.1912). A water right can be abandoned without abandoning the ditch structure which carries the water right and vice versa. *Nichols v. McIntosh*, 34 P. 278, 281 (Colo.1893).

Roaring Fork Club v. St. Jude's

The Colorado Supreme Court reviewed its prior precedent and underscored that law in Colorado “has begun to recognize that the competing uses between two interested owners should be accommodated, if possible, and that inflexible notions of dominant and servient estates do little to advance that accommodation.” *Roaring Fork Club* at 1234-1235. Thus, in a departure from the majority rule of law in the country, and a concentrated effort to harmonize ditch easement law with other areas of Colorado property law, the Court set forth a previously unannounced test for determining under

what circumstances a burdened owner can unilaterally alter or move a ditch easement. The Court also proceeded to instruct as to a recommended course of procedure for burdened estate owners if they seek to move or alter a ditch easement and the benefited owner refuses to consent.

This case involved St. Jude's Company ("Ranch") as the down-gradient owner of 240 acres of agricultural land near the Town of Basalt. The Roaring Fork Club ("Club") is the up-gradient adjacent property owner. The Club purchased its property in 1995. Prior to that time, the Club's predecessors had used the property for agricultural purposes similar to the Ranch. After purchasing the property, the Club began development of its property as a golf course and fly fishing recreational facility with residential cabins.

The Ranch and the Club own water right interests in three unincorporated irrigation ditches that traverse the Club's property and serve both the Ranch and the Club. The Club attempted to obtain the Ranch's consent to ditch alterations in the form of a ditch maintenance agreement, however, such agreement was never reached. One of the ditches was also used by other down gradient owners and the Club did reach consent agreements with some of those owners. The Club received development approvals from the governing land use body and moved forward with construction in and around the ditch easements on its property. The Ranch brought an action in trespass, seeking a mandatory and permanent injunction requiring removal of improvements and for restoration of the ditches to their original alignments.

The trial court concluded the Club had committed trespass upon the Ranch's ditch easements, including excavating in the Ranch's ditch easements, grading and destroying ditch banks, realigning ditch channels, diverting ditch flows, piping some ditch portions and building a golf course and cabins within the easements. Since the Ranch sought equitable relief, the trial Court determined it must balance the equities between the parties. Thus, the trial court departed from strict application of the traditional rule that would require full restoration of the ditches to their original condition. In balancing the equities, the Court found that the Club had never denied the Ranch access to ditches or denied the opportunity to maintain the ditches. Nor had the Ranch suffered any diminution in the amount or quality of water delivered through the ditch system; nor any increased cost of maintenance due to the Club's development on the servient estate. It was found that traditional maintenance of the ditches and disposition of spoilage would be inconsistent with the Club's golf course development. Finally, restoration of the ditches to their condition prior to the trespass would be extremely costly and substantially interfere with the Club's current and ongoing property uses.

The trial court final injunctive order included the option for the ditch alterations to remain in place with the condition that the Club assume all responsibility for and expense of operation and maintenance of the ditches on its property and be obligated to deliver water to the Ranch in amount, quality and timing consistent with the Ranch's adjudicated water rights. The Colorado Court of Appeals reversed in part, holding the second option did not comply with Colorado law. The Court of Appeals interpreted the law to require

restoration of the ditch easements to their original location and condition upon a finding by the trial court of trespass. The Club appealed to the Colorado Supreme Court.

After surveying much of the prior precedent on ditch easements, the Court declared its resolution of this case honors two precepts emerging from the law: (1) a ditch easement is a property right that the burdened owner may not alter without consent of the benefited owner; and (2) there are circumstances where ditch alterations cause no harm to the benefited owner and greatly aid the burdened owner. *Roaring Fork*, 36 P.3d at 1234.

Affirming the trial court's and court of appeals' finding that the Club trespassed on the Ranch's easements by its unilateral alterations, the Court proceeded to provide a test for determining whether or not the ditches should be restored to their pre-alteration condition. The Court announced the Restatement (Third) of Property (Servitudes) § 4.8(3)(2000) "as the correct statement of controlling legal principle for purposes of analyzing a ditch easement relocation or alteration" now and in the future. *Roaring Fork*, 36 P.3d at 1237. The Restatement provides accommodation to the servient owner and protection to the dominant owner as follows:

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:

- a. significantly lessen the utility of the easement,
- b. increase the burdens on the owner of the easement in its use and enjoyment, or
- c. frustrate the purpose for which the easement was created.

Restatement (Third) of Property (Servitudes) § 4.8(3) (2000). Thus, under the Restatement test a burdened owner may move or alter a ditch easement so long as such alteration does not damage the benefited estate owner.

