

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED September 23, 2024 4:31 PM</p>
<p>Appeal from the Water Court Water Division 5, 2019CW3067 The Honorable James B. Boyd The Honorable Christopher G. Seldin</p>	
<p>Defendant-Appellant: BYERS PEAK LAND & CATTLE, LLC, a Colorado limited liability company,</p> <p>v.</p> <p>Plaintiffs-Appellees: BYERS PEAK PROPERTIES, LLC, a Colorado limited liability company; BYERS PEAK DOWNHILL PROPERTIES, LLC, a Colorado limited liability company; C. CLARK and MEREDITH C. LIPSCOMB, individuals; and COLORADO ADVENTURE PARK LLC, a Colorado limited liability company,</p> <p>and Concerning</p> <p>Appellee Pursuant to C.A.R. 1(e):</p> <p>Division 5 Water Engineer.</p>	<p>▲ COURT USE ONLY ▲</p> <p>Supreme Court Case No.:</p> <p>2024SA_____</p>
<p>Attorneys for Defendant-Appellant, Byers Peak Land & Cattle, LLC: Joseph B. Dischinger, # 12240 Philip E. Lopez, # 40484 FAIRFIELD AND WOODS, P.C. 1801 California Street, Suite 2600 Denver, Colorado 80202 Telephone: (303) 830-2400 E-mail: jdischinger@fwlaw.com; plopez@fwlaw.com</p>	
<p style="text-align: center;">NOTICE OF APPEAL</p>	

Defendant-Appellant, Byers Peak Land & Cattle, LLC (“BPLC”), by and through its undersigned attorneys, files the following Notice of Appeal pursuant to C.A.R. 3:

I. Nature of the Case.

A. Nature of the Controversy.

BPLC and Plaintiffs own adjoining ranches outside of Fraser, Colorado and share two irrigation ditches to irrigate their respective ranches, the Beaver Dam Ditch and the Gaskill Ditch. On June 26, 2019 Plaintiffs filed a complaint against BPLC’s predecessor-in-interest, Gold Medal Ranch, LLC (“Gold Medal”), asserting a number of claims, including that Gold Medal unilaterally made modifications to the ditches in violation of *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229, 1230 (Colo. 2001), and that Gold Medal wasted water by diverting excessive water for irrigation causing flooding on Plaintiffs’ land. Gold Medal filed counterclaims on August 13, 2019. The Water Court held trial for nine days between February 24 and April 23, 2021.¹

¹ On the literal eve of trial, Plaintiffs filed a motion to add supplemental claims (“Supplemental Claims”), but requested the Water Court to bifurcate the trial and hear the Supplemental Claims in a subsequent trial. Over Gold Medal’s objections, the Water Court granted Plaintiffs’ motion. During the trial, the Court also took evidence regarding Plaintiffs’ requested preliminary injunction regarding the Supplemental Claims that had been bifurcated. Gold Medal eventually filed supplemental counterclaims (“Supplemental Counterclaims”). The parties have

On June 20, 2023, the Water Court entered its “Judgment and Order on Additional Preliminary Injunction Request” (“Order”), finding for Plaintiffs on all of their claims and denying all of Gold Medal/BPLC’s counterclaims.² *See* Appendix A. The Water Court also awarded Plaintiffs their attorney fees on one of their particular claims. The Water Court also denied Plaintiffs’ request for a preliminary injunction regarding Plaintiffs’ Supplemental Claims (which have now been settled, see footnote 1).

The parties disputed whether the Order constituted a final judgment due to the then-outstanding Supplemental Claims. On August 4, 2023, BPLC filed a motion for reconsideration. On November 24, 2023, BPLC filed a Notice of Appeal with this Court out of an abundance of caution in Case No. 23SA302. This Court entered an order on November 27, 2023 in which it stated “the Court notes that a motion for reconsideration of the judgment is still pending before the trial court; therefore the above-captioned matter is DISMISSED with leave to re-file the notice of appeal after the trial court rules on the motion for reconsideration.” *See Appendix B.* On

reached a settlement on the Supplemental Claims and Supplemental Counterclaims and intend to file a joint motion with the Water Court to dismiss the Supplemental Claims and Counterclaims.

