ADVANCE SHEET HEADNOTE
November 15, 2021

**2021 CO 77**

**No. 20SA278, *Glover v. Resource Land Holdings LLC*—Water Court Subject-Matter Jurisdiction—Ditch Easement Alteration—Attorney Fees.**

In this case, the supreme court considers the water court's subject matter jurisdiction and reviews numerous findings on the merits, including the water court's award of attorney fees. The supreme court concludes that the water court had proper subject matter jurisdiction as water matters were presented in the complaint, the non-water matters were sufficiently related to those water matters to warrant ancillary jurisdiction, and the circumstances of this dispute did not require publication of a resume notice. Further, the supreme court finds no abuse of discretion in the water court's rulings on the merits, including the award of attorney fees. The supreme court also awards appellate attorney fees for certain arguments pressed on appeal.

Accordingly, the supreme court affirms the water court's order and remands for further findings on the attorney fees awards.

**The Supreme Court of the State of Colorado**
2 East 14th Avenue • Denver, Colorado 80203

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**2021 CO 77**

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**Supreme Court Case No. 20SA278**
*Appeal from the District Court*
Weld County District Court, Water Division 1, Case No. 18CW3166
Honorable James F. Hartmann, Water Judge

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**Plaintiffs-Appellants:**

Robert Kint Glover, Gerald Kiefer, Marjorie R. Kiefer Marital Trust, Blair A. Kiefer Family Trust, Jane Raeleen Dunn, Friday LLC, and The Estate of Robert Kint Glover,

and

**Appellant:**

Gregory Cucarola,

v.

**Defendants-Appellees:**

Serratoga Falls LLC; Resource Land Holdings LLC; Jesse McDowell; Town of Timnath; Kitchel Lake Development Corporation; Kitchel Lake Partners, LLC; James Righeimer; Lee Lowrey; and Kenneth Mitchell.

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**Judgment Affirmed**
*en banc*
November 15, 2021

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**JUSTICE HART** delivered the Opinion of the Court.

¶1 This case comes to us after four years of unsuccessful negotiation and several years of contentious litigation over a dispute that, as the water court put it, could have been a "simple, simple" case about the placement of an irrigation ditch and maintenance obligations related to that ditch. Instead of proceeding as a straightforward determination of these issues under the standards we established in *Roaring Fork Club v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), the case was made complex by the plaintiffs' repeated assertions of unsubstantiated factual allegations and multiple legal claims lacking substantial justification. In the end, after ruling against the plaintiffs on the merits, the water court took the rare step of awarding attorney fees to the defendants because of the "frivolous, vexatious, and litigious" nature of many of the plaintiffs' claims.

¶2 On appeal, the plaintiffs argue that the water court, which they vigorously asserted *did* have jurisdiction throughout the proceedings at the trial level, actually *did not* have jurisdiction. They further argue that the court made numerous errors on the merits of the case. And finally they contest the court's award of attorney fees. Reviewing these arguments, we conclude that (1) the water court did have jurisdiction to hear this case, (2) the court's conclusions on the merits of the various claims were correct, and (3) the court's decision to award attorney fees was not an abuse of discretion. Accordingly, we affirm the judgment of the water court. We

also award defendants appellate attorney fees for certain arguments pressed in this appeal.

## I. Facts and Procedural History

¶3 In 2014, Resource Land Holdings LLC and Serratoga Falls LLC[1] began to develop a new residential real estate project in the Town of Timnath ("Timnath"). As part of this development, Serratoga sought to negotiate with Robert Glover and Gerald Kiefer ("Glover") about how Serratoga might replace a concrete-lined, open-air ditch—the Kiefer-Glover Lateral ("KG Lateral"), through which Glover claimed an easement to access certain water rights—with an underground irrigation pipe. Those negotiations were unproductive. In May 2018, Serratoga's attorneys informed Gregory Cucarola, who represented Glover at the time, that they believed the "correct approach to take" if the parties could not agree would be for Serratoga to seek judicial approval of their proposed modification of the KG Lateral through the process approved by this court in *Roaring Fork*, 36 P.3d at 1231.

¶4 Before Serratoga filed a *Roaring Fork* ditch modification proposal, however, Glover filed his own complaint in the water court in October 2018, followed by an

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[1] Resource Land Holdings LLC; Serratoga Falls LLC; Kitchel Lake Development Corporation; Kitchel Lake Partners, LLC; along with various individual members of those entities, were all involved in this ditch dispute as the residential property development proceeded. We refer to these parties collectively as "Serratoga."

amended complaint in April 2019. The amended complaint asserted seventeen claims arising from Serratoga's construction activities. Glover alleged that Serratoga's actions during development, including installation of subdrains, involvement with sewer and water lines, collapsing of a portion of the ditch, and a crossing of the ditch, constituted trespasses to his water rights and easement on the KG Lateral. He also alleged that Serratoga's completed installation of subdrains and proposed move of the KG Lateral underground would affect water flows into the Paige Brothers Seepage Ditches and Reservoir,[2] resulting in additional trespass and nuisance to Kiefer's water rights.

¶5 In claims 1, 4, and 5 of the amended complaint, Glover sought declaratory judgments or "adjudications" related to the scope of Glover's water rights and easements to convey those water rights. The other claims were various tort claims: trespass, nuisance, malicious conduct, slander of title, and civil conspiracy. Glover additionally alleged statutory claims, including violations of sections 7-42-109, C.R.S. (2021) and 37-89-103, C.R.S. (2021) (both of which provide criminal penalties for interference with water structures); section 38-35-109(3), C.R.S. (2021)

[2] Kiefer owns the Paige Brothers Reservoir. It fills from an inlet ditch that collects irrigation seepage and other water from a wetland area referred to as the Paige Seep.

(prohibiting fraudulent document recording and clouding title); and section 38-10-101, C.R.S. (2021) (prohibiting fraudulent conveyance).

¶6 Glover stated in his amended complaint that the water court had exclusive jurisdiction to address some claims as an "adjudication to determine the quality, quantity and timing of [Glover's] use of water" and to address the rest as "ancillary claims that are interrelated with [Glover's] use of water or that directly affect the outcome of water matters within the exclusive jurisdiction of [the water court]."

