

Memorandum Regarding the Law of Ditch Easements  
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September, 2011

Colorado law has long recognized the right to convey water across the land of another so that lands removed from available water can be developed. As early as 1861, Colorado Territorial Laws provided statutory rights-of-way over the lands of others to convey water for agricultural purposes. The Colorado Constitution, Article XVI, section 7 provides:

[a]ll persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands<sup>1</sup>, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

In addition, section 37-86-102 of the Colorado Revised Statutes provides:

[a]ny 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 or proposed use for the purpose of transporting water for beneficial use in accordance with said water right or conditional water right.

This right extends to ditches, dikes, cuttings, pipelines, or other structures sufficient for this purpose. Colorado courts have also recognized and protected such rights-of-way.

Such rights-of-way, also called easements, may be, but do not have to be memorialized by a written grant. They can be verified by a condemnation proceeding contemplated by Colorado Revised Statute § 37-86-104, or by verbal or written consent of the landowner. Because the right-of-way is constitutionally and statutorily permitted, the ditch owner is considered to have title to an easement or right-of-way equivalent to that acquired by grant, without any written documentation. Nothing need be recorded in the County real estate records for such a right-of-way to exist. The owner of the land crossed by a ditch will be considered to have constructive if not actual notice of the ditch actually existing; and if a ditch has been on property for a significant time, the landowner's consent is presumed. Even if the presumption of consent is rebutted with proof that a grant or consent was not given, the right-of-way may be acquired by adverse possession.

Such a right-of-way is irrevocable. Once the ditch has been constructed and is operating, the landowner may not withdraw his consent, and may not deny the ditch

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<sup>1</sup> The term "agricultural lands" in this context is not necessarily the same as used in zoning.

owner the right of entry for maintenance, or obstruct the ditch.

The location and line of the ditch is governed by Colorado Revised Statute § 37-86-106, which provides:

[w]henver any persons find it necessary to convey water through the lands of others, they shall select for the line of such conveyance the shortest and most direct route practicable upon which said ditch can be constructed with uniform or near uniform grade.

This is not a question of what is absolutely necessary; it is a question of what is feasible and practicable. What is “practicable” depends on the facts and circumstances of each circumstance. This determination may involve questions about contours and meandering. Even if another route is available, the current route may be justified if required so that gravity continues to pull the water.

No occupied land may be subjected to the burden of more than one ditch, however, if the water can practicably be conveyed through one structure. If there is more than one ditch, the landowner may be able to demand their consolidation.

The ditch owner must follow the line of the ditch unless access or following the line is not reasonably possible given the grade and contours, in which case it may have limited access via another route. The ditch owner may change the line of a ditch by grant, consent (which will be presumed after a period of time without objection), condemnation, or adverse possession. The ditch owner is not entitled to expand the easement or right-of-way, either in area or type of use, beyond that which existed at the time it was constructed.

The right-of-way extends to the bed of the ditch and sufficient ground on either side to operate it properly, depending on the circumstances of the case. The ditch owner may take whatever actions on the right-of-way as are reasonably necessary for its use. The use of heavy equipment to maintain the ditch can be reasonably necessary in some circumstances. Colorado courts have even recognized the right of a ditch owner to use explosives to dredge a ditch in some circumstances.

In circumstances where the extent of the right-of-way is at issue, courts will rely upon historic use to define the extent.

Although such a right-of-way may be abandoned, abandonment must be established by clear and unequivocal evidence of acts that manifest intent to abandon.

The landowner may require that the ditch owner repair any damage to the property resulting from negligent use or maintenance of the ditch, but not damage that is not a result of negligence. The ditch owner does not have to partake in the most up to date technological advances or the most efficient method of transporting the water. Nor does it have to line the ditch to prevent seepage.

Traditionally, the rule was that a landowner could never alter the ditch or land

subject to the right-of-way. Recently, however, Colorado courts have recognized a more flexible approach that attempts to maximize the competing uses of the landowner and the ditch owner. The current rule is that a landowner may not move or alter a ditch or right-of-way unless it has the consent of the right-of-way owner or obtains a declaratory judgment from court, upon proof that the alteration is reasonable and necessary to permit normal use or development of the land, and only if the alterations do not damage the right-of-way owner or interfere with the use of the right-of-way.