However, the Court specifically disapproves of unilateral action and self-help by a servient ditch owner in moving forward with alterations absent consent from the dominant owner. *Roaring Fork*, 36 P.3d at 1239. As clear direction for burdened and benefited owners, the Court outlines an appropriate procedure to follow in the future. The first and best course of action is for the ditch owners to agree to any alterations or relocations of the ditch which would accommodate both parties. If the benefited owner refuses to consent or agree to the alterations, then the burdened property owner should seek a Court declaratory judgment that the proposed alteration does not damage the benefited owner in accordance with the Restatement test. This procedure provides an appropriate forum for both owners to prove that that alterations will or will not cause damage.

Finally, the Court has served notice that in the future, unilateral alterations of ditch easements without the consent of the benefited estate owners or without seeking a

pre-determination by a court in a declaratory judgment action, will be disapproved of. If this does occur, a trial court is still to apply the Restatement test, but may also impose equitable and legal remedies to redress the trespass. For trespass, the Court discussed that actual damages may be appropriate, or if monetary damages are incalculable or unproven, nominal damages can be awarded. Even punitive or exemplary damages can be awarded where appropriate. *Roaring Fork*, 36 P.3d at 1234.

Accommodation Doctrine

The Colorado adoption of the Restatement rule is the minority approach taken by states when deciding if a burdened estate owner may relocate or alter a ditch easement. Most states, including other western states such as Nevada, Arizona, Washington, and California, have either expressly or implicitly rejected the Restatement approach. See *Swenson v. Strout Realty, Inc.*, 452 P.2d 972 (Nev. 1969); *Stamatis v. Johnson*, 224 P.2d 201 (Ariz. 1950); *Macmeekin v. Low Income Housing*, 45 P.3d 570 (Wash. 2002); *Woods Irrigation Co. v. Klein*, 233 P.2d 48 (Cal. 1951). Although a majority of states do not follow the accommodation doctrine, it is the author's opinion this represents the best approach for ditch easement disputes.

The old Colorado rule from *Cherrichigno v. Dickenson*, 167 P. 1178 (Colo.1917), following traditional easement law, that the servient owner could do nothing to a ditch which would interfere with the vested rights of the down ditch owner without that owner's consent, gave a significant amount of power to the dominant owner. If the servient owner sought to develop the underlying estate and needed to relocate or make alterations to a ditch, regardless of how harmless the ditch alterations were or whether the alterations might in fact increase the benefits to the dominant owner, the dominant owner could simply refuse to give consent, and was under no real obligation to articulate reasons for non-consent. In this situation, prior to the *Roaring Fork* decision, the developer was without a remedy. The servient owner was in the position of either ceasing all development plans that affect the ditch or moving forward at great risk of being enjoined and paying damages, possibly even punitive damages, for proceeding without consent.

The new rule under the Restatement test requires the benefited owner to articulate the injury that it will suffer if the ditch alterations occur. It is no longer enough to simply refuse consent. The Restatement rule will allow the changes so long as the changes are reasonable and the burdened owner can demonstrate there will be no damage to the benefited owner in terms of the test. The burden of proof is on the servient owner. However, normal burden shifting would likely apply and once the servient owner established a prima facie case of no injury, it would be incumbent upon the dominant owner to come forward with evidence of injury to rebut the prima facie case. By providing standards for ditch alterations, the Restatement test mitigates against an unreasonable use or abuse of discretionary power by the dominant owner.

Declaratory Judgment Action

The Supreme Court in *Roaring Fork* recognized the law's previous "one sided" burden on the servient estate, *Id. At 1237*, and adopted a procedure by which the servient owner has a remedy against an unreasonable ditch owner. In providing the declaratory judgment remedy, the Supreme Court now puts the trial courts in the position of potentially providing the necessary permission to proceed despite the non-consenting ditch owners. In addition, the Court can fashion the equitable terms and conditions upon which that permission is given. In essence, the Court becomes the broker of a consent ditch agreement between the parties in the form of a declaratory judgment or injunction order.

Although *Roaring Fork* announced a sweeping new test for ditch alterations, the author is not aware of any controlling authority directly applying the test to date. In one case involving a road easement, however, the Colorado Court of Appeals found that the trial court had "used the essentials of a *Roaring Fork* analysis" to evaluate increased burdens to the dominant estate holder through relocation of the road (the trial court did not have the benefit of the *Roaring Fork* case at the time). *Clinger v. Hartshorn*, 89 P.3d 462 (Colo. 2003).

In another Colorado Court of Appeals decision, *Roaring Fork* was limited to nonconsensual ditch alterations and did not have application in the particular factual context. *East Meadows Company, LLC v. Greeley Irrigation Company*, 66 P.3d 214 (Colo. 2003). In this case, East Meadows Company, LLC ("East Meadows") was required to install trash racks in Greeley Irrigation Company's ("GIC's") ditch as part of a development agreement with the City of Greeley. GIC's ditch rider was unable to remove all of the trash from the racks, resulting in damage to the resulting subdivision. The trial court found for GIC on Summary Judgment, holding that the *Roaring Fork* decision required East Meadows, not GIC, to maintain the trash racks. The court of appeals held that the *Roaring Fork* decision applies only to changes to a ditch by the servient estate without the ditch easement owner's permission. The court remanded the case for a determination of which party was required to maintain the trash racks pursuant to the agreement between GIC and East Meadows.