¶7 Serratoga subsequently brought counterclaims and filed a third-party complaint, adding Timnath as a party. Serratoga sought a declaration of the scope of Glover's water rights; permission to alter the KG Lateral, to cross the Paige Brothers Ditch No. 1, and to move the Prospect Lateral Ditch ("Prospect Lateral")[3] pursuant to *Roaring Fork*; and a declaration of the parties' maintenance obligations

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[3] Prospect Lateral is located in Timnath along Prospect Road, which separates Glover's property and Serratoga's property. Prospect Lateral is a "borrow ditch," created contemporaneously with the construction of a road to "furnish fill and provide draining." *Application for Water Rts. of Huffaker*, 2019 CO 28, ¶ 1 n.1, 439 P.3d 1224, 1226 n.1 (quoting *Borrow ditch*, 2019 *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/borrow%20ditch [https://perma.cc/36RH-RKRZ]). Timnath ordered Serratoga to widen Prospect Road as part of their development activities, which required relocation of the borrow ditch.

associated with each ditch. Serratoga also filed a motion to dismiss eight of Glover's claims.

¶8 The Weld County District Court, Water Division 1, granted the motion to dismiss for seven of the claims, explaining that, as pleaded, the claims were "speculative and devoid of any factual support." The water court also granted a motion for summary judgment filed by Timnath on the claims involving the Prospect Lateral, concluding that Glover could not "maintain an action in adverse possession" against the town to prevent the borrow ditch from being moved. *See* § 38-41-101(1)-(2), C.R.S. (2021) (prohibiting easement adverse possession claims against any city or county). Finding that Timnath's right of way for Prospect Road exists on land owned by Serratoga, the water court held that Serratoga—rather than Timnath—was the proper party to address Glover's claims for relief regarding the Prospect Lateral.

¶9 The water court held a seven-day trial in February 2020 to hear the remaining claims. Following Glover's case-in-chief, Serratoga moved for dismissal under C.R.C.P. 41(b)(1). The water court proceeded to dismiss: (1) claims related to the Prospect Lateral on the basis that Glover had no property interest in the borrow ditch; (2) trespass claims to water rights because, despite the brief collapse of the KG Lateral, there was no evidence that water "was not delivered when it was called for" by Glover; and (3) claims of conspiracy, slander

of title, and malicious conduct as there "just [was] no evidence to support any of those allegations." The water court maintained only the claims to special damages, and for declaratory relief to determine the scope of Glover's easement in the KG Lateral and whether Serratoga's plan to move the KG Lateral underground would affect water rights in the Paige Brothers Reservoir.

¶10 On those remaining claims, the water court issued a verbal ruling in favor of Serratoga at the conclusion of trial. Applying *Roaring Fork*, the water court held that Serratoga's proposed underground pipeline would not significantly lessen the utility of the easement on the KG Lateral, increase the burdens on Glover, or frustrate the purpose of the easement. *See Roaring Fork*, 36 P.3d at 1231. In fact, the water court found that the easement would be "enhanced" (widened) by Serratoga's proposed change and the "pipe [would] deliver more water than was historically delivered to [Glover]." Therefore, the water court approved Serratoga's proposal to alter Glover's KG Lateral easement to construct the underground pipeline and held that the obligation to maintain the pipeline as an easement for Glover fell on Serratoga.

¶11 The water court also found Glover and attorney Cucarola jointly and severally liable for attorney fees for the claims that were dismissed, stating:

> I can count on one hand with fingers left over how many times I've done this in the 17 years I've been a judge. But I think this is a case that warrants such action. Defendants were called upon to spend

> time and money on claims that lacked substantial justification and were frivolous, vexatious, and litigious.

In response to a question about the timing of a hearing on the amount of attorney fees, the water court noted that, although the Statewide Practice Standards in C.R.C.P. 121, section 1-22 give a party seeking attorney fees twenty-one days to serve a motion requesting those fees, he would give Serratoga thirty days to file that motion, with fourteen days for Glover and Cucarola to file a response and to request a hearing. The court noted that "[t]here would not need to be a reply if there's a request for a hearing on reasonableness because—we'll set a hearing."

¶12 Following these rulings, Glover, now represented by Craig Corona, filed two post-trial motions for relief—a C.R.C.P. 59 motion and a C.R.C.P. 60 motion. In the Rule 59 motion, Glover asked the water court to make further findings relating to the trespass claims, clarify findings relating to the award of attorney fees, and amend the award of attorney fees to account for Cucarola being responsible for bringing the claims the court found lacked substantial justification. Citing its "detailed findings" at trial, the water court declined to make further findings and denied the request to modify the findings of joint and several liability for the award of attorney fees.

¶13 In the Rule 60 motion, Glover asserted for the first time that the water court lacked subject matter jurisdiction because none of the claims involved "water matters," and, therefore, the water court's judgment should be voided. The water

court held that claims 1, 4, and 5 all involved "water matters" on the basis that "the findings and declarations requested by plaintiffs related to their right to use water, rather than findings as to the ownership of the water rights." *See In re Tonko*, 154 P.3d 397, 404 (Colo. 2007) ("Water matters involve determinations regarding the right to use water, the quantification of a water right, or a change in a previously decreed water right."). Further, the water court held that "it was proper for the water court to exercise ancillary jurisdiction over plaintiffs' other claims" because they were "inextricably intertwined" with claims 1, 4, and 5. Thus, the water court denied the Rule 60 motion.

¶14 Separately, Cucarola filed a Rule 59 motion for post-trial relief, asking the water court to vacate the findings that certain claims lacked substantial justification, reverse the award of attorney fees as joint and several, and provide him the opportunity to submit written briefing and have an evidentiary hearing on the apportionment of the award. He argued, in part, that the water court failed to make sufficient, specific findings pursuant to section 13-17-102, C.R.S. (2021)—instead giving only a "sweeping determination that claims 'lacked substantial justification and were frivolous, vexatious, and litigious.'" The water court denied the motion as "Cucarola and [Glover] had ample opportunities to back away from the claims that they knew or should have known lacked substantial justification. Their failure to do so resulted in [Serratoga] incurring

great time and expense defending claims that never should have been pursued." Further, the water court noted that the question of the amount of attorney fees and "apportionment of the payment" would be addressed during subsequent hearings during which both Cucarola and his former clients could present arguments in response to Serratoga's specific fee requests.