² After trial, but before the Water Court entered its order, Gold Medal Ranch sold its ranch to BPLC, who was substituted in as the defendant by order of the Water Court dated November 18, 2022.

August 5, 2024, the Water Court entered an order denying BPLC's motion for reconsideration in total ("Reconsideration Order"). *See Appendix C.*

B. The judgment being appealed, including the basis for this Court's jurisdiction.

BPLC appeals the Water Court's June 20, 2023 Order and August 5, 2024 Reconsideration Order. The Order is attached as Appendix A, and the Reconsideration Order is attached as Appendix C.

This Court has jurisdiction over this appeal pursuant to C.A.R. (1)(a)(2), which states that an appeal to the appellate court may be taken from "[a] judgment or decree, or any portion thereof, in a proceeding concerning water rights"; and section 13-4-102(1)(d), C.R.S., which excludes jurisdiction over appeals of "water cases involving priorities or adjudications" from the jurisdiction of the Colorado Court of Appeals.

C. Whether the judgment resolved all issues pending before the court, including attorney fees and costs.

The Order and the Reconsideration Order have resolved all pending claims, because the parties have now stipulated to dismissal of the untried Supplemental Claims and Supplemental Counterclaims (see footnote 1). Plaintiffs filed a motion for attorney fees and bill of costs on July 31, 2023 that is still outstanding, but that outstanding motion has no effect on the filing of this appeal. In its Order, the Water

Court awarded Plaintiffs attorney fees, but the amount of attorney fees requested in Plaintiffs' motion for attorney fees and costs is still unresolved. *L.H.M. Corp., TCD v. Martinez*, 499 P.3d 1050, 1057 (Colo. 2021) (“In sum, we hold that a judgment on the merits is final and appealable notwithstanding an unresolved issue of attorney fees.”).

D. Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b).

Because the parties have agreed to dismissal of the Supplemental Claims and Supplemental Counterclaims, there is no need to request certification of the Order and Reconsideration Order pursuant to C.R.C.P. 54(b).

E. The date the judgment was entered.

The trial court entered the Order on June 20, 2023, and the Reconsideration Order on August 5, 2024. Both were electronically served on the parties that same day via the Colorado Courts E-Filing system.

F. Extensions to file motions for post-trial relief.

On July 5, 2023, BPLC filed a motion for extension of time to file a motion for reconsideration, which the Court granted on July 6, 2023, extending BPLC's deadline to August 4, 2023.

G. Motions for post-trial relief.

BPLC filed its motion for reconsideration on August 4, 2023.

H. Denials for post-trial relief.

The Water Court denied BPLC's motion for reconsideration in the Reconsideration Order issued on August 5, 2024.

I. No extensions to file notice of appeal.

No extensions to file a notice of appeal were filed.

II. Advisory Listing of issues to be raised on appeal.

A. Whether the Water Court erred in holding that Plaintiffs had standing to seek a declaration that Defendant committed waste of water.

i. Whether the Water Court erred in holding that section 37-84-108, C.R.S. creates a private right of action to bring a claim of waste of water.

ii. Whether the Water Court erred in holding that section 37-84-124, C.R.S. creates a private right of action to bring a claim of waste of water.

iii. Whether the Water Court erred in holding that Plaintiffs have standing to assert waste because Plaintiffs made allegations of damages in their trial brief, even though Plaintiffs did not claim damages from Defendant's supposed waste in their complaint.

- B.** Whether the Water Court erred in holding that section 37-84-125, C.R.S., applies to damages incurred from irrigation runoff unrelated to injury to Plaintiffs’ water rights and thereby erred in assessing attorney fees against Defendant pursuant to that statute.
- C.** Whether the Water Court erred in holding that Defendant did not have a natural easement over Plaintiffs’ down-gradient property for irrigation runoff.

 - i. Whether the Water Court’s determination that irrigation runoff from Plaintiffs’ property exceeded any historic tail water easement is supported by the Record.
- D.** Whether the Water Court’s injunctive restrictions on Defendant’s ability to divert water during free river conditions infringes on Defendant’s constitutional right under Colo. Const. art. XVI, § 6 to appropriate unappropriated water.
- E.** Whether the Water Court erred in granting Plaintiffs an unrestricted, year-round easement to run water in the portion of the Gaskill Ditch referred to as the “Lower Gaskill Ditch” for multiple uses, even though the Court found that Plaintiffs’ wintertime needs are sufficiently serviced by the Beaver Dam Ditch, that the Lower Gaskill Ditch has

never been used to carry water in the winter, and that Plaintiffs' only need for the Lower Gaskill Ditch is to irrigate a small portion of land that cannot be irrigated by the Beaver Dam Ditch.