Without binding precedent applying the Restatement rule to a case involving a ditch easement, how this rule will be applied remains unknown. For example, it is unclear in a declaratory judgment action whether a trial court will fashion an order that rises to the level and detail of a typical ditch agreement. There are also questions as to the Court's jurisdiction to order some of the typical ditch agreement provisions, such as the power to order the burdened owner to deed to the benefited owner an express easement with defined widths to replace a prescriptive or implied easement.

In the majority of instances, before making alterations, the servient owner will enter into a "ditch agreement" with the dominant owner which details the terms and conditions for the "consent" to the proposed ditch alterations to be constructed. A typical ditch agreement will contain provisions for: conveyance of an express ditch

easement across the servient estate for the benefit of the dominant owner (including widths and access routes); review and approval by the dominant owner of all plans and specifications for the alterations; future maintenance, repair, replacement, and operation of the improvements; continued delivery of historic and decreed water in same amount and quality; and indemnification for failure of the ditch improvements.

It is the author's opinion trial courts should include as much detail as possible in a declaratory judgment order since this will be the document the parties will have to abide by for years to come. Certainty and prospective direction will help avoid future disputes and subsequent court contempt actions. This will require fairly extensive fact finding by the trial court to appropriately include terms and conditions on water delivery, maintenance, operation and the like.

There is precedent for such a detailed approach from Colorado water courts. Colorado water law provides that a water right owner may change its water right to a new point of diversion or new use provided there is no injury caused to other vested water rights. Colorado water courts frequently issue detailed decrees which contain extensive terms and conditions allowing the change, yet preventing injury to other water rights. In similar vein, a declaratory judgment action for ditch alterations essentially is a change requested by a servient owner so long as terms and conditions can be imposed to not damage the benefited owner. Comprehensive court decisions on ditch disputes would be consistent with water court practice and would serve the purpose of substituting for the consent ditch agreement the parties were not able to achieve on their own.

The remainder of this paper discusses general and specific principles applicable to ditch easements, organized from the perspective of the dominant estate owner and the servient estate owner.

RIGHTS OF DOMINANT ESTATE OWNER

1) Rights of Ditch Easement Holders in Colorado

Colorado Law provides any water right holder with an easement for a right-of-way through lands lying between the point of diversion and the place of use, upon condemnation and payment of just compensation. COLO. CONST. ART. XVI § 7; COLO. REV. STAT. § 37-86-102 et. seq. An easement is an interest in property granting the holder an enforceable right to use property of another for specific purposes. *Clinger v. Hartshorn*, 89 P.3d 462, 466 (Colo.App. 2003.)

Whenever there is ownership of property subject to an easement, there is a dichotomy of interests, both of which must be respected, and which must be kept, as nearly as possible, in balance. *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380 (Colo.App.1983). As discussed above, the Colorado Supreme Court indicated its preference for accommodation in *Roaring Fork Club* when it stated: "In other areas of property law, the law in Colorado has begun to recognize that the competing uses between two interested owners should be accommodated, if possible, and that inflexible

notions of dominant and servient estates to little to advance that accommodation.” *Roaring Fork Club v. St. Jude’s Company*, 36 P.3d 1229, 1234 (Colo. 2001).

The extent of a ditch right-of-way extends to whatever is reasonably necessary to maintain and use the ditch, depending on the circumstances. *Shrull v. Rapasardi*, 517 P.2d 860 (Colo. Ct. App. 1973). Ditch easements are also defined by historic use. *Arthur Irrigation Co. v. Strayer*, 115 P. 724 (Colo. 1911). A ditch easement encompasses, not only the supply ditch (“up-ditch”), but also the tail ditch (“down-ditch”). *See, e.g. Stoll v. Macpherson Duck Club, Ltd.*, 607 P.2d 1019 (Colo. Ct. App. 1979).

Ditch owners are under a number of duties to keep ditches maintained, such as the duty to keep the ditch in repair so as not to cause damage to the servient property. COLO. REV. STAT. § 37-84-101.

a) Scope of Easements

i) General Colorado Easement Law

In determining the scope of an easement, the Colorado Supreme Court has indicated its willingness to look to the Restatement (Third) of Property (Servitudes) for guidance. *See Roaring Fork Club*, 36 P.3d at 1229. The court has noted the following factors as relevant to determining the scope of express grant of an easement when the document was not specific in that regard: (1) the location and character of the properties burdened and benefited by the servitude, (2) the use made of the properties before and after creation of the servitude, (3) the character of the surrounding area, (4) the existence and contours of any general plan of development for the area, and (5) consideration paid for the servitude. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998) quoting Restatement (Third) of Property: Servitudes § 4.10.

ii) Method of Creation Important in Interpretation of Easements

Additionally, the creation of an easement is important in interpreting the range of permissible uses. *Wright v. Horse Creek Ranches*, 697 P.2d 384 (Colo. 1985). The range of permissible uses of any particular easement is defined by the circumstances surrounding the creation of that easement, therefore precise delineation of the means by which a particular easement is acquired is critical to any determination of the extent to which the owner of the dominant estate is entitled to burden the servient estate. *Wright*, 697 P.2d at 388.