¶15 Glover and Cucarola appealed the water court's judgment directly to this court.[4] Glover contests the water court's subject matter jurisdiction over the action on three grounds. First, he contends that the case does not present any water matter that would grant the water court subject matter jurisdiction. Second, he contends that the water court lacked ancillary jurisdiction over any non-water matters, either because the water court lacked subject matter jurisdiction as a whole or because the ancillary matters were not sufficiently related to the water matters to grant jurisdiction. Third, Glover contends that the water court erred in proceeding without publication of a resume notice. In the alternative, Glover argues that the water court committed multiple legal errors on the merits. Finally, Glover argues that the court abused its discretion in awarding attorney fees.

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[4] Cucarola filed his own notice of appeal, contesting the water court's jurisdiction and asserting arguments pertaining to the water court's findings on the award of attorney fees and his own right to due process. His arguments on appeal are addressed in this decision.

## II. Analysis

¶16 We first consider the three proffered grounds for contesting the water court's subject matter jurisdiction: the existence of water matters, appropriateness of ancillary jurisdiction, and absence of resume notice. We conclude that the water court had proper subject matter jurisdiction as Glover presented water matters in the complaint, the non-water matters were sufficiently related to those water matters to warrant ancillary jurisdiction, and the circumstances of this dispute did not require publication of a resume notice. We then turn to the water court's conclusions on the merits of the case, including those findings regarding the award of attorney fees. Finding no errors or abuse of discretion in the water court's rulings on the merits, we affirm the order. Finally, we conclude that Serratoga is entitled to appellate attorney fees for certain arguments pressed in this appeal.

### A. The Water Court Had Subject Matter Jurisdiction

¶17 Water courts "retain exclusive jurisdiction over all water matters." *Kobobel v. Colo. Dept. of Nat. Res.*, 249 P.3d 1127, 1132 (Colo. 2011) (quoting *In re Tonko*, 154 P.3d at 404); *see* § 37-92-203(1), C.R.S. (2021). Whether a claim constitutes a water matter turns on the distinction between "actions involving the *use* of water and those involving the *ownership* of a water right." *Kobobel*, 249 P.3d at 1132 (emphases added); *see also In re Tonko*, 154 P.3d at 404 (explaining this distinction). Water matters involve the use of water, including "applications for

initial decrees and for decrees approving augmentation plans, applications for changes of decreed water rights, and matters concerning the scope of previously decreed water rights and the abandonment, laches, and adverse possession of water rights." *Allen v. State*, 2019 CO 6, ¶ 10, 433 P.3d 581, 584; *see also S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1234 (Colo. 2011) ("Water courts are authorized to construe and make determinations regarding the scope of water rights adjudicated in prior decrees."); *Kobobel*, 249 P.3d at 1132 (holding that a determination of the "scope of [a] right to use [] decreed water rights" constituted a water matter); *In re Tonko*, 154 P.3d at 404 (holding that "[a]pplications for a change of decreed water rights" are water matters); *Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 536 (Colo. 1996) (holding that whether a party is subject to the terms of an augmentation plan is a water matter). Conversely, issues involving ownership of a water right, which frequently arise "in conjunction with the conveyance of property and other rights," do not constitute water matters; they fall under the general jurisdiction of district courts. *Humphrey v. Sw. Dev. Co.*, 734 P.2d 637, 641 (Colo. 1987) (finding that an ownership dispute occurred where "the district court was required to analyze deeds, contracts, and other documents that established the chain of title to certain decreed water rights"); *see also Allen*, ¶ 11, 433 P.3d at 584 (giving examples of actions involving the ownership of a

water right, including "quiet title proceedings, real estate matters, dissolution proceedings, and other civil actions in the district courts").

¶18 Claims 1, 4, and 5 of the amended complaint present water matters because their resolution required determinations regarding the scope of the right to *use* water—rather than *ownership* of the right.[5] Glover contends that, despite the fact that he brought the original action in water court, none of the claims in the complaint constitutes a water matter because the claims actually asked for a determination of ownership of water specifically in the *Roaring Fork* context. He argues that finding otherwise would require every ditch modification case brought under *Roaring Fork* to be heard in water court. We disagree.

¶19 In *Roaring Fork*, we held that when the owner of a ditch burdened by an easement seeks to move or alter the ditch, the "water provided to the ditch easement owner must be of the same quantity, quality, and timing as provided

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[5] Glover's first claim for relief requested the determination of "all quality, quantity and timing of irrigation flows for [his] use of water on [the KG Lateral]." His fourth claim for relief sought a declaratory judgment to those amounts in the KG Lateral, stating that Glover is "entitled to a declaration of the present and future amounts of water they may convey through the existing KG Lateral, any modification thereof, and the quality, quantity and timing thereof." Lastly, Glover's fifth claim sought a declaratory judgment for "all rights to use water as associated with decreed rights in the Paige Brothers Seepage Ditches and Reservoir in view of [Serratoga's] proposed construction," as well as injunctive relief to prevent Serratoga from interfering with those rights.

under the ditch owner's water rights and easement rights in the ditch." 36 P.3d at 1238. A district court may properly construe the quantity, quality, and timing of water delivery to the easement owner when there are records clearly establishing these facts—as was the case in *Roaring Fork* itself. However, when a *Roaring Fork* dispute requires initial determinations as to the scope of a decreed water right or any other water matters as a precursor to ensuring that the same quantity, quality, and timing is provided, then the dispute falls within the exclusive jurisdiction of the water court.

¶20 Here, the parties disagreed over the total flow of water any modified KG Lateral needed to carry. Before resolving the *Roaring Fork* dispute over location and maintenance of the ditch, the water court first had to determine the exact scope of decreed water rights in the KG Lateral and Paige Brothers Seepage Ditches and Reservoir—i.e., Glover's right to use water. This involved the water court deciding numerous right-of-use issues, such as "whether seepage water should be classified as return flows that [Glover] . . . ha[s] the continued right to rely upon under the Paige Brothers Reservoir decree" and whether Glover has the right to use free river flows. Thus, because claims 1, 4, and 5 required the resolution of water matters as initial determinations preceding the *Roaring Fork* analysis, they came within the exclusive jurisdiction of the water court.

