No. _____

IN THE
Supreme Court of the United States

Monaghan Farms, Inc.

Petitioner,

v.

City and County of Denver, Colorado

Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. BERGER*
**Counsel of Record*
MANATT, PHELPS & PHILLIPS
2049 Century Park East,
Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com

MICHAEL R. MCCORMICK
MONTGOMERY LITTLE & SORAN, PC
5445 DTC Parkway,
Suite 800
Greenwood Village, CO 80111
(303) 773-8100
mmccormick@montgomerylittle.com

Counsel for Petitioners

Counsel continued on next page.

ROBERT R. DUNCAN
THE LAW OFFICE OF ROBERT R. DUNCAN
1960 Forest Parkway
Denver, CO 80220
(303) 669-0932
rduncan@rrd-llc.com

QUESTIONS PRESENTED

The City and County of Denver condemned 8,360 acres of land from Petitioner Monaghan Farms as part of its land acquisition for the creation of the Denver International Airport, including a large area surrounding the facility to serve as an environmental buffer and safety zone. Thirty-four years later, Denver decided to use approximately half that land (which had not been used for airport purposes) for commercial non-aeronautical developments. But the power of eminent domain may only be used to take property for public use.

The Colorado courts exacerbated the situation by assuming that conversion to private, commercial, non-aeronautical use was an "airport purpose" as a matter of law, expressly refusing to permit discovery to ascertain the truth or accuracy of that assumption, and then deciding the case as a matter of law without a trial.

Question 1: Is it an appropriate application of *Kelo v. City of New London*, 545 U.S. 469 (2005) to take property for public use (in the sense of actual use by the public) and then later decide to devote that property to private commercial use without reconsidering the constitutional public use requirement?

Question 2: When property has been taken by eminent domain for a specific public use (construct and operate an airport), may that property later be devoted to a wholly different, commercial, non-aeronautical development that abandons the prior public use?

Question 3: Does this Court's recent decision in *Loper Bright* (2024) call for re-examining the duty of the judiciary to exercise independent judgment in deciding public use under *Kelo*?

Question 4: When a court decides a case based on a "legal" determination of a central "fact" while denying either discovery or trial on the merits, has it denied due process of law?

Question 5: Does it satisfy the Fifth Amendment's requirements for exercising eminent domain (incorporated through the Fourteenth Amendment against the states) for the sovereign to seize land in fee simple absolute when (1) the condemnation petition did not explicitly seek fee simple absolute title, (2) the condemnor did not pay full fair market value for the fee simple absolute rights to the property that was taken, (3) the property was not used for its intended public purpose, and (4) the property was later devoted to private use?

CORPORATE DISCLOSURE STATEMENT

Petitioner Monaghan Farms, Inc. is a private corporation. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

PARTIES TO THE PROCEEDING

Petitioner Monaghan Farms, Inc. is a Colorado corporation with its principal place of business in Colorado.

Respondent City and County of Denver is a Colorado home rule city. Its Department of Aviation owns and operates Denver International Airport.

STATEMENT OF RELATED PROCEEDINGS

City and County of Denver v. Monaghan Farms, Case No.: 2021CV33498 (Denver District Court); Judgment entered May 17, 2022.

City and County of Denver v. Monaghan Farms, Case no. 22CA0956 (Colorado Court of Appeals) decided June 29, 2023.

City and County of Denver v. Monaghan Farms, Case no. 2023SC580 (Colorado Supreme Court) order filed Aug. 5, 2024.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES (continued)

Page

CONSTITUTION

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

PETITION FOR WRIT OF CERTIORARI

Monaghan Farms seeks a writ of certiorari to review a decision of the Colorado Court of Appeals, Division III.

INTRODUCTION

Because of its breadth, *Kelo v. City of New London*, 545 U.S. 469 (2005) is allowing lower courts to develop aberrations in the law. This Court needs to provide some guardrails. This case provides a useful place to start.

Kelo, of course, allowed the condemnation of private property for transfer to a different private entity ("from A to B" in the Court's words) as long as the condemning agency believed that the taking was for a "public purpose." The question here is what happens if the initial use described in the condemnation petition is adequate to describe a public purpose—indeed, an actual public use—but the government fails to make that use and instead (years later) decides to devote the property to a purely private, profit-making use?

The true key to this case is whether the use that Denver *now* wants to make of the property that it forcibly took from Monaghan Farms is *in fact a* ***public*** *use*. Should the issue of whether the wholly different use serves a public purpose or use be addressed anew? Is the use that Denver now wants to make of the property that it forcibly took from Monaghan Farms via eminent domain a public use? If, in fact, it serves no such public purpose, should the property not be returned to the original owner or paid for? At least, should the original owner not

be compensated for the usurpation of private development rights by the government?

Put another way, the power of eminent domain was not designed as a tool for government agencies to attempt to wrest property from private parties in order to start their own profitable businesses or to turn the property over to some favored private parties who will make a profit and reward the condemnor with an increased tax pool. Yet that is the upshot of the decision below. If not overturned by this Court, the way will be paved for government agencies to subvert power that they possess only by virtue of being the government—power that is supposed to be used to advance the public weal—to enrich themselves or their friends. The Constitution should rebel at the thought. This Court needs to set the situation aright.

OPINIONS BELOW

The Colorado Court of Appeals issued its opinion on June 29, 2023, published as *City and County of Denver v. Monaghan Farms, Inc.*, 536 P.3d 825 (Colo. App. 2023). (App. p. 1a) A timely petition to the Colorado Supreme Court was denied without opinion on Aug. 5, 2024. (App. p. 17a)

JURISDICTION

The Colorado Supreme Court declined to exercise its discretionary review on August 5, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "... nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Monaghan Farms owned a large farm in rural Colorado.

Monaghan Farms, Inc. owned approximately 9,600 acres of land east of the Denver metro area in rural Colorado. Monaghan Farms used its property for wheat farming and oil and natural gas production. The property was improved with a few buildings including a headquarters, elevator and grain storage, and residences.

Monaghan Farms had its own vision for .the eventual use of its property. In the mid-1980s, Monaghan Farms was on the verge of developing its property with a master planned residential and mixed-use commercial development. After assembling 9,600 acres of land, it spent hundreds of thousands of dollars working with a design consultant to devise plans for a large, integrated project incorporating industrial, commercial, institutional, and residential uses. Eventually, they

developed a master plan for integrated development to serve the projected needs of the greater Denver area as well as a plan for marketing the properties.

B. Denver decides to create a mammoth new airport.

In the 1980s, Denver began planning for a new international airport to replace its aging Stapleton International Airport. One of the problems with the old airport was its close proximity to inhabited areas of Denver. Thus, in planning for its new airport, Denver chose a spot far out in generally uninhabited country. Denver consciously planned to avoid some of the environmental issues that plagued other airports (including its own Stapleton).[1]

Ironically, the changed use that Denver now seeks to make of the land condemned from Monaghan Farms would include erection of massive office buildings and other dense commercial uses that would subject the occupants to the environmental and safety ills that the original remote location of the new airport was

---

[1] For background discussion, see Michael M. Berger, *Nobody Loves An Airport*, 43 So. Calif. L. Rev. 631 (1970). Litigation dealing with adverse environmental impacts of airport operations has occupied significant judicial time. This even included suits brought by neighboring municipalities dealing with promises made by airport operators to the FAA in exchange for federal money for infrastructure construction. *See, e.g., City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972); *City of Romulus v. County of Wayne*, 634 F.2d 347 (6th Cir. 1980).

designed to avoid—not to mention the hazard of putting tall buildings in the vicinity of large aircraft landing and taking off.

C. Denver decides it has more land than it needs for airport use.

In acquiring land for its new airport, Denver took so much property that its land area makes it the second largest airport on earth, ranking behind only King Fahd International Airport in Saudi Arabia. The new Denver airport covers an area of 34,000 acres (some 52.4 square miles), which is nearly twice the size of Manhattan. (See App. p. 90a)

So, 34 years after it condemned the property from Monaghan Farms to construct and operate an airport, Denver decided to take about half of the airport (16,000 acres it had not used for airport purposes) and convert it into private commercial, profit-making space. In Denver's own words, this was for "commercial non-aeronautical land use development."[2]

Monaghan Farms protested. It did so in writing, complaining that its property had been forcibly taken by eminent domain to build an airport and as an environmental buffer to protect surrounding uses as well as a runway safety zone. Assuming *arguendo* that may have been the contemplated use

---

[2] The airport layout is depicted on the diagram attached as App. E, p. 90a. The green area, which had initially been planned as an environmental and safety buffer is now devoted to dense commercial use.

at the time, it is no longer. What may have once been a legitimate public use condemnation became something else entirely. Monaghan Farms asked that the property be used for construction of an airport, as originally specified in the condemnation petition, or that the unneeded property (or its value) be returned or paid for.

D. The Trial Court Grants Summary Judgment to Denver.

Denver filed suit, seeking to quiet its title in light of Monaghan Farms's protest. It urged that, (1) regardless of its current plans, the title it condemned was full fee simple absolute title; (2) Monaghan Farms was barred from asserting that it has any reversionary interest in the property because of Denver's abandonment of airport use and conversion to private, commercial, non-aeronautical use; and (3) that it was not required to devote the property to airport use forever and, in any event, leasing the property for private use would provide funds to lower the operating costs for airlines using the airport, thus qualifying it as "airport use."

The trial court refused to allow discovery on the issue of public airport use, although Denver presented extensive testimony aimed at proving the non-sequitur that non-aeronautical use is, in fact, aeronautical use. The trial court then entered summary judgment for Denver on the title issue. (App. p. 72a)

E. Appellate Proceedings.

The Court of Appeals affirmed. In so doing, that court held that the question of whether the newly proposed use is a "public" use, or whether the issue of "public" use must be addressed anew when the proposed use changes was not relevant and thus was not analyzed. Thus, the appellate court concluded that the issue of whether the "public" use claimed at the time of property condemnation needs to continue into the future was an issue of law and irrelevant to the question of the interest Denver initially condemned. (App. p. 1a)

The Colorado Supreme Court declined to review the matter. (App. p. 17a)

ARGUMENT

I.
It Is Time To Reexamine The Breadth Of The *Kelo* "Public Use" Determination. This Context Provides An Appropriate Platform To Begin That Process.

A. The *Kelo* Underpinning.

Much has happened since this Court decided *Kelo* nearly 20 years ago. Among other things, the author of that opinion has publicly called it "the most unpopular opinion that [he] wrote during" his entire tenure on the Court (Justice John Paul Stevens (Ret.), *Kelo, Popularity, and Substantive Due Process*, 63 Ala. L. Rev. 941, 941 (2012))—and he suggested that he might like to take a "mulligan" (Justice John Paul Stevens, *Judicial Predilections*, 6 Nev. L.J. 1 (2005)).