(1) Easements Granted or Reserved in Writing

If created by a writing, the construction of the writing in the light of the circumstances existing at the time of the grant will define the scope of the easement (see above discussion).

(2) Easements by Prescription and Implication

Colorado limits easements acquired by prescription to the use and location established during the period of the statute of limitations. *Wright*, 697 P.2d at 388. Where a ditch easement arises by prescription, the dimension of the access right to maintain the ditch is that which is “reasonably necessary.” *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380 (Colo. Ct. App. 1983). In ascertaining whether a particular use is permissible under an easement created by prescription a comparison must be made between such use and the use by which the easement was created with respect to (a) their physical character, (b) their purpose, (c) the relative burden caused by them upon the servient tenement. *Wright*, 697 P.2d at 388 (*quoting* Restatement of Property § 478 (1944)).

Thus, the beneficiary of a prescriptive easement will be permitted to vary the use of the easement to a reasonable extent. *Id.* This flexibility of use is limited, however, by concern for the degree to which the variance further burdens the servient estate. *Id.* at 389; *See also* Willis V. Carpenter, West’s Colorado Practice Series, Methods of Practice § 65.6 (4th ed. 2005). A prescriptive ditch easement owner’s right to access, maintain, and operate the ditch is thus limited to the extent “reasonably necessary.”

b) Permissible Uses of Ditch Easements

i) Right to Transport and Delivery of Water

Most fundamentally, ditch owners have the right to delivery of water through the ditch. Comparing it to the water rights context, the *Roaring Fork* court explained ditch owners have the right to maintenance of ditch conditions existing at the time of their origination. *Roaring Fork Club*, 36 P.3d at 1238 fn 4. The ditch owner is entitled to the same “quantity, quality, and timing” as provided under the ditch operating in combination with the collection of rights in the ditch. *Id.*

ii) Ditch Owner’s Rights of Operation, Maintenance & Repair

In addition to the right to divert appropriated water across another persons land, the ditch easement owner is protected by other related rights which are appurtenant or incidental to the easement. *Knudson v. Frost*, 139 P. 533 (Colo. 1914). In general, the ditch easement owner is entitled to do whatever is *reasonably necessary* for the enjoyment of the easement. *See, e.g., Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo. 1998); *Shrull v. Rapasardi*, 517 P.2d 860 (Colo. App. 1973); *Osborn & Caywood Ditch Co. v. Green* 673 P.2d 380 (Colo. App. 1983). A ditch owner may enter the servient estate to operate and maintain the ditch when necessary to the enjoyment of the easement, and in fact, has a duty to maintain and repair. *Roaring Fork Club*, 36 P.3d at 1232; *Knudsen v. Frost*, 139 P. 533, 536 (Colo. 1914); *See also*

Restatement (Third) of Property: Servitudes § 4.13.⁴ “The owner of the easement is privileged to repair in all cases where the easement cannot be enjoyed without repairs; and, in making them, he may dig up the soil, and otherwise use and encumber it, doing no more injury than is necessary, when such course is indispensable to the enjoyment of the easement.” *Knudsen*, 139 P. at 536. This includes a right of entry upon the servient estate for the purpose of making repairs whenever such repairs are necessary, but at no other time and for no other purpose. *Id.* The right to keep the ditch in a state of maintenance and repair is sometimes called an appurtenant or “secondary” easement.⁵

The dominant estate owner’s exercise of these appurtenant rights, however, may not *unnecessarily inconvenience* the owner of the servient estate, nor may he expand the easement. *See, e.g., Knudson v. Frost*, 139 P. 533 (Colo. 1914); *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380 (Colo. App. 1983).

In *Knudson*, the appellate court granted an absolute easement of 20 feet on each side of the ditch. *Knudson*, 139 P. at 534. This was overturned in favor of a flexible easement of necessity. *Id.* The right to operate and maintain an irrigation ditch is incidental to a grant of an irrigation ditch and is based on necessity, and the use is confined to the times, places, and extent necessary. *Id.* at 537. Thus, in Colorado, a ditch owner may do whatever is reasonably necessary to the enjoyment of the easement and to

⁴ “Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:

(1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary’s control, to the extent necessary to

- (a) prevent unreasonable interference with the enjoyment of the servient estate, or
- (b) avoid liability of the servient-estate owner to third parties.

(2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement or profit to repair or maintain the servient estate or the improvements used in the enjoyment of the easement or profit.

(3) Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common.