## B. Ancillary Jurisdiction Over Non-Water Claims Was Appropriate

¶21 Having established the water court's exclusive jurisdiction over claims 1, 4, and 5 as water matters, we next address whether this jurisdiction extended to the non-water claims as ancillary issues.

¶22 Ancillary jurisdiction over non-water matters exists in Colorado water courts where the ancillary claims are "interrelated with the use of water or . . . directly affect the outcome of water matters within the exclusive jurisdiction of the water court." *Kobobel*, 249 P.3d at 1132; *see also Crystal Lakes*, 908 P.2d at 541–42. We have previously stressed that the purpose of ancillary jurisdiction is judicial efficiency. In *Crystal Lakes*, we explained that requiring rulings in two different actions to "bring about [a just and final] result" approaches absurdity. 908 P.2d at 543–44 (alteration in original) (quoting *Perdue v. Fort Lyon Canal Co.*, 519 P.2d 954, 956) (Colo. 1974)). Thus, "[a]s a general rule, '[o]nce a court takes jurisdiction of an action, it thereafter has exclusive jurisdiction of the subjects and matters ancillary thereto.'" *Id.* at 543 (second alteration in original) (quoting *People in Int. of Maddox v. Dist. Court ex rel. Arapahoe Cty.*, 597 P.2d 573, 575 (Colo. 1979).

¶23 Consistent with this efficiency rationale, ancillary jurisdiction does not extend to real property issues "only tangentially involv[ing] water matters." *FWS Land & Cattle Co. v. Colo. Div. of Wildlife*, 795 P.2d 837, 841 (Colo. 1990) (holding that a water court does not have ancillary jurisdiction to determine a right to use

*lands* underlying a reservoir in contrast to a right to use *water*). It also does not extend to non-water matters where the water court dismisses the water matters prior to trial. *See Sheek v. Brooks*, 2019 CO 32M, ¶¶ 20–23, 440 P.3d 1145, 1149 (holding that the water court lacked ancillary jurisdiction over additional claims of trespass or theft where the water matters were dismissed prior to trial).

¶24 Here, where the water court exercised jurisdiction over water matters essential to the *Roaring Fork* analysis at trial, it properly exercised ancillary jurisdiction over the remaining interrelated tort and statutory claims. Finding otherwise in this case would produce precisely the absurd result that we warned against in *Crystal Lakes*, 908 P.2d at 543–44. It would require parties with claims that involve the resolution of underlying water matters to first litigate those matters in the water court and then proceed to district court for litigation on the same facts and significantly related issues. Therefore, we conclude that the water court had subject matter jurisdiction not only to determine the water matters but also to resolve the ancillary tort and statutory claims interrelated with those matters.

### C. Publication of a Resume Notice Was Not Required

¶25 The final ground for Glover's contest of the water court's subject matter jurisdiction is the lack of publication of a resume notice.

¶26 Glover raised the issue of publication of a resume notice for the first time on appeal. "Generally, 'issues not raised in or decided by a lower court will not be addressed for the first time on appeal.'" *United Water & Sanitation Dist. ex rel. United Water Acquisition Project Water Activity Enter. v. Burlington Ditch Reservoir & Land Co.*, 2020 CO 80, ¶ 37, 476 P.3d 341, 350 (quoting *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm*, 2012 CO 61, ¶ 18, 287 P.3d 842, 947). We could disregard the argument on this basis alone. However, we will briefly address the merits of the claim, as it relates to our ruling on the award of appellate attorney fees.

¶27 Colorado law requires "resume notice"—publication of a notice in a generally circulated newspaper—for water right adjudications as special statutory proceedings. *See* § 37-92-302(3); C.R.C.P. 90; *Sheek*, ¶ 13, 440 P.3d at 1148. However, in *King Consol. Ditch Co.*, this court held that there are "limited circumstances" where personal service, rather than resume notice, is appropriate. 250 P.3d at 1235. These circumstances include "declaratory judgment actions where relief is sought against a named party, as opposed to an application affecting all water rights on a stream system." *Id.* We explained that personal service is appropriate because "[t]hese actions focus on specific disputes among and between specific water users." *Id.*

¶28 This dispute—a specific dispute between Glover and Serratoga as named parties—is precisely the type of water matter for which personal service is appropriate, rather than resume notice. The lack of resume notice does not affect the water court's jurisdiction.

## D. The Water Court's Rulings Were Correct on the Merits

¶29 Turning to the merits, we find no errors in the water court's conclusions for the reasons stated below.

### 1. The Water Court Correctly Dismissed the Trespass Claim Because Serratoga Did Not Unilaterally Alter the KG Lateral

¶30 We first consider whether the water court erred in applying *Roaring Fork* when it dismissed Glover's claim for trespass on the KG Lateral easement.

¶31 In *Roaring Fork*, this court considered whether the burdened estate owner "had the right to move the ditch" without consent. 36 P.3d at 1232. The burdened estate owner in *Roaring Fork* was a club "[s]eeking to alter the ditch course in order to accommodate its golf and fishing development." *Id.* at 1230. The club went ahead with construction to move the ditch, including activities such as excavating within the easement, grading and destroying ditch banks, realigning ditch channels, diverting water flows, and piping portions of the ditches. *Id.* We disapproved of these actions occurring without consent, which we called a "self-help approach." *Id.* at 1239. Reviewing the trial court's decision that the club

committed trespass on the ditch easement, we agreed that a trespass occurred when the ditch easement was unilaterally altered because such an action went against the common law principle that "ditch easements are a property right that the burdened estate owner may not alter absent consent of the benefitted owner." *Id.* at 1234. Therefore, we held that:

> the owner of [the burdened estate] may not move or alter that easement unless that owner has the consent of the owner of the [benefitted estate]; OR unless that owner first obtains a declaratory determination from a court that the proposed changes will not significantly lessen the utility of the easement, increase the burdens on the owner of the easement, or frustrate the purpose for which the easement was created.

*Id.* at 1231.