Indeed, not only was it Justice Stevens' least popular opinion, it may well be one of the Court's least popular opinions.[3] It was met almost immediately with a firestorm of protest in state legislatures which enacted statutes and constitutional amendments to ensure that the broad definition of "public use" appearing in *Kelo* was not part of their state's constitutional jurisprudence. (See, as illustrative of the numerous—and immediate—critiques of *Kelo*, Timothy Sandefur, *The Backlash So Far: Will Americans Get Meaningful Eminent Domain Reform?* 2006 Mich. St. L. Rev. 709 (2006); Gideon Kanner, Kelo v. New London: *Bad Law, Bad Policy, and Bad Judgment*, 38 Urb. Law. 201 (2006) (Kanner, *Bad Law*).)

But the Court need not look solely to legal commentaries or state legislative responses to understand the consternation generated by the issues raised by *Kelo* and the urge to reform (or, at least, constrain) its holding. In dissenting from a recent denial of certiorari, Justice Thomas, joined by Justice Gorsuch, urged the Court to look for opportunities to reexamine the bases of *Kelo*:

> "First, this petition provides us the opportunity to correct the mistake the Court made in *Kelo*. There, the Court found the Fifth Amendment's 'public use' requirement satisfied when a city transferred land from one private owner to another in the name of economic

[3] Justice Stevens charitably referred to his *Kelo* opinion as "much criticized." (6 Nev. L.J. at 3.)

> development. That decision was wrong the day it was decided. And it remains wrong today. 'Public use' means something more than any conceivable 'public purpose.' … Taking land from one private party to give to another rarely will be for 'public use.' The majority in *Kelo* strayed from the Constitution to diminish the right to be free from private takings.
>
> "Second, even accepting *Kelo* as good law, this petition allows us to clarify the Public Use Clause and its remaining limits. *Kelo* weakened the public-use requirement but did not abolish it.… This Court should not stand by as lower courts further dismantle constitutional safeguards." *Eychaner v. City of Chicago*, 141 S. Ct. 2422, 2423 (2021) (dissenting opinion) (cleaned up).

This case presents a variant of *Kelo* and an opportunity to place some guardrails around it. Here, although the condemnor recited a legitimate sounding—indeed, actual—public use at the time it filed suit to condemn the subject property, it later had a change of municipal heart and decided to devote about half of this substantial, multi-thousand acre taking to purely private, profit-making, non-aeronautical commercial uses.

Kelo, as this Court is aware, held that the constitutional term "public use" could be equated with the concept of "public purpose," thus greatly broadening the potential use of that concept. As the Court also knows, that holding came in for substantial criticism, and even alarm from almost

every state legislature. As one scholar put it, the decision engaged in "overreaching semantic gymnastics," suggesting that the simple replacement of the word "use" with "purpose" in the sentence "I need to purpose [use?] your lawn mower" demonstrates that the words are not equivalent. (Kanner, *Bad Law*, 38 Urb. Law. at 202.)

Here, the courts below decided that they could duck the issue by holding that the public use issue was simply irrelevant to determining what interest was originally condemned. Denver's complaint presented an issue to the trial court regarding whether "commercial non-aeronautical land uses at Denver International Airport … is in the service and support of DEN and therefore is a public airport use." (App. pp. 6a, 73a) However, the trial court's order granting summary judgment held "the determination of this factual issue is irrelevant" (App. p. 7a) and Denver's claims regarding the property interest Denver condemned could be "determined as a matter of law" (App. p. 77a).

The Court of Appeals likewise held Denver's claim regarding "public airport use" need not be reached as a matter of law because the court agreed with Denver that it was not relevant to the property interest Denver condemned. (App. p. 6a.)

Assuming *arguendo* that commercial non-aeronautical land use is *a* "public" purpose, it is clearly not *the* public purpose for which eminent domain was invoked to force the transfer of the property by court order in the first place.

That is a radical expansion of *Kelo*. At least in *Kelo*, the city was open about condemning the property in order to transfer it to other private entities for private development in order to increase the city's tax base.[4] For better or worse, the Court concluded that it would accept the city's assertion that this was in the general public interest, thus satisfying the public use (if read as "purpose") requirement.

Here, however, the initial condemnation was said to be directly for the creation of a mammoth new international airport. Ultimately, Denver's reach may have exceeded its grasp, and it ended up with thousands of acres of land that was not needed for airport construction. So it decided to turn a profit instead of maintaining a large environmental buffer and safety zone around its new airport.

B. The *Beistline* Diversion.

Making profitable investments is not the job of local government. More to the point, exercising the power of eminent domain to wrest property from private citizens in order to lay the foundation for

---

[4] In that sense, *Kelo* built on *Berman v. Parker*, 348 U.S. 26 (1954) which permitted the condemnation of sound structures in an otherwise blighted neighborhood to further comprehensive reconstruction of the neighborhood. But that is not this case either. The Monaghan Farms parcels are not blighted and there is no urban renewal here.

speculative profit-making enterprises is certainly not the job of municipal government. [5]

In upholding the propriety of such action, the courts below said they relied on federal law as described in the Ninth Circuit Court of Appeals' decision in *Beistline v. City of San Diego*, 256 F.2d 421 (9th Cir. 1958).

But *Beistline* is incapable of carrying the freight that the Colorado courts piled on it. To be sure, that opinion *says* that once a condemnation action is based on a legitimate sounding "public use" the issue is over. It cannot be questioned later if the condemning agency decides to make a wholly different (and arguably not public) use.

But *Beistline* contains no analysis to back up its decision. It essentially says "because we said so." But that is not—or, at least, should not be—the stuff of constitutional adjudication.[6] This strips the

---

[5] The power of eminent domain has rightly been described by various courts as "awesome." As one court put it, "The power of eminent domain, *next to that of conscription of man power for war*, is the most awesome grant of power under the law of the land." *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) (emphasis added); *see also Township of West Orange v. 769 Assoc., LLC*, 969 A.2d 1080, 1085 (N.J. 2009); *Maryland Plaza Redev. Corp. v. Greenberg*, 594 S.W.2d 284, 291 (Mo. App. 1979); *City of Oakland v. Oakland Raiders*, 220 Cal.Rptr. 153, 156 (Cal. App. 1985); *Miles v. Dawson*, 830 S.W.2d 368, 370 (Ky. 1991).

[6] A nationally recognized eminent domain scholar describes *Beistline* as "singularly uninformative." Gideon Kanner, *We Don't Have To Follow Any Stinkin' Planning – Sorry About That, Justice Stevens*, 39 Urb. Law. 529, 548 (2007) (Kanner, *Stinkin'*).

landowner of all constitutional Fifth Amendment protection after the time of the initial taking.

Beistline began from a false premise, i.e., that the sale was a "voluntary" one that involved no coercion by the government. That is wrong as a simple matter of definition. In that case, the city had actually filed suit to condemn the property. The parties then (as is often the case) settled the case by agreeing on a price and transferring title. But no one believes such a transfer is truly "voluntary." As one court put it:

> "A proceeding to condemn is, in substance, a proceeding *to compel a sale* by the owner to the petitioner, * * * . *Atlanta, K. & N.R. Co. v. Southern R. Co.*, 6 Cir., 131 F. 657, 666." *Hawaiian Gas Prod. v. Comm'r of Internal Revenue*, 126 F.2d 4, 5 (9th Cir. 1942) (emphasis added).

As this Court put it recently:

> "Eminent domain is the power of the government to take property for public use *without the consent* of the owner." *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 487 (2021) (emphasis added).

Indeed, *Beistline* itself cites *Hawaiian Gas* for the proposition that "a condemnation proceeding is by its very nature a forced or compulsory sale." (256 F.2d at 423.) Conceding that, *Beistline* concludes in true *non sequitur* fashion that "[n]o such theory [i.e., compulsory sale] does or could exist in the law of condemnation …." (*Id.*)

Beistline thus disproves its own premise and, perforce, its holding. Condemnation law uniformly recognizes that sales to a condemning authority are, by definition, not voluntary. Thus, such sales are uniformly precluded from use as "comparable sales" for valuation purposes precisely because they are not arms' length transactions between parties, neither of which is under any pressure to sell or buy. *See*, *e.g.*, *Pinczkowski v. Milwaukee County*, 687 N.W.2d 791, 798 (Wis. App. 2004); *Dean v. Board of County Sup'rs,* 708 S.E.2d 830, 832-33 (Va. 2011); *Board of Trustees v. Shapiro*, 799 N.E.2d 383 (Ill. App. 2003); *Harrington v. Vermont Agency of Transp.,* 971 A.2d 658, 660 (Vt. 2009). *Cf.* 26 U.S.C. § 1033 (property compulsorily or involuntarily converted as a result of 'condemnation or threat or imminence thereof' afforded beneficial tax treatment)."

Proceeding from that erroneous premise, *Beistline* then asserts that the only time to evaluate public use is the time of the initial condemnation. Nothing after that matters. For this proposition, the Court of Appeals cites one old decision of this Court, *Reichelderfer v. Quinn*, 287 U.S. 315 (1932). But that case clearly involved the change from one clearly public use to another (park to fire station). There was no question that the initial taking was for a public use and so was the changed use.

The old California cases cited by *Beistline* are of no help either. *Spinks v. City of Los Angeles*, 31 P.2d 193 (1936), for example, likewise involved an obvious public use change, from public park to public street. To the extent that *Spinks* casts any

light on the issues here, it supports Monaghan Farms. In the California Supreme Court's words:

> "Where a tract of land is donated to a city with a restriction upon its use—as, for instance, when it is donated or dedicated solely for a park—the city *cannot legally divert the use of such property to purposes inconsistent with the terms of the grant*." *Id.* at 194 (emphasis added).

So, here, the property was taken for the express purpose of building a new airport. Period. Not as a municipal investment vehicle.

The other California cases cited are to the same effect, and provide no support for the proposition that land taken for an *actual public use* may be turned into a private, profit-making use.

Thus *Beistline*, the case on which the Colorado courts placed their reliance has, in fact, no foundation. It cannot support the result reached below.

That is why this case provides a solid basis for the Court to delve further into the holding and effects of *Kelo*. The issue squarely presented here is whether a radical change in use of condemned property, from construction of a public airport to the opening of for profit, non-aeronautical, businesses requires a new look at the public use issue. If the property is no longer needed for the new airport, and it is better suited to private commercial use, then it ought to be returned to the former owner to make such use, or else paid for.

II.
When The Government Condemns Far More Land Than It Needs For Its Public Project, The Constitutional Rights Of The Underlying Property Owner Should Require That Any Remainder Be Returned Or Paid For, Rather Than Enriching The Government For Converting It To Private Commercial Use.

This case starkly presents the issue of abuse of the eminent domain power. It is not a case of simply having a leftover scrap of unneeded or unusable property after legitimately condemning property for a public project and then building the project. Here, Denver condemned enough land to allow it to build—if it chose—the second largest airport on the planet. But it did not do that. Of the 8,360 acres that it condemned from Monaghan Farms, it later decided it needed only about half of that, and could devote the remaining thousands of acres to private, commercial, profit-making use.

