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## Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229 (Colo. 2001)

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the Aspinall Unit ("Unit") for mining purposes. The water court held that since the Bureau of Reclamation ("BUREC") held the water rights to the Unit, Mount Emmons needed a contract with BUREC to benefit from the subordination policy. The policy essentially stated that in-basin projects on the Gunnison and its tributaries above the Unit could deplete at least 60,000 acre-feet of water. The Colorado Supreme Court rejected this decision.

The Court previously held that based on the subordination agreement, BUREC must allow upstream, junior, in-basin depletions of at least 60,000 acre-feet water. The Court stated that this depletion allowance trumped BUREC's senior rights to appropriate water. Because Mount Emmons was an in-basin and upstream appropriator, the Court determined that Mount Emmons was an intended beneficiary of this depletion allowance.

Furthermore, the Court disapproved of the water court's reliance on *Board of County Comm'rs v. Crystal Creek Homeowners' Ass'n* to determine the case. In *Crystal Creek*, the water court determined that potential appropriators needed a contract with BUREC for access to the 60,000 acre-foot depletion allowance. Based on the facts in *Crystal Creek*, the water court similarly decided that Mount Emmons also needed a contract with BUREC to access the depletion allowance. The Supreme Court disagreed with this analysis because in *Crystal Creek*, the appropriator was a trans-basin diverter, unlike Mount Emmons, which was an in basin appropriator.

Finally, the Court determined that Mount Emmons was an intended beneficiary of the subordination agreement, and that Mount Emmons and BUREC did not need a contract for the issuance of a conditional water decree. According to the Court, Mount Emmons must show that water was available as a prerequisite to receiving a conditional water right. Therefore, the Court reversed the water court's denial and remanded the case to determine if a sufficient amount of water was available to satisfy Mount Emmons' application for a conditional water right.

*Stefania Niro*

**Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229 (Colo. 2001)**  
(holding that the owner of property burdened by a ditch easement who cannot secure the consent of the benefited owner to move or alter the easement may make alterations only after obtaining a court declaration that such alterations will not damage the benefited owner).

The Roaring Fork Club ("Club") acquired neighboring, upgradient property adjoining St. Jude's Company ("Ranch"). The Club and the Ranch shared an interest in three irrigation ditches that traversed the Club's property. The Club intended to develop its property for recreational use by building a private fishing and golf

club. In order to accommodate its development plans, the Club attempted to purchase a portion of the Ranch's easements, or to formalize a ditch maintenance agreement. However, when the parties were unable to reach an agreement, the Club moved forward with construction in and around the ditches.

The Ranch initiated a trespass action against the Club, seeking a mandatory and permanent injunction requiring the Club to restore the ditches to their original condition. The trial court, acting in equity, concluded that the Club had committed trespass on the Ranch's easements. However, because the Ranch sought an equitable remedy, the trial court concluded that the Ranch was entitled to injunctive relief in one of two forms. The Club must either restore the ditches to their original condition or assume all responsibility for and expense of operation and maintenance of the ditches on its property, and be permanently obligated to deliver water to the Ranch in the amount, quality and time consistent with the Ranch's adjudicated rights. The court gave the right to choose between the alternative remedies to the Club, which chose the maintenance and delivery option.

The Ranch appealed, and the court of appeals reversed, holding that the maintenance and delivery option did not comply with Colorado law. Further, the court of appeals held the trial court order unjustifiably rewarded the Club for deliberate and conscious trespass. The Colorado Supreme Court granted certiorari to determine whether the court of appeals was correct in preempting the trial court's exercise of equitable discretion, and whether the court of appeals erred by requiring an award of injunctive relief.

The majority rule in the United States, which prohibits burdened estate owners from unilaterally relocating easements, has historically governed ditch easements as well. Nevertheless, competing land uses and unclear common-law precedent have led to conflicts. Although the supreme court found that the Club had trespassed upon the Ranch's easement, they recognized that competing uses should be accommodated, if possible, and that inflexible notions of dominant and servient estates did little to advance that accommodation.

The supreme court looked to the Restatement (Third) of Property (Servitudes) § 4.8(3) (2000) ("Restatement") to articulate a balanced approach between burdened and benefited estate holders. Thus, the supreme court found the Restatement allowed a burdened property owner, such as the Club, to unilaterally move or alter a ditch easement in order to maximize the use of its own property (unless it is specified in deed or otherwise to have a certain location), subject both to a reasonableness test and to the constraints delimited in the Restatement rule.

The supreme court then explained how it reconciled the notion that interference with a ditch easement without consent, which constitutes trespass, with the Restatement doctrine. If a burdened owner seeks to move or alter a ditch easement and the benefited owner refuses consent, the burdened owner may seek a declaratory judgment from a court that the alteration does not damage the

benefited owner(s) in accordance with the Restatement test. In such a proceeding, a judge would apply the Restatement rule to determine whether the planned changes pass the three-prong test.

The three-prong test requires the burdened owner to present a prima facie case that the alteration would cause no damage under the Restatement rule. A successful showing would shift the burden to the benefited owner to establish damage. If the burdened owner made a showing of no damage and the benefited owner's evidence was insufficient to rebut, the court would enter a declaration for the burdened owner. However, if the benefited owner successfully demonstrated damage, the court should decline to permit the alteration.

In evaluating damage, or the absence of damage, the trial court must not only look at the operation of the ditch for the benefited owner, but also at the maintenance rights associated with the ditch. In addition, the water provided to the ditch easement owner must be of the same quantity, quality and timing as provided under the ditch owner's water rights and easement rights in the ditch.

Returning to the case at hand and recognizing that their opinion identified a remedy previously not clear in law, the supreme court remanded the case to the trial court to determine whether the Club's alteration of the easement was reasonable and otherwise satisfied the Restatement criteria. If the alterations did not meet the test, the court must order restoration. Further, the Ranch was entitled to an order allowing it to inspect, maintain, operate and repair the ditch easement and water structure, irrespective of allocation of costs and burdens of maintenance that might form part of equitable relief.

*John A. Helfrich*

## CONNECTICUT

**Wood v. Zoning Bd. of Appeals., 784 A.2d 354 (Conn. 2001)** (holding spring water collection, storage, and transportation is not a permitted agricultural use within Somers Town Code 214-4).

Hillside and co-plaintiffs ("Hillside") appealed the trial court's decision to uphold a cease and desist order the zoning Board of Appeals in the Town of Somers ("Board") issued following judgment that collecting, storing, and transporting spring water for human consumption is not a permitted agricultural use within A-1 zoning districts, pursuant to Somers Town Code provision 214-4. The court concluded Hillside failed to prove the Board's statutory interpretation was illegal, arbitrary, or an abuse of its discretion. Hillside also claimed the court should not have decided whether the use was legally nonconforming, because the Board failed to address such issue initially, and, thus, the court should have remanded it to the Board.

Applying Somers zoning regulations, the appellate court's