¶32 In the present case, unlike in *Roaring Fork*, there was ultimately no movement or alteration to the ditch easement. Both parties agree that damage occurred to the physical infrastructure of the KG Lateral while Serratoga undertook construction work on its adjacent property—such as damages that "caused [the] concrete portion [of the ditch] to collapse" and "an issue with the pipe that leads from the concrete portion of the ditch over to the pipe that leads under Prospect Road." But the parties disagree on the nature of this damage and its source. Glover asserted repeatedly during the litigation that this damage was intentional and that it was a species of "self-help" intended to move or alter the ditch easement. Serratoga responded either by denying that it caused the damage

or by noting that any damage was accidental and could not be characterized as a self-help effort designed to alter or move the easement without consent. And in each instance, Serratoga promptly repaired any damages without moving or altering the ditch.

¶33 Ultimately, the water court found no evidence of "self-help" in these incidents and noted that the "ditch was repaired in its *existing location* with concrete to the *same capacity* and *dimensions*" to remedy the physical damage temporarily caused by the construction. (Emphases added.) We agree there cannot be a *Roaring Fork* trespass without evidence of an actual movement or alteration; accidental damage and repair is not movement or alteration within the meaning of *Roaring Fork*.

¶34 The water court also found that Serratoga properly came to the court, through their counterclaim, to propose altering the easement from an open-air ditch to an underground pipeline after they tried to "work it out and agree" but failed to gain Glover's consent. In its judgment, the water court stated: "The Defendants didn't use self-help. I asked that question specifically. Did you attempt to pipe this lateral without permission? And the answer was, 'No.' There was no self-help regarding the conveyance structure." Contrasting these findings to those in *Roaring Fork*, we agree that Serratoga properly proposed its anticipated unilateral alteration to the ditch in its counterclaim without pursuing self-help.

¶35 Importantly, the existence of a non-exclusive, prescriptive easement does not prevent the burdened property owner from using the property altogether. *See City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1086 (Colo. 2009). We have previously explained that the owner of the servient estate retains "the right to use the non-exclusive easement for purposes that are consistent with the rights of the easement holder and that do not unreasonably interfere with the dominant estate." *Id.*; *see also Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo. 1998). Thus, while Glover enjoys a "non-exclusive, prescriptive easement" to "access, maintain, operate, and receive water rights from the KG Lateral," Serratoga retains the right to develop their adjacent property in a manner that does not unreasonably interfere with the easement. The water court concluded that Serratoga's prompt repair of the damages that occurred on the ditch during the course of their development of adjacent property did not unreasonably interfere with Glover's easement. We see nothing to warrant upsetting that conclusion.

¶36 Therefore, the water court did not err in dismissing the claim for trespass on the KG Lateral easement.

## 2. The Water Court Properly Dismissed Kiefer's Claims to a Prospect Lateral Easement

¶37 We next review whether the water court erred when it dismissed Kiefer's claims to a Prospect Lateral easement.[6]

¶38 An individual cannot acquire title, interest, or right of "any land, water, water right, easement or other property whatsoever" by possession—"no matter how long continued"—against the State of Colorado or any of its cities or municipalities. § 38-41-101(2). Once a dedication of a right of way to a city occurs, a defendant no longer can claim a property interest in that same right of way. *See City of Canon City v. Cingoranelli*, 740 P.2d 546, 547 (Colo. App. 1987) (holding that the defendant had no adverse possession claim to a strip of land against Canon City where the City had accepted a dedication to a right of way that included the strip).

¶39 Here, the water court found that Timnath (with Larimer County as its predecessor) established a right of way for Prospect Road through a properly recorded dedication in 1889 that included the Prospect Lateral as a borrow ditch to be created at the time of construction of the public highway. Kiefer, meanwhile,

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[6] Only Mr. Kiefer brought claims for the Prospect Lateral, so we refer to him as a singular plaintiff in this discussion.

began conveying water down the Prospect Lateral in the 1970s. Kiefer argues that these conveyances created a property right—a ditch easement—in the Prospect Lateral. But Kiefer cannot establish an easement through a claim against Timnath regardless of whether the easement is established by adverse possession, prescriptive easement, or irrevocable license. *See* § 38-41-101(2); *see In re Tonko*, 154 P.3d at 404 (explaining that a ditch easement may "be established as a prescriptive easement, an easement by estoppel, an easement from prior use, or an irrevocable license"). Thus, the water court properly dismissed Kiefer's claims to a Prospect Lateral easement.

### 3. The Water Court Properly Declared the Parties' Rights and Duties in the Easements

¶40 We now turn to whether Glover is correct in his assertion that the water court failed to declare all of the parties' rights and duties as to the Prospect Lateral, KG Lateral, and Paige Brothers Seepage Ditch.

¶41 This court has previously held that the purpose of a declaratory judgment is "to afford relief from uncertainty and insecurity." *Colo. State Bd. of Optometric Exam'rs v. Dixon*, 440 P.2d 287, 289 (Colo. 1968). The water court, through its final judgment and orders on multiple motions, made detailed findings as to the rights and duties of each of the parties with regard to the easements. Thus, Glover's contention that the court did not declare the parties' rights is simply incorrect.

¶42 First, as discussed above, Kiefer has no rights or duties regarding the Prospect Lateral borrow ditch. The water court determined, and this court affirms, that there is no basis on which Kiefer may claim a right in the ditch. The water court further detailed that Timnath and Serratoga have no duty to place a structure on the Prospect Lateral for Kiefer "to continue his practice" of diverting water in that ditch.

¶43 Second, the water court gave a detailed analysis of the rights and duties related to the KG Lateral in its judgment and post-trial order. In its judgment, the water court authorized Serratoga to modify the KG Lateral—changing it from an open-air, concrete-lined ditch to a piped ditch—and explained that Serratoga has "the obligation to maintain that as an easement in favor of [Glover]." Then, in response to Glover's Rule 59 motion requesting specific findings regarding the easements, the water court gave a succinct summary of the rights and duties related to the KG Lateral, stating that "the width of the KG Lateral easement across [Serratoga's] property is 50 feet" and the "responsibilities and costs of construction and maintenance of the piped section of the KG Lateral falls exclusively on [Serratoga]." Further, it explained that the easement entitles Glover to "continued delivery of their water through this pipeline in the same quantity, quality, and timing as [they] have historically been entitled to under their water rights." Finally, the court put the responsibility of "maintaining the open portions of the

ditch" on Glover, "absent an operating agreement between the parties in the future establishing a different arrangement." Through these findings, the water court thoroughly explained the parties' rights and duties in the KG Lateral.