Government should not be in the business of speculating in real estate. Government officials are not equipped to evaluate risks associated with commercial real estate development because they lack expertise in real estate markets. In attempting to enter the commercial development market, they are gambling with public funds, not their own investments, thus having no personal stake in the project. Even when they engage in studies (as this Court believed was done in *Kelo*), they do not always get it right (as all subsequent examinations

of the aftermath of *Kelo* have shown).[7] It should particularly not be allowed to engage the coercive power of eminent domain to take private property for a legitimate sounding public purpose and then later decide to convert it to a profit-making enterprise. That is not the business of government. *See* Kevin L. Cooney, *A Profit For the Taking: Sale of Condemned Property After Abandonment of the Proposed Public Use*, 74 Wash. U.L.Q. 751 (1996). If property is to be put to profit-making use, then the private, free enterprise system ought to be allowed to work.

After all, at the time Denver initially condemned this property, Monaghan Farms had been working on plans of its own to develop this land for a mixed residential and business community. No reason appears why it should not be restored to that position. Or at least be compensated for the loss of this economic opportunity.

As Israel's High Court of Justice summarized it, "expropriation was not intended to enrich the state." HCJ 2390/96, *Karsik v. State of Israel*, 55(2) PD 625 (p. 22) (2001) (For further discussion see Danielle Marx, *Takings and the Requirement of Ongoing Public Purpose*, 36 Isr. L. Rev. 151 (2002).

A. The Property Owner's Interests Should be Paramount Under the Constitution.

As the rights of property owners who are the targets of eminent domain are protected by the

---

[7] See, e.g., Kanner, *Bad Law,* 39 Urb. Law. at 536-37.

Fifth Amendment, the rights of the condemning agency are generally construed strictly against the government. (*Warm Springs Irr. Dist. v. Pacific Live Stock Co.*, 270 F. 560 (9th Cir. 1921); *Johnson v. Preston*, 203 N.E.2d 505 (Ohio App. 1963); *McMechan v. Board of Education*, 105 N.E.2d 270 (Ohio 1952).) The documents filed in support of the condemnation generally limit the scope of the taking. (*Alemany v. Comm'r of Transp.*, 576 A.2d 503 (Conn. 1990); *see also Isley v. Bogart*, 338 F.2d 33 (10th Cir. 1964); *Superior Oil Co. v. Harsh*, 39 F. Supp. 467 (E.D. Ill. 1941), *aff'd*, 126 F.2d 572 (7th Cir. 1942).) In like manner, the compensation paid provides direction whether a fee simple absolute, or some lesser estate, was condemned. (*Canova v. Shell Pipeline Co.*, 290 F.3d 753 (5th Cir. 2002); *Town of Morganton v. Hutton & Bourbonnais Co.*, 112 S.E.2d 111 (N.C. 1960); *Jones v. Oklahoma City*, 137 P.2d 233 (Okla. 1941).)

Where there are doubts, ambiguities should be resolved in favor of the property owner. (*General Hospital Corp. v. Massachusetts Bay Transp. Authority*, 672 N.E.2d 521 (Mass. 1996); *Egaas v. Columbia County*, 673 P.2d 1372 (Or. App. 1983).)

Here, the record shows that Denver did not directly ask for fee simple absolute title. The record also shows that the compensation it paid was for less than the adjudicated value of a full fee simple absolute estate in this land.

When anything less than fee simple absolute title is condemned, the use of the condemned property interest must be for and in accordance with the purposes which justified the

condemnation. (*United States v. Burmeister*, 172 F.2d 478 (10th Cir. 1949); *Spears v. Kansas City Power & Light Co.*, 455 P.2d 496 (Kan. 1969).)

Plainly, the reason that Denver decided after the fact to assert that it took "fee simple absolute" title was that general real estate law endows the holders of such interests the ability to do as they see fit with their property.

Thus, the assertion that Denver took such title bolsters the idea that there is no need to reexamine the public use issue if the use later changes. But if Denver is wrong—as the record would show if the issue had been allowed to proceed on its merits—no such absolute title was even sought in the condemnation petition.

Guidance on the proper resolution of this issue comes from Israel's High Court of Justice. Faced with a situation similar to the one here, that Court concluded that:

> "Indeed, an authority that has expropriated land for a specific purpose and for many years makes no use of the land for the purpose for which the land was expropriated, in its very omission reveals that it does not need the land that was expropriated; not at the time it was expropriated and not for the purpose for which it was appropriated.… From here the accepted legal rule follows, that unreasonable delay by the authority in accomplishing the purpose of the expropriation grants the individual the right to demand the cancellation of the

expropriation." (*Karsik v. State of Israel*, HCJ 2390/96, p. 21 (2001).)

As the Fifth Amendment guarantees have been incorporated into the Fourteenth Amendment's due process guarantee (*Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897)), Colorado cannot provide less protection to property owners than other states or the United States. It can only provide more protection, as the Fifth Amendment serves as a floor. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923) (state "powerless to diminish" rights, but may increase them); *Mills v. Rogers*, 457 U.S. 291, 300 (1982) (U.S. Constitution provides "minimum" protection to which all are entitled); see also Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988) ("the federal Constitution stands as a secure political safety net—*a floor below which state law may not fall*"; emphasis added.)

B. When The Government's Interests Are Financial, Its Actions Must Be Viewed With Skepticism.

Underlying the Court's conclusion that Constitutional decisions necessarily impinge on the freedom and flexibility of government agencies (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987)) was undoubtedly the Court's repeated recognition that, when the governmental interest is financial, its actions must be viewed warily. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) ("complete deference to a legislative

assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. *A governmental entity can always find a use for extra money ....*" (emphasis added); *United States v. Good Real Property*, 510 U.S. 43, 55-56 (1993) (careful examination "is of particular importance ... where the Government has a direct pecuniary interest in the outcome of the proceeding"); *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (concerns regarding "statutes tainted by a governmental object of self-relief ... in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties").

To allow Denver to decide to engage in profit-making enterprises on land that it condemned, rather than leaving it in private hands so that such activities could be undertaken by private enterprise undercuts our constitutional system. Bluntly, "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." (*United States v. Cors*, 337 U.S. 325, 332 (1949).)

III.
This Court's Recent Decision in *Loper Bright* (2024) Calls For Re-Examining The Duty Of The Judiciary To Exercise Independent Judgment In Deciding Public Use Under *Kelo.*

In *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2263 (2024) this Court held courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and that courts may not defer to an agency interpretation of the law simply because a

statute is ambiguous. *See also West Virginia v. Environmental Protection Agency*, 597 U.S. 697, 699 (2022) (major questions doctrine). Because this Court found this is true with respect to a statute, the principle should apply with even greater force with respect to the Takings Clause in the Constitution.

It is true that in *Kelo* the Court gave deference to the city's administrative planning process. (See, e.g., the discussion at 545 U.S. at 483-84.) The Court concluded that the state court decision had been based on a "carefully considered" development plan. (545 U.S. at 478)[8] However, the extent of that deference is now called into question by this Court's decision in *Loper Bright*.

But what is even more troubling is that at least in *Kelo*, the Court acknowledged its basic duty to determine public use: "This Court's authority … extends … to determining whether … proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution." (*Kelo*, 545 U.S. at 489-90.) However in this case, while the Colorado courts were presented with the public use issue, they refused to exercise their independent judgment to determine Public Use. Instead, an agency used its extraordinary power of eminent domain to force the sale of land to be used to construct one of the world's largest airports and then, abruptly,

[8] It turns out that was just so much "hortatory fluff," as Justice O'Connor explained in her dissent. (545 U.S. at 497) For further analysis see, e.g., Gideon Kanner, *Stinkin'*, 39 Urb. Law. 529 (2007).

changed its mind to use nearly half of the massive area condemned for private commercial use—without any court taking the time or effort to analyze the propriety of that change. The Colorado courts simply rubber-stamped Denver's radical change of plans without examination.

With respect, such judicial abdication flies in the face of American jurisprudence. "It is well established that…the question [of] what is a public use is a judicial one." (*City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).) As this Court recently summarized:

> "The Framers … envisioned that the final interpretation of the laws would be the proper and peculiar province of the courts. Unlike the political branches, the courts would by design exercise neither Force nor Will, but merely judgment. To ensure the steady, upright and impartial administration of the laws, the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches.
>
> "This Court embraced the Framers' understanding of the judicial function early on." (*Loper Bright*, 144 S.Ct. at 2257.)

Accordingly, certiorari is necessary to re-examine the duty of the judiciary to exercise its independent judgment in deciding Public Use under *Loper Bright* and *Kelo*.

IV.
Where A Disputed Fact Is At The Core Of A Litigation, It Is Not Proper To Decide It As A Matter Of "Law"

A. The General Rule.

At the heart of this case is the question of whether using thousands of acres of land condemned to develop an airport to create, instead, a for-profit commercial, non-aeronautical, enterprise is a "public" use in any sense of the word. Whether the answer to that question is one of fact or law is central to the propriety of the decision below.

The trial court held that the "public" use issue was "irrelevant" and that it had meaning only at the time of the initial condemnation. So saying, it forensically swept the public use issue under a broad judicial rug that hid the issue from view.

"Legal" issues are those that "can be resolved *without* reference to *any disputed facts*." *Dupree v. Younger*, 598 U.S. 729, 735 (2023) (emphasis added). Distinguishing "law" from "fact" is not always easy. Indeed, this Court has noted "the vexing nature of the distinction between questions of fact and questions of law." *E.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

> "Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.' [Citation.] In making that determination, a court must view the evidence 'in the light most

favorable to the opposing party.'" *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (*quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

Denver has plainly understood throughout that the issue of whether its scheme actually satisfied the "public use" mandate was important to the case. That is why it raised the issue as a claim in its complaint. When moving for summary judgment, however, it sought to leave that issue off the table, saying that a decision in its favor on the other issues would allow it (and the courts) to avoid coming to grips with the centrality of current public use to its case. Denver escaped and evaded this issue with smoke and mirrors, persuading the trial court and the Colorado appellate courts that this threshold issue did not have to be squarely addressed—and it never was.

This Court should not be fooled.

B. Converting Land Condemned To Create Environmental Buffers And Safety Zones Into Profit Making Private Ventures Cannot Be Assumed To Be A "Public Use"

When Denver announced the plans for its new airport, it proudly proclaimed that it was acquiring so much land that it would be able to surround the core facilities with a large buffer area to protect any eventual neighbors from the side effects of airport operations (noise, dust, fumes, etc.). It was familiar with those problems because its own airport (Stapleton) was plagued by them, just as other urban airports had been for years. Building a

new airport far into the rural countryside gave Denver the opportunity to avoid such problems. Denver proudly proclaimed that it was creating the most environmentally compatible airport in the country because of the location of the new facility, the method of its operation and noise buffer areas surrounding the new airport.[9]

Likewise, Denver wisely decided to create airport safety zones prohibiting any non-airport related structures from being built near the end of the runways to prevent both people and property from getting hurt or damaged by airplane crashes.

Fast forward. Denver decided that it had so much land that it could use some of it to make money or offset the cost of operations for its airline clients. The 1988 airport design had a large land area because of the large airport noise contours and safety zones that were supposed to make it the most environmentally compatible airport in the world. (See App. p. 90a, a drawing Denver prepared showing the buffer zone in green.) Now Denver is going to fill in those noise contours and safety zones with as many high-density commercial office buildings as possible out of greed for tax revenues and to lower operating costs for the private airlines using the airport.