- i. Whether the Water Court erred in determining that Plaintiffs have the right to continued use of a road known as the Spur Road to access the Lower Gaskill Ditch in light of undisputed evidence that the Spur Road has been removed and Plaintiffs can access the Lower Gaskill Ditch by other less burdensome means such as use of a newly constructed road or by driving on the Lower Gaskill Ditch ditchbank.
- ii. Whether the Water Court's finding that "the spur road generally follows the alignment of the Lower Gaskill Ditch" is supported by the Record.

III. Transcripts of evidence taken before the court that is necessary to resolve the issues raised on appeal.

Transcripts from the trial held on February 24, February 26, March 1-5, March 17, and April 23, 2021, and the exhibits entered into evidence at that trial, are necessary to resolve the issues raised on appeal.

IV. Whether the order on review was issued by a magistrate where consent was necessary.

Not applicable.

V. Counsel for the parties.

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VI. Appendix Containing Order of the Water Court.

The following orders of the Water Court are attached:

Appendix A: Water Court Judgment and Order on Additional Preliminary Injunction Request, dated June 20, 2023

Appendix B: Supreme Court Order in Case No. 23SA302

Appendix C: Water Court Order On Defendant's Motion for Clarification and Reconsideration, dated August 5, 2024

RESPECTFULLY SUBMITTED this 23rd day of September 2024.

FAIRFIELD AND WOODS, P.C.

Original duly signed and on file for review

By: *s/ Philip E. Lopez*
Philip E. Lopez

ATTORNEYS FOR DEFENDANT-APPELLANT
BYERS PEAK LAND & CATTLE, LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2024, a true and correct copy of the foregoing **NOTICE OF APPEAL** was electronically served via Colorado Courts E-Filing System on the following:

Byers Peak Downhill Properties Llc	JASON M GROVES (Patrick Miller and Noto PC) KEVIN LAND PATRICK (Patrick Miller and Noto PC) MICHAEL OPIE FRAZIER (Campbell Wagner and Frazier LLC)
Byers Peak Properties Llc	JASON M GROVES (Patrick Miller and Noto PC) KEVIN LAND PATRICK (Patrick Miller and Noto PC) MICHAEL OPIE FRAZIER (Campbell Wagner and Frazier LLC)
C Clark Lipscomb	JASON M GROVES (Patrick Miller and Noto PC) KEVIN LAND PATRICK (Patrick Miller and Noto PC) MICHAEL OPIE FRAZIER (Campbell Wagner and Frazier LLC)
Colorado Adventure Park Llc	JASON M GROVES (Patrick Miller and Noto PC) KEVIN LAND PATRICK (Patrick Miller and Noto PC) MICHAEL OPIE FRAZIER (Campbell Wagner and Frazier LLC)
Division 5 Engineer	DIVISION 5 WATER ENGINEER (State of Colorado DWR Division 5) ALLISON DAWN ROBINETTE (Department of Revenue MED) CHRISTOPHER ROBERT STORK (CO Attorney General)
Meredith C Lipscomb	JASON M GROVES (Patrick Miller and Noto PC) KEVIN LAND PATRICK (Patrick Miller and Noto PC) MICHAEL OPIE FRAZIER (Campbell Wagner and Frazier LLC)
State Engineer	COLORADO DIVISION OF WATER RESOURCES (State of Colorado - Division of Water Resources) ALLISON DAWN ROBINETTE (Department of Revenue MED) CHRISTOPHER ROBERT STORK (CO Attorney General)

A courtesy copy of this **NOTICE OF APPEAL** was also filed electronically through the Colorado Courts E-Filing System with the District Court, Water Division 5, Case No. 19CW3067.

/s/ Susan Wilkerson

Susan Wilkerson

Pursuant to C.A.R. 30(f), a printable copy of this document shall be maintained by the filing party and made available for inspection by other parties or the court upon request.