(4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.” Restatement (Third) of Property: Servitudes § 4.13 (2000).

⁵ The right to maintain and operate a ditch easement is referred to as a “secondary easement” in other states. For example: *Montana*: *Laden v. Atkeson*, 116 P.2d 881 (Mont. 1941). *California*: *Pico v. Colimas*, 32 Cal. 578 (owner of an easement upon the land of another has a right to enter upon the land to keep the easement in repair, but that aside from this and analogous purposes he has no right of way.); *Wood v. Truckee Turnp. Co.*, 24 Cal. 474 (dominant owner had the right to enter upon servient estate for the purpose of keeping item in repair, or freeing it from obstruction prejudicial to the easement. But aside from these and analogous purposes, the defendants had no right to enter upon the lands affected by the servitude.). *Oregon*: *Thompson v. Uglow*, 4 Or. 369 (Oregon Sup.Ct. 1873) -- the general rule is that where an easement had been acquired and the instrument is silent both as to the party bound to make repairs and as to the privileges and duties for the party in making them, it has been stated, in general terms, that, where the deed thus leaves the matter of repairs to be implied, each case must be determined according to its own peculiar circumstances.

keep it in a proper state of repair, provided it is done without unnecessary inconvenience to the owner of the fee and the extent of the easement is not enlarged.

For example, the duty to maintain and repair entitles the ditch owner to fix the structures and keep the same in working condition. *Shrull v. Rapasardi*, 517 P.2d 860 (Colo. Ct. App. 1973). In *Shrull*, the court found the right to operate and maintain a ditch could not be revoked after 7 years of acquiescence. *Id.* The defendant's right included the use of dynamite to reopen a ditch after a flood and clear the ditch of debris. *Id.* "The right of an owner with respect to a ditch excavated over the private land of another extends to the bed of the ditch and sufficient ground on either side to operate it properly, depending necessarily, in each case, upon the particular circumstances of each case." *Id.* at 862.

c) Dimensions of the Ditch Easement

Width or specific dimensions of the easement are whatever is necessary given the circumstances. Courts are very reluctant to specify the exact dimensions of an easement for the purposes of exercising the various incidental or appurtenant rights of access, operation, maintenance and repair. *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380 (Colo. Ct. App. 1983). In *Osborn*, the servient estate owner secured permission from the ditch owner to install a moveable overhead sprinkler system on the banks of the ditch and crossing the ditch. *Id.* The sprinkler interfered with the operation and maintenance of the ditch by muddying the access road, weakening the ditch banks, and increasing weed growth. *Id.* Thus, the trial court issued an injunction specifying the bounds of the easement and prohibiting landowner from placing any object in the boundaries of the easement. *Id.*

The court stated that where a ditch easement arises by prescription, the dimension of the access right to maintain the ditch is that which is "reasonably necessary" in accordance with historic practice. *Id.* The court also found the injunction absolutely prohibiting landowner from placing any object of any nature in the easement was too broad and restrictive. *Id.* It modified the injunction to permit uses that did not unreasonably interfere with easement holder's use and maintenance of the ditch. *Id.*⁶

d) No Right to Exclude Landowner

Additionally, an easement holder has no right to exclude the landowner from the ditch. A party who has obtained an easement by prescription has not acquired title to the land over which it flows, and thus the easement should not work a dispossession of the landowner. *Osborn & Caywood Ditch Co.*, 673 P.2d 380 (Colo. Ct. App. 1983). Thus, a ditch easement holder may not erect a fence around the ditch, or exclude the landowner in any manner, without first obtaining the consent of the landowner.

⁶ Similarly in *Knudsen*, the Supreme Court overturned a ruling that defined the dimension of the easement. It stated that the easement to operate and maintain is limited by necessity. *Knudsen v. Frost*, 139 P. 533 (Colo. 1914).

e) Specific Examples/Issues

i) Ditch Owner's Right to Relocate of Ditch

A ditch owner may not relocate a ditch because it would unreasonably interfere with the enjoyment of the servient estate. The dominant estate is forbidden from unreasonably interfering with the use and enjoyment of the servient estate. Restatement (Third) of Property: Servitudes § 4.10. What constitutes unreasonable interference will depend largely on the circumstances, particularly the purpose for which the servitude was created and the use of the servient estate made or reasonably contemplated at the time the easement was created. *Id.*

Although the Restatement approach adopted in *Roaring Fork Club* allows the *servient* estate to move the easement in certain situations, this rule is not reciprocal. *See* Restatement (Third) of Property § 4.8 (2000) (stating “This rule is not reciprocal. It permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the easement to relocate the easement.”).

ii) Upgrades Within the Bounds of the Easement

There is no Colorado binding precedent that the author is aware of that directly addresses whether upgrades or improvements (above and beyond reasonably necessary maintenance and repairs as discussed above) are included within the rights of the easement holder. This is likely determined on a case by case basis and hinges on the Court's determination of whether the upgrade or improvement (e.g. piping an open ditch) expands the scope of the easement when compared to historic manner and character of use.