If the Court needed a stark reminder of the wisdom in its conclusion in *United States Trust*, 431 U.S. at 26, that "[a] governmental entity can always find a use for extra money," this is it. Denver's decision to convert a carefully planned

---

[9] See authorities cited *supra*, p. 4, fn. 1.

environmental buffer and safety zone into a cash cow, disavowing promises to its own citizens as well as the FAA should not have received the seal of approval from the Colorado courts.

V.
It Violates the Fifth Amendment Protection of Property Owners in Eminent Domain to Grant the Government Fee Simple Absolute Title Where (1) the Condemnation Petition Never Explicitly Sought Fee Simple Absolute Title, (2) the Condemnor Did Not Pay Full Fair Market Value For the Fee Simple Absolute Rights to the Property, (3) the Property Was Not Used For Its Specified Public Purpose, And (4) the Property Was Later Devoted to Private Use.

The reason that the lower courts said they were able to duck the central "public use" issue was that they said that the interest taken by Denver in the original condemnation lawsuit was full fee simple absolute title. (App. p. 7a) But that begs the question. It simply *assumes* that Denver acquired fee simple absolute title because it *now says* that is what it took.

But Denver's current assertions must be compared to the court files below. These facts appear: *First*, the condemnation petition did not explicitly seek fee simple absolute title. *Second*, Denver did not pay the full fair market value of fee simple absolute title. *Third*, the condemnation decree did not transfer full fee simple absolute title. *Fourth*, the property was not put to the public

purpose specified in the condemnation petition—at least nearly half of it was not. *Finally*, Denver now wants to devote the property to profit-making, private commercial use to lower the operating costs for airlines. The property was not condemned for that.

Although not technically part of the Court of Appeals' opinion, the following note precedes it in the printed version:

> "A division of the court of appeals holds that when a city acquired private land through eminent domain, it acquired those parcels in fee simple absolute despite the fact that (1) the condemnation petition didn't explicitly request condemnation in fee simple absolute, (2) the city didn't pay full market value for the parcels, and (3) the parcels were later leased for private commercial use." (App. p. 1a)

Albeit not written by the Court of Appeals itself, it is a concise summary of what happened below. It reinforces Monaghan Farms' reading of the record. And it demonstrates how an objective reader of this record confirms what Denver (and the lower courts) did and did not do. Pandora's Box has been opened.

In eminent domain proceedings, property owners are largely at the mercy of government condemnors. Once an agency with the "despotic" power of eminent domain (see *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 311-12 (1795)) decides to exercise it, it is virtually impossible for a property owner to fight. Even though some such actions result in "settlements," the reality is that the

looming eminent domain power removes any voluntariness that might otherwise appear.

The Colorado courts have cast their net too broadly. They have created a system in which the government may essentially do as it pleases in wielding the awesome power of eminent domain. They have gone beyond the basic requirements laid down by the Fifth Amendment and this Court's decisions. It is time to call a halt, and the place to do so is here. As Justice Thomas put it recently,

> "our role is to enforce the Takings Clause as written …." *Knick v. Township of Scott*, 588 U.S. 180, 207 (2019) (concurring opinion).

That rejected the position of the United States, which "urge[d] us not to enforce the Takings Clause as written …." *Id.* at 206. The same response is appropriate here. The basic and fundamental protections of the Fifth Amendment need to be enforced against all government agencies.

CONCLUSION

The Colorado Courts have abused this Court's expansive definition of "public use" and allowed Denver to use its eminent domain power for its own enrichment. This must be stopped.

Certiorari should be granted.

Respectfully submitted,

MICHAEL M. BERGER*
**Counsel of Record*
MANATT, PHELPS & PHILLIPS
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com

COUNSEL FOR PETITIONER
MONAGHAN FARMS

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE COLORADO COURT OF APPEALS, FILED JUNE 29, 2023

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
June 29, 2023

2023COA60

No. 22CA0956, *Denver v. Monaghan Farms* — Eminent Domain — Condemnation; Real Property — Present Estates and Future Interests — Fee Simple Absolute — Possibility of Reverter

A division of the court of appeals holds that when a city acquired private land through eminent domain, it acquired those parcels in fee simple absolute despite the fact that (1) the condemnation petition didn't explicitly request condemnation in fee simple absolute, (2) the city didn't pay full market value for the parcels, and (3) the parcels were later leased for private commercial use.

Appendix A

COURT OF APPEALS OF COLORADO,
DIVISION THREE

Court of Appeals No. 22CA0956

CITY AND COUNTY OF DENVER,
A COLORADO MUNICIPAL CORPORATION,

Plaintiff-Appellee,

v.

MONAGHAN FARMS, INC.,
A COLORADO CORPORATION,

Defendant-Appellant.

JUDGMENT AFFIRMED.

Division III
Opinion by JUDGE GRAHAM[*].
Lum and Bernard[*], JJ., concur.

Announced June 29, 2023

Defendant-appellant, Monaghan Farms, Inc. (MF), appeals the district court's orders (1) denying MF's motion to dismiss for failure to join an indispensable party

[*] Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

under C.R.C.P. 12(b)(6); (2) granting summary judgment for plaintiff-appellee, the City and County of Denver (Denver), on its first (quiet title) and second (release of claims) claims; (3) denying MF's C.R.C.P. 56(f) motion for a denial or continuance on Denver's summary judgment motion; and (4) entering a final judgment and decree quieting title in favor of Denver. We affirm the judgment of the district court.

I. Background

This appeal concerns MF's attempt to recover land ceded to Denver via eminent domain over thirty years ago. In 1988, Denver filed a petition to condemn 8,360 acres of land — the Monaghan Parcels — for the purpose of constructing and operating what would become Denver International Airport (DIA). After Denver was granted immediate possession of the Monaghan Parcels, the condemnation court appointed three commissioners and held a hearing to determine the compensation to which MF was entitled.

The condemnation court entered a "Rule and Decree in Condemnation," stating that upon payment to MF of $27,155,218.31, plus interest, Denver would be "the absolute holder and owner in unconditional fee simple absolute, free of all rights of reversion and reversionary interests," of the Monaghan Parcels. A little over a month later, the court updated the total compensation due to $27,455,218.31 in its "Amended Rule and Decree in Condemnation," correcting a clerical mistake in the prior order. The court determined the fair value of the Monaghan Parcels to be $38,455,218.31.

Both parties eventually appealed the matter to the Colorado Supreme Court, but they settled their respective claims before the case was decided.

The settlement agreement, signed on November 12, 1992, memorialized the parties' agreement as follows:

- Denver would pay MF $30,096,000, less the $11,340,000 that MF had already withdrawn from the court registry, resulting in a net payment of $18,756,000. The parties agreed that this value was not necessarily reflective of the actual market value of the Monaghan Parcels.

- The parties would jointly file a motion for dismissal of the pending appeal with prejudice and remand to the district court for (1) vacatur of the earlier Rule and Decrees; (2) entry of a "Second Amended Rule and Order"; and (3) disbursement of funds consistent with the agreement.

- The parties would release each other (and their predecessors, successors, etc.) "from each and every cause of action . . . which the releasing parties had, may now have, or which may hereafter arise against any of the released parties by reason of any act, omission, matter, event, cause or other thing whatsoever occurring prior to the date hereof."

The settlement was conditioned on the condemnation court, upon remand, adopting the settlement as an order of the court and issuing an order for the agreed-upon

disbursement of funds, among other things. If those conditions weren't met, then each party's obligations under the agreement would terminate.

On remand, the condemnation court entered its Second Amended Rule and Order, *nunc pro tunc* to January 30, 1990;[1] vacated its prior two orders; and specified "that all interests of [MF] in said property have been acquired by [Denver,] and that title to the property described in Exhibit A appurtenances thereto belonging, free and clear of all liens and encumbrances, is hereby vested in [Denver.]" Exhibit A described the property as "[a]ll property interests in, above, on and below the surface of the [Monaghan] Parcels."

In May 2017, after learning that Denver planned to lease part of the condemned property for private commercial use instead of for DIA, MF sent a letter to Denver requesting good faith negotiations under the settlement agreement, contending that it retained a "right to reversion" if the parcels were no longer used for DIA. The letter set forth MF's request as follows:

> [MF] respectfully demands that Denver immediately cease and desist any private commercial use of the Private Use Parcels and instead use the Monaghan Property solely for public airport uses.

1. The Second Amended Rule and Order was originally entered on November 19, 1992.

> Alternatively, if Denver refuses to cease using the Monaghan Property for private commercial uses, then [MF] respectfully requests that Denver convey title to the Private Use Parcels back to [MF].

On April 20, 2020, MF sent Denver another letter, reasserting its intent to pursue claims for reversion.

On November 3, 2021, Denver filed its complaint against MF for quiet title and declaratory judgment. It requested (1) an order quieting its title to the Monaghan Parcels and rejecting any claims to a right of reverter by MF; (2) a declaration that the 1992 settlement agreement barred MF from pursuing any claims that it had any reversionary interest in or to the Monaghan Parcels; and (3) a declaration that the development of commercial, non-aeronautical land uses at DIA, including within any Monaghan Parcels, was in the service and support of DIA, and therefore a "public airport use."

MF then filed a motion to dismiss for failure to join an indispensable party pursuant to C.R.C.P. 12(b)(6), asserting that Adams County should be joined. Before a hearing could be held on the motion to dismiss, Denver filed its motion for summary judgment on its claims to quiet title and to release claims, arguing that those claims were determinative and should be considered first because the public use issue was relevant only to the motion to dismiss. The court heard argument on those two claims.

After the hearing, MF filed a motion to deny the two claims outright or to delay the court's ruling on the summary judgment motion so that MF could conduct discovery pursuant to C.R.C.P. 56(f).

The district court ruled on the motions, concluding that discovery was not necessary to determine whether Denver's specified land use was a "public airport use" because that issue was irrelevant to Denver's first and second claims. It therefore denied MF's motion to dismiss (finding that Adams County wasn't a party necessary to its adjudication), rejected MF's request to conduct discovery, and granted Denver's motion in part.

As to the quiet title claim, the court found that the use of the phrase "all property interests" in Exhibit A, discussed above, meant that Denver sought and received title to the Monaghan Parcels in fee simple absolute.[2] It further determined that MF did not retain a reversionary interest in the property and that the release provisions in the settlement agreement included any purported right of reversion following condemnation.

The court also found that the settlement agreement was unambiguous, making extrinsic evidence inadmissible in its interpretation of the agreement, and that MF had failed to engage in good faith negotiations with Denver.

---

2. Denver's title is subject to specified exceptions for each parcel identified in Exhibit A related to mineral rights and prior right-of-way easements, none of which are relevant here.

Appendix A

On May 17, 2022, the court entered its "Final Judgment and Decree," declaring that Denver owns the Monaghan Parcels in fee simple absolute and that [MF] retains no residual interest in the property.