¶44 Finally, the water court addressed the rights and duties related to the Paige Brothers Seepage Ditches and Reservoir—again in its judgment and its post-trial order denying Glover's Rule 59 motion. It detailed rights "from 1911" that "involve the accumulation of tail waters from irrigation seepage" flowing into the Paige Brothers Reservoir and stated that Serratoga "committed to retaining the Paige Brothers Ditch in its present condition," although "little to no maintenance . . . has occurred historically." It also found that Serratoga showed "the footprint of the Paige [Brothers Ditch] will remain," that "the Paige Number 1 will remain," and "that water will continue to be delivered after the development occurs."

¶45 Overall, these findings—among others—offer ample certainty and security for the involved parties, and this court therefore concludes that Glover's assertion that the water court failed to declare the parties' interests in the easements is without merit.

### E. The Water Court's Award of Attorney Fees Was Not an Abuse of Discretion

¶46 At the close of the week-long trial, the water court announced that it would grant Serratoga's request for attorney fees because Glover's litigation strategy

forced Serratoga "to spend time and money on claims that lacked substantial justification and were frivolous, vexatious, and litigious."

¶47 On appeal, Glover and Cucarola raise several issues related to the award of attorney fees, namely whether the water court erred in finding that certain claims lacked substantial justification and whether the court violated Cucarola's due process rights by awarding fees without briefing and a hearing. We address these concerns in turn.

¶48 In authorizing the award of attorney fees, the legislature recognized that increased civil litigation "strain[s] the judicial system and interfer[es] with the effective administration of civil justice." § 13-17-101, C.R.S. (2021). Awarding fees is a tool the court can use to reduce the number of "substantially frivolous, substantially groundless, or substantially vexatious" claims and alleviate this strain. *Id.* To accomplish this aim, a court "shall assess attorney fees if . . . it finds that an attorney or party brought or defended an action . . . that lacked substantial justification." § 13-17-102(4), C.R.S. (2021). An action lacks "substantial justification" if it is "substantially frivolous, substantially groundless, or substantially vexatious." *Id.*

¶49 We review the decision to award attorney fees for abuse of discretion. *Anderson v. Pursell*, 244 P.3d 1188, 1193 (Colo. 2010). Under an abuse of discretion standard, we will not disturb an award if it is supported by the record. *See Front*

*Range Res., LLC v. Colo. Ground Water Comm'n*, 2018 CO 25, ¶ 40, 415 P.3d 807, 815 (finding no abuse of discretion where the district court denied attorney fees due to the presence of complex issues); *Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Cherokee Metro. Dist.*, 2015 CO 47, ¶¶ 25–26, 351 P.3d 408, 415 (finding that a water court did not abuse its discretion where the order of costs and attorney fees had evidentiary support in the record).

### a. The Water Court Did Not Abuse its Discretion When it Determined that the Trespass Claim Lacked Substantial Justification

¶50 Applying this standard, we consider whether the water court abused its discretion when it found that Glover's claim for trespass on the easement lacked substantial justification. We find no abuse of discretion.

¶51 Glover argues that the court erroneously imposed a requirement that a *Roaring Fork* trespass cause damage by allowing Serratoga to avoid liability because it fixed the ditch after it was damaged. This argument misunderstands the water court's conclusions. The water court carefully considered the various damages to and repairs of the physical infrastructure of the KG Lateral during the time that the parties were negotiating and Serratoga was developing its land adjacent to the easement. The court ultimately dismissed Glover's ditch-related trespass claim after Glover completed his presentation of evidence because it concluded: first that these events did not amount to a unilateral movement or

alteration of the ditch without consent under *Roaring Fork*; and second that they did not unreasonably interfere with Glover's easement rights. To the extent that it considered whether an unreasonable interference with Glover's easement occurred, the analysis was not at the expense of or in conflict with its *Roaring Fork* analysis.

¶52 Further, the water court properly applied *Roaring Fork*. While evidence of damage is not required to prove trespass under *Roaring Fork*, 36 P.3d at 1234, such a claim does require evidence of a unilateral alteration. The water court correctly recognized that unintentional damage to the structure of the KG Lateral followed by repairs and successful water deliveries after those repairs does not equate to a unilateral alteration of the ditch easement. And, as previously described, when negotiations between the parties broke down, Serratoga recognized that it would need to come to the water court to propose an alteration to the ditch easement under *Roaring Fork* because it could not make a unilateral alteration. The fact that Glover made it to the courthouse first does not diminish the reasonableness of the water court's determination that Serratoga, through its counterclaim, properly came to the court as required by *Roaring Fork* and that activities occurring before that proposal were not unilateral alterations executed through self-help.

¶53 Hence, there is ample support in the record for the water court's determination that the trespass claims lacked substantial justification. We therefore find no abuse of discretion.

### b. The Water Court Did Not Abuse its Discretion in Finding a Lack of Substantial Justification for the Additional Claims

¶54 Glover and Cucarola also contend that the water court erred in its award of attorney fees for several additional claims—nuisance, slander of title, acting intentionally with malice, violation of two criminal statutes, fraudulent conveyance, and civil conspiracy. We find no abuse of discretion for the award of fees on any of these claims.

¶55 Cucarola argues that the water court erred in awarding fees for the trespass-to-water-right claim by misapplying the law and ignoring evidence regarding the installation of subdrains. He argues, essentially, that even if Kiefer was receiving all the water to which he was entitled from the Paige Brothers Reservoir, evidence that the subdrains were also drawing water should be sufficient to prove trespass to a water right. The water court correctly rejected this argument.

¶56 The water court determined that the property right at issue in the trespass-to-water-right claim is the "right to one fill of [Paige Brothers Reservoir] each year during the irrigation season." Thus, Serratoga's activities "may not interfere with the filling of the Paige Brothers Reservoir." At multiple points during the

litigation, including in the context of hearing evidence about the installation of the subdrains, the water court acknowledged this water right. But the water court also concluded that there was no evidence that any groundwater diverted through the subdrains caused an injury to that water right. In fact, the water court found that the Paige Brothers Reservoir "continued to fill to capacity to the point of spilling through the outlet structure *after the installation of subdrains*." (Emphasis added.) Therefore, the court reasonably concluded that the trespass-to-water-right claim lacked substantial justification.