RIGHTS OF SERVICENT ESTATE

a) Servient Use of the Burdened Estate

The Colorado Supreme Court addressed the servient owner's rights to use the burdened estate. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo. 1998). Unless the intentions of the parties are determined to require a different result, the owner of the servient estate may make any use of the burdened property that does not unreasonably interfere with the enjoyment of the easement by its owner for its intended purpose. *Id. citing* Restatement (Third) of Property § 4.9 (2000). The question of unreasonable interference by the servient owner involves a factual determination to be decided following presentation of evidence of the need for, and reasonableness of, the interference. *Shold v. Sawyer*, 944 P.2d 683 (Colo. App. 1973) (installation of gates and cattle guards justified by extrinsic evidence of necessity and reasonableness).

i) Use of Ditch Easement

The servient landowner is prohibited from using the ditch in a way that inhibits operation and maintenance. *Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380, 382 (Colo. Ct. App. 1983). In *Osborn*, the servient estate owner secured permission from the ditch owner to install a moveable pivot sprinkler system on the banks of the ditch and crossing the ditch. *Id.* The extra water from the sprinkler ultimately caused a weakening of the banks and increased weed growth, making it more difficult to access the easement for operation and maintenance of the ditch. *Id.* This was an unreasonable interference with the ditch easement. *Id.* The court issued an injunction permitting uses that did not “unreasonably inhibit company’s ability to traverse the access road, maintain the ditch, spray and burn weeds, and so long as he does not damage the ditch structure.” *Id.* at 383. *citing, Harding v. Pinello*, 518 P.2d 846 (Colo. Ct. App. 1973) (unpublished) (allowing grazing over way-of-necessity easement).

ii) Servient’s Use of Reservoirs

Colorado has also addressed the servient estate’s use rights in relation to reservoirs. *Bijou Irr. Dist v. Barnett*, 832 P.2d 713 (Colo. 1992). Where a reservoir is on public lands, recreational use of reservoir waters is permitted. *Id.* On the other hand, where use of the surface water interferes with the ability of the dominant owner’s operation of the reservoir, it will not be permitted. *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175 (Colo. 1991). In *Bijou*, the servient owners of land under a reservoir decreed for irrigation purposes were not entitled to use water for recreational purposes because recreational use interferes with ability of irrigation company to maintain dams and change water levels as needed. *Id.* Thus, use of the ditch or reservoir that interferes with the ability of the owner to convey water is impermissible.

b) Servient’s Right to Alter or Modify Ditch Easement

i) *Roaring Fork Club v. St. Jude’s Company*

As discussed above, when a servient owner desires to alter or modify an easement, that landowner must first obtain consent from the ditch owner or a declaratory judgment that satisfies the Restatement section 4.8 test. *Roaring Fork Club v. St. Judes Company*, 36 P.3d 1229 (Colo. 2001). In *Roaring Fork Club*, the Colorado Supreme Court adopted the Restatement rule pertaining to “alterations” of an easement by the servient landowner. 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:

- (1) Significantly lessen the utility of the easement,
- (2) Increase the burdens on the holder of the easement benefit, or
- (3) Frustrate the purpose for which the easement was created.

Thus, before a landowner *alters* a ditch, the landowner must first secure a declaratory judgment.

ii) What Constitutes an Alteration of a Ditch?

(1) *Guidance from Roaring Fork Club*

It is safe to say that any change in the location or dimensions of an easement, however small, constitutes an alteration. *Roaring Fork Club*, 36 P.3d at 1230. In *Roaring Fork Club*, the Court described the actions taken by the defendant: excavating within the right-of-way, grading and destroying ditch banks and portions of the ditches, realigning ditch channels, diverting ditch water flows, piping portions of ditches, constructing cabins and golf course improvements within the easements, and temporarily piping wastewater into one of the ditches. *Id.* Thus, it is reasonable to assume each of these activities are considered “alterations” to the ditch in need of consent or declaratory judgment.

Furthermore, *Cherichigno* stated that a property owner has no right for his own convenience or profit to change the location of a ditch, or do anything which will interfere with the “vested rights” of a benefited estate therein, without consent of the benefited estate. *Cherichigno v. Dickinson*, 167 P. 1178 (Colo. 1917) *quoted in* *Roaring Fork*, 36 P.3d at 1233. This is a broad statement and could be interpreted to preclude almost all activities on the ditch.

iii) Specific Alterations and Issues:

(1) Relocation or Realignment of a Ditch

It is clear that the relocation of a ditch constitutes an alteration. *Roaring Fork, supra*. See e.g., F. M. English, *Relocation of Easements (Other Than Those Originally Arising by Necessity); Rights as Between Private Parties*, 80 A.L.R.2d 743 (1964) § 18 (Ditches and flumes). In *Roaring Fork Club*, the Supreme Court adopted the restatement rule “for purposes of analyzing a ditch easement *relocation* or alteration.” *Roaring Fork Club*, 36 P.3d at 1237 [emphasis added]. Relocation also includes “realignment” of the current ditch, even if it would benefit both estates. Therefore, before a servient owner may realign or relocate a ditch, that owner must first obtain consent or a declaratory judgment which satisfies the restatement rule.