MF now appeals the following conclusions from the court's order for summary judgment: (1) the 1992 settlement agreement released MF's claims arising from prior-occurring events; and (2) Denver acquired title to the Monaghan Parcels in fee simple absolute. It also appeals (3) the court's denial of its motion to dismiss finding that Adams County was not a necessary party; and (4) its entry of the Final Judgment and Decree, quieting title in the Monaghan Parcels. Because we agree with Denver that it acquired the Monaghan Parcels in fee simple absolute, we need not reach MF's remaining contentions.

II. Nature of the Condemned Parcels

MF contends that the district court committed reversible error by concluding that Denver condemned the Monaghan Parcels in fee simple absolute because Denver's 1988 petition didn't request condemnation in fee simple absolute, nor did Denver pay for the parcels to be taken in fee simple absolute. MF asserts that Denver merely obtained a defeasible fee subject to the possibility of reverter should the land not be used for "public airport use." Denver counters that the 1992 settlement agreement combined with the Second Amended Rule and Order conveyed the Monaghan Parcels in fee simple absolute and that MF retains no reversionary interest in the property. We agree with Denver.

Appendix A

A. Additional Facts

In the 1988 condemnation petition, Denver sought to acquire "[a]ll property interests in, above, on and below the surface of the Parcels," subject to several exclusions of mineral rights and utility easements not relevant here. Notably, the petition contains no mention of a possibility of reverter, nor do the 1992 settlement agreement or the Second Amended Rule and Order. Instead, the Second Amended Rule and Order describes the acquired interests as follows:

> The entry of this Second Amended Rule and Order resolving and settling this action between the parties, including the full compensation to be paid for the taking of *said property described in the Petition in Condemnation filed herein, including all appurtenances thereto, and any and all interests therein*, including damages, if any, and for any and all other costs of said parties, including, but not limited to, appraisal and other expert witness fees, including all reports, discovery costs and expenses, trial preparation time, reimbursable costs, and any and all interest, before or after the entry of judgment, to which [MF] may be entitled, if any . . . .
>
> . . . .
>
> ORDERED, ADJUDGED, AND DECREED that the property and interests therein

> described in Exhibit A attached hereto and incorporated herein by reference have been duly and lawfully taken by [Denver] pursuant to the statutes and the Constitution of the State of Colorado; *that all interests of [MF] in said property have been acquired by [Denver]*; and that title to the property described in Exhibit A, together with all appurtenances thereto belonging, *free and clear of all liens and encumbrances*, is hereby vested in [Denver].

(Emphases added.)

B. Standard of Review

We review de novo the court's order granting summary judgment, applying the same standard as the district court. *Keith v. Kinney*, 140 P.3d 141, 151 (Colo. App. 2005). Thus, we must determine whether a genuine issue of material fact exists and whether the district court correctly applied the law. C.R.C.P. 56(c); *Poudre Sch. Dist. R-1 v. Stanczyk*, 2021 CO 57, ¶ 12, 489 P.3d 743.

In resolving a motion for summary judgment, "[a] court must give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed evidence and resolve all doubts in favor of the nonmoving party." *Wagner v. Planned Parenthood Fed'n of Am., Inc.*, 2019 COA 26, ¶ 6, 471 P.3d 1089, *aff'd*, 2020 CO 51, 467 P.3d 287. The nonmoving party may not rely on "mere allegations or denials" of the moving party's pleadings but must identify specific facts, through

affidavits or otherwise, that show there is a genuine triable issue sufficient to allow a reasonable jury to return a verdict in its favor. *A-1 Auto Repair & Detail, Inc. v. Bilunas-Hardy*, 93 P.3d 598, 603 (Colo. App. 2004); *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007).

C. Applicable Law

"The interpretation of a settlement agreement, like any contract, is a question of law that we review de novo." *Ringquist v. Wall Custom Homes, LLC*, 176 P.3d 846, 849 (Colo. App. 2007); *see also CapitalValue Advisors, LLC v. K2D, Inc.*, 2013 COA 125, ¶ 17, 321 P.3d 602 (we review the interpretation of a contract de novo (citing *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000))). In construing a contract, our goal is to give effect to the intent and reasonable expectations of the parties. *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004) (citing *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003)); *CapitalValue*, ¶ 18. We determine the parties' intent primarily from the language of the contract itself. *In re Marriage of Thomason*, 802 P.2d 1189, 1190 (Colo. App. 1990).

Extrinsic evidence of intent is relevant only where there is an ambiguity in the terms of the contract. *Ad Two*, 9 P.3d at 376. Ambiguity exists if the language of the contract is susceptible of more than one reasonable interpretation. *In re Marriage of Crowder*, 77 P.3d 858, 861 (Colo. App. 2003). To determine whether there is ambiguity, courts must examine the instrument's language and construe it in harmony with the plain and generally accepted meaning of the words employed. *Town of Minturn v. Tucker*, 2013 CO 3, ¶ 40, 293 P.3d 581.

Additionally, the question whether a right of reverter exists is a question of law that we review de novo. *See Bill Barrett Corp. v. Lembke*, 2020 CO 73, ¶ 13, 474 P.3d 46; *Perfect Place v. Semler*, 2016 COA 152M, ¶ 47, 428 P.3d 577, *rev'd on other grounds*, 2018 CO 74, 426 P.3d 325. But because actions to quiet title under C.R.C.P. 105 are equitable proceedings, we review the trial court's findings of fact for an abuse of discretion and review de novo whether the trial court correctly understood the appropriate test for quieting title. *Semler*, ¶ 47.

A plaintiff in an action to quiet title to lands must rely on the strength of its own title, and when it appears that its rights have terminated, it is in no position to question the legality of the title claimed by others. *Sch. Dist. No. Six v. Russell*, 156 Colo. 75, 82, 396 P.2d 929, 932 (1964).

D. Language of the Condemnation

The language of the Second Amended Rule and Order is clear; Denver sought and acquired the Monaghan Parcels, "and any and all interests therein," free and clear of any possibility of reverter to MF. As the district court explained, "Conveyances of real estate are deemed to be fee simple unless expressly limited." *Campbell v. Summit Plaza Assocs.*, 192 P.3d 465, 473 (Colo. App. 2008); *see also* § 38-1-105(4), C.R.S. 2022 (In a condemnation action, "[u]pon the entry of such [a rule describing the land and compensation for it], the petitioner shall become seized in fee unless a lesser interest has been sought . . . of all such lands, . . . described in said rule as required to be taken."). The only limitations provided related to mineral

rights and prior right-of-way easements, none of which grant MF a right of reverter. The lack of certain "magic words" doesn't change the nature of the estate that Denver obtained. *See Steamboat Lake Water & Sanitation Dist. v. Halvorson*, 252 P.3d 497, 504 (Colo. App. 2011).

MF relies on *Gypsum Ranch Co., LLC v. Board of County Commissioners*, 219 P.3d 365, 370 (Colo. App. 2009) (*Gypsum I*), *rev'd sub nom. Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127 (Colo. 2010) (*Gypsum II*), for the premise that an "all interests" provision does not convey fee simple absolute to a condemnor. We do not read *Gypsum I* so broadly. There, a division of this court held that, contrary to the condemnor's claim, the condemnation granted only "an interest in the property sufficient to meet the purpose of the condemnation," but not the underlying mineral interests, as those were precluded from condemnation via section 38-1-105(4). *Gypsum I*, 219 P.3d at 370. Our supreme court reversed the decision, holding that, while "governmental entities are prohibited from acquiring a right to any mineral resource beneath real property that was itself acquired through condemnation for highway purposes, . . . statutory enactments are presumed to be intended to change the law and to do so only prospectively." *Gypsum II*, 244 P.3d at 131. Neither of these cases holds that an "all interests" provision isn't sufficient to obtain all property interests that are able to be condemned. Moreover, the issue at hand doesn't concern mineral interests, as those were properly excluded from Denver's condemnation of the Monaghan Parcels. Thus, MF's reliance on *Gypsum I* and *Gypsum II* is misplaced.

And we dispose of MF's contention that the phrase "free and clear of all liens and encumbrances" doesn't extinguish the possibility of reverter. "A good title in fee simple means the legal estate is in fee, free and clear of all claims, liens, and encumbrances whatsoever, except as listed in the deed." *Campbell*, 192 P.3d at 473. As explained above, no right of reverter is shown anywhere in the transferring documents; thus, MF's severance of the right of reverter from liens and encumbrances does it no good.

E. Payment for the Condemnation

Similarly inaccurate is MF's contention that because Denver didn't pay the full market value for the parcels, it thus could not have acquired them in fee simple absolute, for which MF relies on *Halvorson*, 252 P.3d at 504. But, contrary to MF's assertion, *Halvorson* does not posit a factor test requiring that a condemnor sought and paid for an absolute fee interest in order to obtain fee simple absolute. True, the *Halvorson* court stated "that here, because the District *explicitly sought, and paid for*, an absolute fee interest in Lot 78, the trial court did not err in so describing the District's title." *Id.* (emphasis added). But this dictum doesn't create a new test for courts to consider when evaluating condemnations, so we decline to apply it here.

Moreover, not only did the settlement agreement make it clear that the parties had agreed that the price paid did not necessarily reflect the market value of the property, but paying the full market value for a condemned property doesn't equate to transfer in fee simple absolute.

See Gypsum I, 219 P.3d at 370 ("Because the power to take by eminent domain is qualified, the title may be qualified, even if the condemnor has paid full value for the property."); *Lithgow v. Pearson*, 25 Colo. App. 70, 80, 135 P. 759, 762 (1913) (where owner forced to accept condemnation, payment of full and actual value of property proper even though fee simple absolute may not have been transferred). Thus, MF's argument fails.

F. Use of the Condemned Parcels

Nor do we agree with MF's contention that the use of the parcels for anything other than DIA triggers a reversionary interest. Divisions of this court have recognized that private interests taken via condemnation are not subject to defeasement simply because the property is later put to private use. *See Halvorson*, 252 P.3d at 504; *Wall v. City of Aurora*, 172 P.3d 934, 937 (Colo. App. 2007) ("[A] condemnor may use condemned property for a different purpose, so long as the original purpose was valid at the time of the taking."). We see no reason here to depart from that acknowledgment.

Accordingly, we agree with the district court's determination that Denver acquired the Monaghan Parcels in fee simple absolute and that MF did not retain any reversionary interest, regardless of the use to which the property is put.

III. Remaining Contentions

Because we have determined that MF has no interest in the Monaghan Parcels, we do not reach MF's remaining contentions. We note that these include MF's assertions that the district court erred by failing to afford discovery under C.R.C.P. 56(f). In light of our disposition concluding that there was no remaining right of reverter, further discovery would have been unavailing.

IV. Disposition

We affirm the judgment of the district court.

JUDGE LUM and JUDGE BERNARD concur.

APPENDIX B — FINAL JUDGMENT AND DECREE OF THE DENVER DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, FILED MAY 17, 2022

DENVER DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No.: 2021CV33498
Division: 424

CITY AND COUNTY OF DENVER,
A COLORADO MUNICIPAL CORPORATION,

Plaintiff,

v.