¶57 Cucarola further contends that the water court erred in finding that the nuisance claim related to the subdrains lacked substantial justification. "A claim for nuisance is predicated upon a substantial invasion of an individual's interest in the use and enjoyment of his property." *Hoery v. United States*, 64 P.3d 214, 218 (Colo. 2003). Again, the property at issue here is the Paige Brothers water right—the right to a single fill of the Paige Brothers Reservoir each irrigation season. The water court found that there was no evidence of a substantial invasion to the use and enjoyment of the Paige Brothers water right as there was no injury to the water right from the installation of the subdrains. These findings support the water court's determination that the nuisance claim lacked substantial justification.

¶58 Glover also argues that fees should not have been awarded for the claim that Serratoga was "acting intentionally with malice" because the water court

dismissed it early in the litigation pursuant to C.R.C.P. 12(b)(5). In its order granting a motion to dismiss on this claim, the water court explained that Glover failed "to provide any facts to show that [Serratoga] acted intentionally and with malice." Without any facts to support the claim—particularly when it was dismissed under Rule 12(b)—the water court acted within its discretion in finding that it lacked substantial justification. *See* § 13-17-201, C.R.S. (2021) (mandating attorney fees for tort actions "dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure"); *Crandall v. City of Denver*, 238 P.3d 659, 665 (Colo. 2010) (holding that an award of attorney fees is mandatory without exception for a "plaintiff's tort action . . . dismissed pre-trial on a C.R.C.P. 12(b) motion to dismiss").

¶59 For the claims related to two criminal statutes, section 7-42-109 (providing a criminal penalty for malicious or willful damage to a ditch) and section 37-89-103 (providing a criminal penalty for interference with a ditch), Glover and Cucarola argue that they were making a good faith argument for the extension of these criminal statutes into the civil realm. True, section 13-17-102(7), C.R.S. (2021), prohibits an award of attorney fees for a claim asserted "in a good faith attempt to establish a new theory of law in Colorado," but the water court did not abuse its discretion in awarding attorney fees for the claim advanced here. In defense of the decision to plead the claimed criminal violations, Glover stated that the

statutes were used "to show the Legislative intent and public policy that [Glover] obtain restitution in full, and that [his] property rights be vindicated." Based on this description, the water court acted within its discretion when it concluded that this was not a good faith attempt to establish a new theory of law. *Am. Telev. & Commc'ns Corp. v. Manning*, 651 P.2d 440, 447 (Colo. App. 1982) (warning against using a criminal statute "to buttress . . . common law claims").

¶60 Finally, Glover contends that a slander of title claim was not pursued through trial and, thus, should not be included in the award of attorney fees. He points to our decision in *Anderson* where we held that no attorney fees should be awarded for a claim that was abandoned before an opening brief was ever filed. 244 P.3d at 1198. Glover is correct that the specific claim for slander of title was withdrawn. However, we note that the amended complaint still included, and Glover pursued as claim 12, clouded title and fraudulent document recording under section 38-35-109(3), C.R.S. (2021), and derivative civil conspiracy claims. These claims were essentially just a restyling of the original slander of title claim. Indeed, apart from removing the words "slander of title" from the heading for claim 12, the paragraphs setting forth the allegations were identical to those in the previous complaint; the only thing that changed was the header. And even after the water court entered summary judgment in favor of Serratoga on the section 38-35-109(3) claims and found that there was no cause of action under the statute

because Glover was "not the owner[] of the real property that is subject of the recorded document," Glover continued to argue about the applicability of the statute. Further, in his arguments opposing Serratoga's Rule 41 motion, Cucarola maintained the argument that Serratoga's actions "clouded" the Glover property. The record reflects that the water court addressed Glover's averment and found that there "wasn't an intent by [Serratoga] to try and cloud the title to the easement. [They] *always* knew there was going to be an easement. *Always*. It's just a question of how that would look." (Emphases added.) Similarly, the water court found "no evidence" to support the allegations that Serratoga "hid[] the ball and conspir[ed]" to "convey property fraudulently." Thus, we find adequate support in the record for the water court's finding that the claims of clouded title (also referred to as slander of title), fraudulent document recording, fraudulent conveyance, and derivative civil conspiracy lacked substantial justification. The court did not abuse its discretion in awarding fees for those title-related statutory and tort claims.

¶61 Cucarola additionally asserts that the pursuit of the dismissed claims was objectively meritorious as he litigated an inevitable lawsuit in good faith reliance on his clients, retained experts, and co-counsel. Cucarola contends that assessing fees against him but not co-counsel Craig Corona was an abuse of the water court's discretion.

¶62 We do not agree with this characterization of the lawsuit brought by Glover as inevitable. The *Roaring Fork* analysis to assess whether to move the KG Lateral underground seemed inevitable based on deteriorated communications between the parties. As the water court put it, this could have been a "simple, simple" case with a determination of the proposed *Roaring Fork* easement modification that Serratoga indicated it would need to bring—and subsequently did bring in the counterclaim—unless negotiations led to an agreement. What was not inevitable was the litany of unsubstantiated claims brought by Glover. Thus, we find record support for the water court's fee determination that the dismissed tort claims lacked substantial justification.

¶63 Finally, the record supports the court's conclusion that the unsubstantiated allegations and unfounded assertions of malicious and tortious behavior on the part of Serratoga originated under Cucarola's counsel. Corona entered his appearance on November 11, 2019, well after the original and the first amended complaint were filed. And his role at trial differed from that of Cucarola. Recognizing that the water court "is in the best position to observe the course of the litigation" and make an attorney fees determination, we find no abuse of discretion here. *Anderson*, 244 P.3d at 1194; *see also Archer v. Farmer Bros. Co.*, 90 P.3d 228, 231 (Colo. 2004) (explaining that a trial court is given broad discretion

to determine who is a prevailing party in the context of a fee award because of its "unique opportunity to observe the course of litigation").

¶64 In sum, the water court acted within its discretion in finding that Glover's dismissed claims lacked substantial justification and therefore warranted an award of attorney fees.

### c. Cucarola Was Not Denied Due Process

¶65 Cucarola separately asserts that his due process rights were violated in the award of attorney fees because the water court failed to make requisite findings pursuant to statute in imposing fees and failed to accept written briefing and hold a separate hearing. There is no basis for this claim.