Other cases in Colorado have followed this same rule. For example, relocation of a ditch for a subdivision is an alteration. *Valley Development Co. v. Weeks*, 364 P.2d 730 (1961). In *Weeks*, the servient owner destroyed and moved a ditch without notifying the down-ditch owner. *Id.* The servient estate also built houses where the easement has previously been located. *Id.* This was considered an alteration. *Id.*

Similarly, the relocation of a ditch was an alteration in *Brown*. *Brown v. Bradbury* 135 P.2d 1013 (Colo. 1943). See also *Chirichigno v. Dickinson*, 167 P. 1178 (Colo. 1917) (holding servient estate had no right, for their own convenience or profit, to change the location of the ditch, or to do anything which interfered with the vested rights

of the plaintiffs therein); *Graybill v. Corlett*, 154 P. 730 (Colo. 1916) (holding servient estate could not change the course of ditch without the consent of the party entitled to water from it).

(2) Modifications to the Ditch Bank

Causing damage to the ditch banks can also be an alteration. In *Roaring Fork Club*, the golf club destroyed and regraded ditch banks, among other things. *Roaring Fork Club*, 36 P.3d at 1231. This was considered an alteration.

Similarly, In *Osborn & Caywood Ditch Co.*, the servient estate installed railroad ties on the banks of the ditch for a pivot irrigation system. *Osborn & Caywood Ditch Co.*, 673 P.2d at 382. The sprinkler water softened the banks of the ditch which created muddy conditions on the access road. *Id.* Although the appellate court characterized this damage as an “unreasonably interference with the operation and maintenance of the ditch,” it would probably be considered an “alteration” today under *Roaring Fork Club*.

(3) Culverting/Piping a Ditch

Culverting or Piping a ditch is an “alteration” under *Roaring Fork Club*. In *Roaring Fork Club*, the servient owner piped a portion of the ditch. *Roaring Fork Club*, 36 P.3d at 1231. This, in addition to other modifications, was considered an “alteration.” *Id.*

Similarly, Piping a ditch resulting in increased maintenance to the dominant estate is an alteration. *Stuart v. Davis*, 139 P. 577 (Colo. Ct. App. 1917). In *Stuart*, the owner of land over the servient estate has no right to substitute a buried pipe and siphon without the consent of down ditch stockholder. *Stuart*, 139 P. at 577. In *Stuart*, the servient landowner piped an open ditch, which resulted in increased maintenance for the ditch owner. *Id.* The court held that the landowner had no authority, for his own benefit, to substitute a buried pipe for an open ditch which is more expensive to maintain and less beneficial to the down-ditch landowner. *Id.*

Similarly, in *Verzuh*, a servient landowner piped a portion of a ditch without permission of the ditch owner to build an airport. *Verzuh v. Rouse*, 660 P.2d 1301 (Colo. Ct. App. 1982). The servient owner was liable for damages and ordered to keep the ditch clear of obstructions. *Id.*

(4) Lining a Ditch

There is no Colorado precedent on whether lining a ditch is considered an alteration, and this is perhaps a closer question. However, in light of the general principle that the servient estate has “no right, for their own convenience or profit, to change the location of the ditch, or to do anything which interfere[s] with the vested rights of the plaintiffs therein,” *see, Chirichigno v. Dickinson*, 167 P. 1178 (Colo. 1917), it is likely a landowner who seeks to line a portion of a ditch for his own purposes would

first need consent or a declaratory judgment because he has no right to tamper with the ditch for his own convenience.

(5) Improvements on top of a culverted ditch

Servient use that does not unreasonably interfere with the exercise of the easement is permissible. Restatement (Third) of Property: Servitudes § 4.9c. Constructing improvements on top of a culverted ditch may result in an increased burden to the dominant estate because it increases the cost of maintenance. *Roaring Fork Club*, 36 P.3d at 1231. In *Roaring Fork Club*, the club built a golf course green over a portion of a piped ditch. *Id.* Although, the *Roaring Fork* court did not directly address this issue, such improvement would likely have been considered an “alteration” subject to the *Roaring Fork* test.

(6) Water rights related improvements

There is even a question of whether a servient owner, who is also a co-owner on the ditch, has the unilateral right to install take-out and other water measuring related items in the bed of the ditch (e.g., diversion or dividing box; Parshall flume or weir) without first seeking the consent of the down gradient ditch owner or the court. The better view is that these would be permissible unilateral improvements primarily because they are required by law. *See, 37-84-119 & 120 (owners to construct necessary outlets for delivery of water; and properly measure such water according to each owner’s pro rata share)*. However, under *Roaring Fork Club*, there is risk that any change to the ditch is an alteration.