MONAGHAN FARMS, INC.,
A COLORADO CORPORATION,

Defendant.

Filed May 17, 2022

FINAL JUDGMENT AND DECREE

The Court hereby enters this Final Judgment and Decree pursuant to C.R.C.P. 57, 58, and 105 concerning the real property located in the City and County of Denver and Adams County, Colorado and more particularly described on the attached Exhibit A, attached hereto and incorporated herein by reference.

Appendix B

1. The Plaintiff City and County of Denver ("Denver") brought this lawsuit against Defendant Monaghan Farms seeking declaratory and quiet title relief concerning property Denver acquired through eminent domain in 1992.

2. On April 27, 2022, this Court granted Denver's Motion for Summary Judgment on its First and Second Claims for Relief. Because the First and Second Claims for Relief are dispositive of the entire dispute, there is no need for the Court to address the Third Claim for Relief, which was pled as an alternative claim to the First and Second Claims for Relief.

3. Based upon the Court's Summary Judgment Order, the pleadings and other matters of record on file in this action, the Court hereby Finds, Declares, Orders and Decrees as follows:

a. Denver owns the property identified and described in Exhibit A in *fee simple absolute*, subject only to specified exceptions for each parcel identified in Exhibit A related to mineral rights and prior right-of-way easements.

b. Monaghan Farms retains no residual interest, including any reversionary interest, in any of the property identified and described in Exhibit A.

4. This Final Judgment and Decree, along with the attached Exhibit A, may be recorded with the Clerk and Recorder of the applicable county.

SO ORDERED this 17th day of May, 2022.

BY THE COURT:

/s/_____
Shelley I. Gilman
District Court Judge

Appendix B

DISTRICT COURT, DENVER COUNTY, COLORADO

Case Number: 2021CV33498
Division: 424

CITY AND COUNTY OF DENVER,

Plaintiff,

v.

MONAGHAN FARMS INC.,

Defendant.

ORDER: EXHIBIT A TO FINAL JUDGMENT AND DECREE

The motion/proposed order attached hereto: SO ORDERED.

Exhibit A is incorporated by reference to the Final Judgment and Decree.

Issue Date: 5/17/2022

/s/_____
SHELLEY ILENE GILMAN
District Court Judge

Appendix B

EXHIBIT A

The property interests being acquired are described under the following parcel designations 1 through 16, and except where specifically noted in the parcel descriptions include the following interests:

(a) All property interests in, above, on and below the surface of the Parcels:

(b) Any and all improvements and fixtures located on the Parcels;

(c) All appurtenances thereunto appertaining;

(d) All water rights and related licenses, rights-of-way, easements and priorities associated with or appurtenant to the Property and owned by Seller, including but not limited to all water, water rights, geothermal water, geothermal water rights, ditches, ditch rights, priorities, reservoirs and reservoir rights, livestock watering tanks, springs, filings, wells, well permits and underground water, adjudicated and unadjudicated, tributary and nontributary, on or used on or appurtenant to the Property, including but not limited to all nontributary underground water, water rights and well permits, including but not limited to those waters, water well rights, and well permits described in Sections 37-90-101 *et seq.* and 37-92-101 *et seq.*, C.R.S., the "Statewide Nontributary Ground Water Rules, " 2 CCR 402-7, 9 CR 2, effective March 2, 1986, and "The Denver Basin Rules," 3 CCR 402-6, 8 CR 12, effective December

30, 1985, with respect to nontributary ground water underlying the Property, including without limitation all water rights associated with the following: all wells and water rights decreed in Case No. 85CW135(C), Water Division No. 1, which decree is recorded on September 10, 1986 at Reception No. B677828 in Book 3199 at Page 172 in the office of the Clerk and Recorder for Adams County, Colorado; Case No. 85CW135(B), Water Division No. 1, which decree is recorded on May 4, 1987 at Reception No. B737529 in Book 3311 at Page 46 in the office of the Clerk and Recorder for Adams County, Colorado; Case No. 85CW135(A), Water Division No. 1, which decree is recorded on May 4, 1987 at Reception No. B737528 in Book 3311 at Page 28 in the office of the Clerk and Recorder for Adams County, Colorado; and all wells and water rights identified in Well Permits numbered 217043, 14128, 58822, and 72811 as filed with the Colorado Division of Water Resources.

(e) All mineral, royalty and other participating rights conveyed to J. H. Monaghan and N. M. Monaghan as set forth in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado.

(f) Any and all of Reopondents' interests, if any, in and to the real property situate in the North one-half of Section 32, Township 2 South, Range 65 West of the 6th Principal Meridian, Adams County, Colorado.

(g) Any rights and interests of Respondent owners in and to the property described as the West 210 feet of

Appendix B

Sections 9, 16, 21, 28, and 33 of Township 2 South, Range 65 West of the 6th P.M. and the West 210 feet of Section 4 Township 3 South, Range 65 West of the 6th P.M.

Parcel 1

All of Section 31, Township 2 South, Range 65 West of the Sixth P.M. and the North one-half of Section 36, Township 2 South, Range 66 West of the Sixth P.M., all located within the City and County of Denver, State of Colorado.

Subject to:

1. Easement and right of way for utility purposes as granted to Colorado-Wyoming Gas Company by instrument recorded December 10, 1964 in Book 1199 at Page 214 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects N½ Section 36.)

2. Easement and right of way as granted to Phillips Petroleum Company by instrument recorded July 21, 1971 in Book 1716 at Page 349 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects NW¼ Section 36.)

3. Reservation as contained in Deed from The Union Pacific Land Company recorded June 10, 1908 in Book 25 at Page 200 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Reserving all oil, coal and other minerals within or underlying said land, with right to prospect

> for, mine and remove same, all oil, coal and other minerals which may be found thereon and right of ingress and egress and regress upon said land, to prospect for, mine and remove any and all such oil, coal and other minerals and right to use so much of said land as may be convenient or necessary for the right of way to and from such prospect places or mines and for the convenient and proper operation of such prospect places and for roads and for removal therefrom of oil, coal, minerals and machinery and other material. (Affects all of Section 31.)

4. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone or telegraph lines and the use of

the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the second part, their heirs, successors and assigns, shall be entitled to one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any lessee. (Affects E½ Section 31.)

5. All rights to any and all minerals, ore and metals of any kind and character, and all coal, asphaltum, oil, gas and other like substances in or under said land, the rights of ingress and egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances as reserved in that certain Patent from the State of Colorado recorded June 19, 1985 in Book

3015 at Page 91 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects N½ Section 36.)

6. Terms, conditions and provisions of Oil and Gas Lease recorded February 25, 1972 in Book 1782 at Page 515 in the office of the Clerk and Recorder for Adams County, Colorado And All assignments thereof. Affidavit of Lease Extension recorded September 22, 1980 in Book 2491 at Page 920 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects S½ and NW¼ Section 31.)

7. Terms, conditions and provisions of Oil and Gas Lease recorded October 15, 1981 in Book 2593 at Page 592 in the office of the Clerk and Recorder for Adams County, Colorado and all assignments thereof. Affidavit of Lease Extension recorded February 3, 1986 in Book 3105 at Page 493 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects Section 36.)

Parcel 2

The South one-half of Section 32, Township 2 South, Range 55 West of the 6th P M., City and County of Denver, State of Colorado.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as reserved in United States Patent recorded January 10, 1889 in Book A67 at Page 306 in the office of the Clerk

and Recorder for Adams County, Colorado (affects SW¼) and March 10, 1904 in Book 16 at Page 120 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼).

Subject to:

1. The rights, title and interests of the City and County of Denver in and to the East 30 feet of said section for road, public highway, right of way, and other statutory purposes.

2. A reserved right of way for ditches or canals constructed by the authority of the United States, as reserved in United States Patent recorded January 10, 1889 in Book A67 at Page 306 in the office of the Clerk and Recorder for Adams County, Colorado (affects SW¼) and March 10, 1904 in Book 16 at Page 120 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼).

3. Reservations contained in Deed from Box Elder Farms Co. to J. H. Monaghan and N. M. Monaghan recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> All the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same and sufficient use of the surface thereof, and the right to lay, maintain, and operate pipeline for oil and gas,

and to erect, maintain, and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the second part, their heirs, successors and assigns, shall be entitled to one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any lessee. (Affects SW¼ and E½ SE¼)

Appendix B

Parcel 3

Section 33, Township 2 South, Range 69 West of the 6th P.M., City and County of Denver, State of Colorado, excepting therefrom the West 210 feet.

Subject to:

1. The rights, title and interests of the City and County of Denver in and to the East 30 feet of said Section and the South 30 feet of said Section for road, public highway, right of way, and other statutory purposes.

2. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded January 22, 1974 in Book 1910 at Page 210 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects W½.)

3. Reservation as contained in Deed recorded May 20, 1909 in Book 25 at Page 216 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> All oil, coal and other minerals within or underlying said lands. The exclusive right to prospect in and upon said land for coal and other minerals therein, or which may be therein, and to mine for the removal from said land, all coal and other minerals which may be found thereon by any one. The right of ingress. egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as

> may be convenient or necessary for the right of way to and from prospect places or mines and for the convenient and proper operation of such prospect places, mines and for roads and approaches thereto or for removal therefrom of all coal, machinery or other material. The right to Union Pacific Railroad Company to maintain and operate its railroad in its present form of construction, and to make any change in the form of construction or method of operation of said railroad.

4. Reservations as contained in Deed from Box Elder Farms Co. recorded December 5, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or

interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled to one-half of the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second Part, their heirs, successors and assigns by any lessee.

5. Terms, conditions and provisions of Oil and Gas Lease in favor of Champlin recorded February 25, 1972 in Book 1782 at Page 515 in the office of the Clerk and Recorder for Adams County, Colorado. Affidavit of Lease Extension recorded September 22, 1980 in Book 2491 at Page 920 in the office of the Clerk and Recorder for Adams County, Colorado.

Appendix B

Parcel 4

Section 28, Township 2 South, Range 65 West of the 6th P.M., City and County of Denver, State of Colorado, excepting therefrom the West 210 feet of the Southwest quarter and the West one-half of the Northwest quarter.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises as reserved in the following United States Patents: (a) recorded June 25, 1891 in Book A2S at Page 287 in the office of the Clerk and Recorder for Adams County, Colorado, (b) recorded October 23, 1093 in Book A24 at Page 299 in the office of the Clerk and Recorder for Adams County, Colorado, (c) recorded December 3, 1909 in Book 25 at Page 525 in the office of the Clerk and Recorder for Adams County, Colorado, and (d) recorded November 18, 1944 in Book 302 at Page 32 in the office of the Clerk and Recorder Adams, Colorado

Subject to:

1. The rights, title and interests of the City and County of Denver in and to the North 30 feet of said Section and the East 30 feet of said Section for road, public highway, right of way and other statutory purposes.

2. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded January 22, 1974

in Book 1910 at Page 210 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects SW¼.)

3. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pike lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.
>
> Box Elder Farms Co., for itself and or its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided,

however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled to one-half of the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second Part, their heirs, successors and assigns by any lessee. (Affects all of Section 28 except W½ of NW¼.)

Parcel 5

Section 24, Township 2 South, Range 66 West of the 6th P.M., a portion of which is located in the City and County of Denver, and a portion of which is located in the County of Adams, State of Colorado.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises as reserved in the following United States Patents: (a) recorded March 8, 1892 in Book A25 at Page 371 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼), (b) recorded March 2, 1902 in Book A25 at Page 505 in the office of the Clerk and Recorder for Adams County,

Colorado (affects NW½), (c) recorded February 11, 1891 in Book A25 at Page 260 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼), and (d) recorded April 14, 1891 in Book A25 at Page 273 in the office of the Clerk and Recorder for Adams County, Colorado (affects SW¼).

Subject to:

1. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded August 14, 1980 in Book 2482 at Page 23 in the office of the Clerk and Recorder for Adams County, Colorado.

2. Easement as granted to Thomas C. Vessels in instrument recorded August 2, 1973 in Book 1879 at Page 609 in the office of the Clerk and Recorder for Adams County, Colorado.

3. The rights, title and interests of the City and County of Denver and Adams County in and to the South 30 feet of said Section for road, public highway, right of way and statutory purposes.

4. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever

nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled to one-half of the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second

Part, their heirs, successors and assigns by any lessee. (Affects N½.)

Parcel 6

Southeast quarter of Section 20, Township 2 South, Range 65 West of the 6th P.M.. City and County of. Denver, State of Colorado.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises as reserved in that certain United States Patent recorded April 25, 1911 in Book 25 at Page 382 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects SE¼.)

Subject to:

1. An Easement as granted to Union Rural Electric Association, Inc., in instrument recorded March 20, 1980 in Book 2439 at Page 798 in the office of the Clerk and Recorder for Adams County, Colorado.

2. The rights, title and interests of the City and County of Denver in and to the East 30 feet of said Section and the South 30 feet of said Section for road, public highway, right of way and other statutory purposes.

3. Reservation as contained in Deed from Box Elder Farms Co. to J. H. Monaghan and N. M. Monaghan

recorded December 5, 1951 in Book 432 at Page 156 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Excepting and reserving unto the grantor, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive rights to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby. (Affects SE¼.)

Parcel 7

Section 21, Township 2 South, Range 65 West of the 6th P.M., City and County of Denver, State of Colorado excepting therefrom the West 210 feet.

Together with:

All "Surface Owner's" rights and privileges identified in the Surface Owners Agreements recorded March 25,

1957 in Book 652 at Page 159 in the office of the Clerk and Recorder for Adams County, CoLorado, August 28, 19S7 in Book 672 at Page 76 in the office of the Clerk and Recorder for Adams County, Colorado, and April 17, 1970 in Book 2230 at Page 307 in the office of the Clerk and Recorder for Adams County, Colorado.

Subject to:

1. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded October 8, 1980 in Book 2497 at Page 923 in the office of the Clerk and Recorder for Adams County, Colorado.

2. An Easement as granted to Koch Industries, Inc., in instrument recorded July 17, 1972 in Book 1807 at Page 416 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects N½.)

3. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded January 22, 1974 in Book 1910 at Page 210 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects W½.)

4. Right of way as granted to Phillips Petroleum Company in instrument recorded July 21, 1971 in Book 1716 at Page 349 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects NW¼.)

5. The rights, title and interests of the City and County of Denver for road, public highway, right of way, and statutory purposes in and to a tract of land located in

the South of Section 21, T25, R65W of the 6th P.M., City and County of Denver, Colorado, being more particularly described as follows: Considering the South line of the SW¼ of said Section 21 as bearing N89°51'03"W and with all bearings contained within this description are relative thereto. The Southeast corner and the S½ corner of said Section 21 are monumented by 1½" Brass Caps with no markings on caps. Beginning at the Southeast corner of said Section 21; thence along the South line of the SE¼ of said Section 21 N89°51'03"W a distance of 2647.20 feet to the 5¼ corner of said Section 21; thence along the South Line of the SW½ of said Section 21 N89°50'53"W a distance of 2617.90 feet to a point on said south line that is 30.00 feet from the Southwest corner of said Section 21; thence departing from said South line N00°27' 59"W a distance of 29.32 feet; thence :572°31'00-E a distance of 16.13 feet; thence N88°39'30"E a distance of 413.54 feet: thence 589°36' 43"E a distance of 662.05 feet; thence S89°55'03" a distance of 1699.92 feet; thence S89°49'39"E a distance of 1R86.47 feet: thence 389°35'35"E a distance of 416.61 feet; thence S87°18'26"E a distance of 267.15 feet; thence 56.09 feet along the arc of a curve concave to the Northwest, said curve has a delta angle of 91°48"17", a radius of 35.00 feet and is subtended by a chord which bears N46°47'11"E a distance of 50.27 feet; thence N00°52'47"E a distance of 267.15 feet to a point on the East line of said section 21; thence along said East line S00°43'55"E a distance of 328.05 feet to the Southeast corner of said Section 21, said point being POINT OF BEGINNING.

6. Terms, conditions and provisions of Surface Owners Agreements recorded March 25, 1957 in Book 652 at Page 159 in the office of the Clerk and Recorder for Adams

County, Colorado (affects NW¼), August 28. 1957 in Book 672 at Page 76 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼) and April 17, 1978 in Book 2230 at Page 307 in the office of the Clerk and Recorder for Adams County, Colorado.

7. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.
>
> Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves

> the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the not proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled to one-half or the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second Part, their heirs, successors and assigns by any lessee.

8. Reservation contained in Deed from The Union Pacific Land Co. to Walter R. Graves recorded April 13, 1909 in Book 25 at Page 214 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> All oil, coal and other minerals within or underlying said lands. The exclusive right to prospect in and upon said land for coal and other minerals therein, or which may be therein, and to mine for the removal from said land, all coal and other minerals which may be found thereon by any one. The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as

> may be convenient or necessary for the right of way to and from prospect places or mines and for the convenient and proper operation of such prospect places, mines and for roads and approaches thereto or for removal therefrom of all coal, machinery or other material. The right to Union Pacific Railroad Company to maintain and operate its railroad in its present form of construction, and to make any change in the form of construction or method of operation of said railroad.

Parcel 8

Section 22, Township 2 South, Range 65 West of the 6th P.M., City and County of Denver, State of Colorado.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as reserved in the following United States Patents: (a) as recorded May 4, 1897 in Book A24 at Page 517 in the office of the Clerk and Recorder for Adams County, Colorado (effects SW¼, and (b) as recorded September 6, 1902 in Book A41 at page 457 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼).

Right of any proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises as reserved in the

following United States Patents: (a) recorded September 20, 1901 in Book A41 at Page 410 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼), and (b) recorded June 2, 19O1 in Book 25 at Page 487 in the office of the Clerk and Recorder for Adams County, Colorado (affects NW¼).

All the rights, title and interests of Monaghan Farms, Inc. in, to and under the Oil and Gas Lease between Monaghan Farms, Inc. and Koch Industries, Inc. recorded April 8, 1969 in Book 1507 at Page 94 in the office of the Clerk and Recorder for Adams County, Colorado, and any amendments or extensions thereof.

Subject to:

1. The rights, title and interests of the City and County of Denver for road, public highway, right of way, and statutory purposes in and to the East 30 feet of said Section, and the South 30 feet of said Section.

2. The rights, title and intetests, if any, of the City and County of Denver for road, public highway, right of way, and statutory purposes in and to a tract of land located in the W½ of Section 22, T2S, R6SW of the 6th P.M., City and County of Denver, Colorado, being more particularly described as follows: Considering the West line of the NW¼ of said Section 22 as bearing N00°43'05"W and with all bearings ontained within this description are relative thereto. The Northwest corner of the West quarter corner of said Section 22 are monumented by 1 ½" Brass Caps with no markings on caps. Beginning at the Northwest corner of said Section 22; thence along the West line of

the NW¼ of said Section 22 S00°43'05"E a distance of 2643.23 feet to the West quarter corner of said Section 22; thence along the West line of the SW¼ of said Section 22 S00°43'55"E a distance of 2613.28 feet to a point on said West line that is 30.00 feet from the Southwest corner of said Section 22; thence departing from said West line N89°51'07"E a distance of 27.91 feet; thence 1100°13'17"W a distance of 379.53 feet; thence N00°24'56"E a distance of 253.34 feet; thence NO1°49'49"E a distance of 82.96 feet; thence NO1°27'20"E a distance of 454.06 feet; thence N00°09'00"E a distance of 344.74 feet; thence N00°50'27"W a distance of 1653.98 feet; thence NO1°10'43"W a distance of 305.23 feet; thence NO1°37'08"W a distance of 363.82 feet; thence N00°27'39"W a distance of 674.04 feet; thence N00°12'44"E a distance of 745.15 feet to a point on the North line of said Section 22; thence along said North line 589°48'40"W a distance of 66.41 feet to the Northwest corner of said Section 22; said point being the Point of Beginning.

3. A reserved right of way for ditches or canals constructed by authority of the United States, as reserved in the following United States Patents; (a) as recorded May 4, 1897 in Book A24 at Page 517 in the office of the Clerk and Recorder for Adams County, Colorado (affects SW¼), and (b) as recorded September 6, 1902 in Book A41 at Page 457 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼).

4. Oil and Gas Lease between Monaghan Farms, Inc. and Koch Industries, Inc. recorded April 8, 1969 in Book 1507 at Page 94 in the office of the Clerk and Recorder for Adams County, Colorado. (affects E½ NW¼.)

5. Reservation as contained in Deed from Box Elder Farms Co. to J. H. Monaghan and N. M. Monaghan recorded December 5, 1951 in Book 432 at Page 156 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Excepting and reserving unto the grantor, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive rights to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any building, machinery, pipelines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby. (Affects all except the E½ NW¼ of said Section 22.)

Parcel 9

The South one-half of Section 13, Township 2 South, Range 66 West of the 6th P.M., a portion of which is located in the City and County of Denver and a portion of which is located in the County of Adams, State of Colorado.

Appendix B

Subject to:

1. An Easement as granted to Thomas G. Vessels in instrument recorded August 2, 1973 in Book 1879 at Page 609 in the office of the Clerk and Recorder for Adams County, Colorado.

2. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use cif the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone or telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.
>
> Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves

the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any ouch lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the second part, their heirs, successors and assigns, shall be entitled to one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any lessee. (Affects S½.)

Parcel 10

Section 16, Township 2 South, Range 65 West of the 6th P.M., City and County of Denver, State of Colorado except the following:

(A) The West 210 feet thereof

(B) A tract of land situate in the NW¼ NW¼, of said Section 16, Township 2 South, Range 65 West, 6th Principal Meridian, more particularly described as follows: Beginning at the Northwest corner of said Section 16; thence south along the West boundary line of said Section 16, a distance of 1125 feet to a

point; thence easterly parallel with the north boundary line of said Section 16, a distance of 855 feet to a point; thence northerly parallel with the West boundary line of said Section 16, a distance of 1125 feet more or less to the north boundary Line of said Section 16; thence westerly along the north boundary line of said Section 15, a distance of 855 feet more or less to the point of beginning.