¶66 First, Cucarola asserts that section 13-17-103(1), C.R.S. (2021), required the court to set forth a "claim-by-claim analysis" in determining *whether* to award attorney fees, independent of any determination as to the amount of that fee award. He makes this argument by pointing to the language in section 13-17-103(1) requiring a court to "specifically set forth the reasons for said award . . . [i]n determining whether to assess attorney fees *and* the amount of attorney fees to be assessed." (Emphasis added.) The "and," Cucarola suggests, means that a full analysis must occur at the moment of determination that any fee will be awarded, even if the determination of the award amount is deferred. We do not believe the quoted language supports Cucarola's argument. While the trial court

must consider the factors in section 13-17-103(1) in "determin[ing] whether the action in question (or any part thereof) 'lacked substantial justification,'" *Munoz v. Measner*, 247 P.3d 1031, 1034 (Colo. 2011), and in assessing "the amount of such fees," *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo. 1997), the statute does not break these two determinations apart for review. The granting of an award of attorney fees encompasses both *whether* to assess fees and *for how much*. The court will be required to set forth its analysis of the appropriateness of any fee award when it holds the hearing on that issue. It bears emphasizing that the water court made it clear in its February 19 order, again in its ruling on Cucarola's Rule 59 motion, and again in its order granting a stay of the hearing on attorney fees pending this appeal, that it would be accepting written pleadings and holding a hearing as to the amount of attorney fees and the apportionment of those fees. It would be a waste of judicial resources for this court to consider whether the water court has met the requirements of section 13-17-103 before the water court even conducts its hearing and completes its findings on the amount of the award.

¶67 Even accepting Cucarola's argument that the court was required to make specific findings before deciding *whether* to award fees, the water court's oral findings at the close of argument on Serratoga's Rule 41 motion, as well as its February 19 ruling, did "specifically set forth the reasons" for the decision to award fees. For example, as to Glover's claim that Mr. McDowell should be found

liable in his individual capacity (one of the claims for which fees were awarded), the court found that there had "not been one scintilla of evidence" and that the absence of evidence "was made crystal clear throughout the course of the testimony." The court further found that there had been many allegations pressed by Glover and Cucarola that Serratoga was "hiding the ball and conspiring and acting with malice and intentionally, that [Serratoga had] purportedly attempted to slander title and convey property fraudulently. There just is no evidence to support any of the allegations." Throughout its oral ruling on the Rule 41 motion and its February 19 ruling on the remaining matters, the court explained in different ways that the dismissed claims lacked any substantial justification. The court's findings were sufficient, and they did not deny any due process rights.

¶68 Cucarola also argues that he is entitled to a separate hearing and written briefing on the issue of attorney fees pursuant to Rule 121, section 1-22. This argument is correct, as far as it goes. But Cucarola ignores the fact that the water court very specifically provided in its February 19 ruling that it would be accepting written briefing pursuant to Rule 121 and that it would hold a hearing if one was requested. And, as we have explained, the court specified on multiple occasions that the briefing and hearing would address both the amount of the attorney fees award and its apportionment. Cucarola's assertion that he has been denied due process under these circumstances is frivolous.

## F. Appellate Attorney Fees

¶69 Serratoga has asked us to award appellate attorney fees in this appeal. While we do not believe that fees are appropriate for all of the arguments raised by Glover and Cucarola, we do believe that certain claims merit an award of attorney fees.

¶70 We may award attorney fees for costs incurred on appeal if we determine "that an appeal or cross-appeal is frivolous" pursuant to C.A.R. 38(b). *See also In re Est. of Shimizu*, 2016 COA 163, ¶ 34, 411 P.3d 211, 219 (describing an award of fees for a "frivolous" appeal under section 13-17-102). The purpose of doing so is "to deter 'egregious conduct,' and not to discourage legal theories that, while having no support in our extant decisional law, nevertheless may be persuasive by virtue of the unique character of the case." *Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 935 (Colo. 1993). It follows then that we award appellate fees only "in cases that are clear and unequivocal." *Id.* In this case, we conclude that several of the claims pursued on appeal are so frivolous that they merit an award of attorney fees.

¶71 In particular, Cucarola's assertion that the water court denied him due process rests on such a disregard of the record—including the court's specific findings as to the lack of substantial justification for the claims that were dismissed and the court's express invocation of Rule 121 in its February 19 ruling, together

with the stay of the hearing on fees pending this appeal—that the claim can only be fairly described as frivolous.

¶72 The same is true of Glover's claim on appeal that the water court failed to declare all of the parties' rights and duties in the subject easements. The water court gave declarations of the interests at multiple points during trial. Most notably, it summarized those rights in its detailed order denying Glover's Rule 59 motion in response to the same request. This claim asks for something the water court already provided at length and is frivolous.

¶73 Similarly, Glover's claim on appeal that the water court lacked jurisdiction because of the lack of publication of a resume notice disregards well-established principles of water law, including our decision in *King Consol. Ditch*, 250 P.3d at 1235. This claim unequivocally lacks any merit.

¶74 Finally, Glover and Cucarola pursued an appeal on claims that the water court repeatedly warned the parties lacked any evidence or support at multiple points during the water court proceeding. *See Spring Creek Ranchers Ass'n v. McNichols*, 165 P.3d 244, 246 (Colo. 2007) (affirming that an attorney was being "stubbornly litigious" where he brought "repetitive arguments lack[ing] substantial justification and lengthened the water court proceeding"). This disregard for existing law without credible supporting arguments warrants some award of fees to Serratoga, which had to expend additional resources to defend

these meritless arguments on appeal. In particular, the appellate claims as to trespass on a water right, nuisance, acting with malice, fraudulent conveyance, civil conspiracy, and the application of criminal statutes in the civil realm are so lacking in substance as to be frivolous.

¶75 For these reasons, we award Serratoga reasonable appellate attorney fees on the specific claims identified here, for which the amount will be determined on remand to the water court.

## III. Conclusion

¶76 For the reasons set forth above, we conclude that the water court properly exercised jurisdiction over the present case, and we affirm the water court's judgment, including its award of attorney fees. We also award Serratoga reasonable appellate attorney fees for specific claims and remand to the water court for further proceedings consistent with this opinion.