(7) Other activities that could constitute alterations

There are several other improvements or actions that, if taken by the servient estate owner, could qualify as “alterations” in need of prior consent or declaratory judgment, including, but not limited to: bridge crossings, utility crossings (either above ground or boring underneath ditch), fences across the ditch, landscaping along the ditch (and/or planting of trees). There is little Colorado case law guidance on whether these are activities that do not need permission.

ABANDONMENT or EXTINGUISHMENT OF A DITCH EASEMENT

Abandonment:

The same rules of abandonment apply to the right-of-way as to the water right. *Upper Harmony Ditch Co. v. Carwin*, 539 P.2d 1282 (Colo. 1975); GEORGE VRANESH, COLORADO WATER LAW 174 (1987). Abandonment must be proven by evidence of non-use and intent to abandon. *Upper Harmony Ditch Co.*, 539 P.2d 1282. Intention may be shown either expressly or by implication. *Id.* Nonuse for a long period of time is evidence of intention to abandon. *Id.* It is not conclusive, but merely establishes a prima facie case, which can be rebutted. *Id.* at 1285; *South Boulder Co. v. Davidson Co.*, 288 P.

177 (Colo. 1930); *Sieber v. Frink*, 2 P. 901 (Colo. 1883). The Restatement takes the position that nonuse alone is never sufficient to prove abandonment as to any variety of easement, but constitutes relevant evidence that, with other accompanying facts, can justify a finding of abandonment.⁷

In *Upper Harmony Ditch*, a ditch right-of-way was not abandoned after a 48-year period of nonuse. *Upper Harmony Ditch Co.*, 539 P.2d at 1284. In 1921, a flood washed out the headgate. *Id.* For 48 years, the ditch was dormant until it began diverting again in 1969 pursuant to a separate water right. *Id.* The court did not find any reason to overturn the trial court's finding that forty-eight years of nonuse was insufficient to manifest an intent to abandon a ditch right-of-way. *Id.*

Colorado's 10-year rebuttable presumption of abandonment for *water rights* has never applied to ditch easements, as far as this author is aware. COLO. REV. STAT. § 37-92-402 (11); *People v. City of Thornton*, 775 P.2d 11 (Colo. 1989). Water rights and ditch easements are separate and distinct property interests which can be conveyed separately and extinguished separately. *Upper Harmony Ditch Co. v. Carwin*, 539 P.2d 1282 (Colo. 1975); *San Luis Val. Land & Cattle Co. v. Hazard*, 157 P.2d 144 (1945); Mortimer Stone, ed., *Survey of Colorado Water Law*, 47 DENV. U. L. REV. 226 (1970).

Extinguishment through Adverse Possession:

Although the less common theory, there is some arguable authority that an easement can also be extinguished by adverse use by the servient estate owner. *See, Fruit Grower's Ditch & Reservoir Co. v. Donald*, 41 P.2d 516 (Colo. 1935) (stating that mere nonuse of an easement acquired by grant, however long continued, does not create abandonment absent adverse use by the servient estate for the statutory period for prescription; thus indicating that adverse possession of the easement was possible even though not proved in this case).

Further support for this concept is found in the restatement: "An easement is extinguished by a use of the servient tenement by the possessor [which could occur only if] the easement did not exist, provided (a) the use is adverse as to the owner of the easement and (b) the adverse use is, for the period of prescription [18 years in Colorado], continuous and uninterrupted." Restatement of Property: Servitudes § 506.⁸ To start the prescriptive period, the use of land by the servient tenant must be one that is incompatible or irreconcilable with authorized right of use, in this case, the conveyance of water over the property. *Powell on Real Property* § 34.21 (2005).

⁷ Restatement of Property: Servitudes § 504 (2005). "An easement may be extinguished by an intentional relinquishment thereof indicated by conduct respecting the use authorized thereby."

⁸ *See, e.g., Idaho: Shelton v. Boydston Beach Ass'n*, 641 P.2d 1005 (1982) (evidence that plaintiff owner of servient premises constructed retaining wall, erected fences, and planted grass and flowers within easement, all such improvements being inconsistent with express purposes of boating, bathing, driving, and parking, set forth in grant of easement, could be taken as "clear and convincing" evidence that servient owner had prevented use of property for stated purposes and thus permitted conclusion that easement had been extinguished); *California: Popovich v. O'Neal*, 219 Cal. App. 2d 553 (Cal. App. 1963) (maintenance of locked gate across roadway easement for more than statutory five years extinguished easement).

***Disclosures:** The author, Scott Miller was an attorney representing the defendant, Roaring Fork Club, in the Roaring Fork Club v. St. Jude's litigation discussed in this paper. Author wishes to gratefully acknowledge the contributions of Chad Lee (law clerk to Patrick, Miller & Kropf, P.C. in 2005) to this paper.*