Subject to:

1. Right of way as granted to Phillips Petroleum Company in instrument recorded July 21, 1971 in Book 1716 at Page 349 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects W½.)

2 An easement as granted to Koch Industries, Inc. in instrument recorded July 17, 1972 in Book 1807 at Page 416 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects SW¼.)

3. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded April 22, 1975 in Book 1989 at Page 268 in the office of the Clerk and Recorder for Adams County, Colorado.

4. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded October 8, 1980 in Book 2497 at Page 923 in the office of the Clerk and Recorder for Adams County, Colorado.

5. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone or telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.
>
> Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection

> with the granting of any such lease; provided also, the parties of the second part, their hairs, successors and assigns, shall be entitled to one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any lessee.

6. All rights to any and all minerals, ore and metals of any kind and character, and all coal, asphaltum, oil, gas and other like substances in or under said land, the rights of ingress and egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances, as reserved in the following Patents from the State of Colorado: (a) in document recorded March 26, 1910 in Book 48 at Page 200 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼); (b) in document recorded March 26, 1910 in Book 48 at Page 201 in the office of the Clerk and Recorder for Adams County, Colorado (affects SW¼); (c) in document recorded March 26, 1910 in Book 48 at Page 201 in the office of the Clerk and Recorder for Adams County, Colorado (affects NW¼); and (d) in document recorded March 26, 1910 in Book 48 at Page 202 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼).

Parcel 11

Section 15, Township 2 South. Range 65 West of the 6th P.M.. City and County of Denver, State of Colorado.

Appendix B

Together with:

All "Surface Owner's" rights and privileges identified in the Surface Owners Agreements recorded February 11, 1972 in Book 1780 at Page 522 and November 19, 1975 in Book 2028 at Page 372 in the office of the Clerk and Recorder for Adams County, Colorado.

Subject to:

1. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded October 8, 1980 in Book 2497 at Page 923 in the office of the Clerk and Recorder for Adams County, Colorado

2. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded April 22, 1975 in Book 1989 at Page 268 in the office of the Clerk and Recorder for Adams County, Colorado.

3. The rights, title and interests of the City and County of Denver for road, public highway, right of way, and other statutory purposes in and to the East 30' of said Section.

4. The rights, title and interests, if any, of the City and County of Denver for road, public highway, right of way, and other otatutory purposes in and to a tract of land located in the W½ of Section 15, T2S, R65W of the 6th P.M., City and County of Denver, Colorado, being more particularly described as follows: Considering the West line of the SW¼ of said Section 15 as bearing S00°10'47"E and with all bearings contained within this description are relative thereto. The Southwest corner and the West

quarter corner of said Section 15 are monumented by 1 ½" Brass Caps with no markings on caps. Beginning at the Southwest corner of said Section 15; thence along the West line of the SW¼ of said Section 15 N00°10'47"W a distance of 2643.38 feet to the West quarter corner of said Section 15: thence along the West line of the NW¼ of said Section 15 N00°10'44"W a distance of 2643.64 feet to the Northwest corner of said Section 15, said point, being monumented by a 1 ½" Brass Cap with no markings on cap; thence along the North line of the NW¼ of said Section 15 N89°47'48"E a distance of 24.00 feet; thence departing from said North line S00°07'37"E a distance of 589.58 feet; thence S00°35'32"E a distance of 3920.04 feet; thence SO1°18'16"E a distance of 756.12 feet; thence 500'12'44"W a distance of 21.52 feet to a point on the South line of said Section 15; thence along said South line S89°48'40"W a distance of 66.41 feet to the Point of Beginning.

5. Terms, conditions and provisions of Surface Owners Agreements recorded February 11, 1972 in Book 1780 at Page 522 in the office of the Clerk and Recorder for Adams County, Colorado; and November 10, 1975 in Book 2028 at Page 372 in the office of the Clerk and Recorder for Adams County, Colorado.

6. Reservation contained in Deed from The Union Pacific sand Co. to K. McKenzie recorded February 18, 1909 in Book 25 at Page 212 in the Office of the Clerk and Recorder for Adams County, Colorado as follows:

> All oil, coal and other minerals within or underlying said lands. The exclusive right to prospect in and upon said land for coal and other

> minerals therein, or which may be therein, and to mine for the removal from said land, all coal and other minerals which may be found thereon by any one. The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from prospect places or mines and for the convenient and proper operation of such prospect places, mines and for roads and approaches thereto or for removal therefrom of all coal, machinery or other material. The right to Union Pacific Railroad Company to maintain and operate its railroad in its present form of construction, and to make any change in the form of construction or method of operation of said railroad.

7. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to

remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pine lines, telephone or telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the second part, their heirs, successors and assigns, shall be entitled to one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any Lessee.

Parcel 12

Section 9, Township 2 South, Range 65 West of the 6th P M., City and County of Denver, State of Colorado, excepting therefrom the West 210 feet.

Appendix B

Together with:

All "Surface Owner's" rights and privileges identified in the Surface Owner's Agreement recorded February 11, 1972 in Book 1780 at Page 522 in the office of the Clerk and Recorder for Adams County, Colorado.

Subject to:

1. Right of way as granted to Panhandle Eastern Pipe Line Company in Instrument recorded October 8, 1980 in book 2497 at Page 923 in the office of the Clerk and Recorder for Adams County, Colorado.

2. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded January 22, 1974 in Book 1910 at Page 210 in the office of the Clerk and Recorder for Adams County, Colorado.

3. Right of way as granted to Phillips Petroleum Company in instrument recorded July 21, 1971 in Book 1716 at Page 349 in the office of the Clerk and Recorder for Adams County, Colorado.

4. Right of way as granted to Koch Industries, Inc. in instrument recorded July 17, 1972 in Book 1807 at Page 419 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects S½.)

5. Terms, conditions and provisions of Surface Owners Agreements to Champlin Petroleum Company recorded February 11, 1972 in Book 1780 at Page 522 in the office of the Clerk and Recorder for Adams County, Colorado.

6. Reservation as set forth in Deed from The Union Pacific Land Company to Benjamin T. Harrison and William T. Bauns recorded March 23, 1908 in Book 25 at Page 197 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> All oil, coal and other minerals within or underlying said lands. The exclusive right to prospect in and upon said land for coal and other minerals therein, or which may be therein, and to mine for the removal from said land, all coal and other minerals which may be found thereon by any one. The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from prospect places or mines and for the convenient and proper operation of such prospect places, mines and roads and approaches thereto or for removal therefrom of all coal, machinery or other material. The right to Union Pacific Railroad Company to maintain and operate its railroad in its present form of construction, and to make any change in the form of construction or method of operation of said railroad.

7. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

Appendix B

Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery. pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone And telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled

to one-half of the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second Part, their heirs, successors and assigns by any lessee.

Parcel 13

Section 10, Township 2 South, Range 65 West of the 6th P.M., City and County of Denver, State of Colorado.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as reserved in United States Patent recorded May 18, 1892 in Book A25 at Page 441 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects NW¼.)

Right of any proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises as reserved in the following United States Patents: (a) recorded May 18, 1892 in Book A24 at Page 179 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼); (b) recorded June 2. 1892 in Book A24 at Page 184 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼); and (c) recorded May 10, 1895 in Book A24 at Page 4O8 in the office of the Clerk and Recorder for Adams County, Colorado (affects SW¼).

Appendix B

Subject to:

1. Right of way as granted to Phillips Petroleum Company in an Instrument recorded July 21, 1971 in Book 1716 at Page 349 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects NW¼.)

2. Right of way as granted to Koch Industries, Inc. in an instrument recorded July 17, 1972 in Book 1807 at Page 419 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects S½.)

3. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded October 5, 1980 in Book 2497 at Page 923 in the office of the Clerk and Recorder for Adams County, Colorado.

4. The rights, title and interests of the City and County of Denver for road, public highway, right of way, and other statutory purposes in and to the East 30 feet of said Section.

5. The rights, title and interests, if any, of the City and County of Denver for road, public highway, right of way, and other statutory purposes in and to a tract of land located in the W½ of Section 10, T2S, R65W of the 6th P.M., City and County of Denver, Colorado, being more particularly described as follows: Considering the West line of the SW¼ of said Section 10 as bearing N00°57'13"W and with all bearings contained within this description are relative thereto. The Southwest corner and the West quarter corner of said Section 10 are monumented by 1 ½"

Brass Caps with no markings on caps. Beginning at the Southwest corner of said Section 10; thence along the West line of the SW¼ of said Section 10 N00°57'11"W a distance of 2643.40 feet to the West quarter corner of said Section 10; thence along the West Line of the W¼ of said Section In N00°57'13"W a distance of 2613.41 feet to a point on said West line that is 30 feet from the Northwest corner of said Section 10; thence departing from said West line N89°44'36"E a distance of 86.71 feet; thence 73.82 feet along the arc of a curve concave to the Southeast, said curve has a delta angle of 63°47'28", a radius of 66.30 feet and is subtended by a chord which bears S30°40'30"W a distance of 70.O6 feet; thence S01°13'15"E a distance of 600.23 feet; thence S00°S0'08"E a distance of 1164.94 feet; thence 500°29'36"E a distance of 3226.86 feet to a point on the South line of said Section 10; thence along said South line S89°47'48"W a distance of 24.00 feet to the Southwest corner of said Section 10, said point being the Point of Beginning.

6. A reserved right of way for ditches or canals constructed by authority of the United States, as reserved in United States Patent recorded May 18, 1892 in Book A25 at Page 441 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects NW¼.)

7. Reservations contained in Deed from Box Elder Farms Co. to J. H. Monaghan and N. M. Monaghan recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado.

Appendix B

Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same and sufficient use of the surface thereof, and the right to lay, maintain, and operate pipeline for oil and gas, and to erect, maintain, and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the second part, their heirs, successors and assigns, shall be entitled to

one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any lessee.

Parcel 14

E½ and NW¼ of Section 4, Township 3 South, Range 65 West of the 6th P.M., a portion of which is located in the City and County of Denver and a portion of which is located in the County of Adams, State of Colorado, excepting therefrom the West 210 feet of the NW¼ of said Section.

Together with:

Right of any proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as reserved in the following United States patents: (a) recorded April 13, 1915 in Book 68 at Page 170 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼), and (b) recorded May 27, 1910 in Book 25 at Page 533 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼).

Right of any proprietor of a vein or lode to extract and remove his ore therefor should the same be found to penetrate or intersect the premises as reserved in United States Patent recorded March 17, 1909 in Book 25 at Page 508 in the office of the Clerk and Recorder for Adams County, Colorado. (Affects NW¼).

Appendix B

Subject to:

1. Right of way as granted to Panhandle Eastern Pipe Line Company in instrument recorded January 22, 1974 in Book 1910 at Page 210 in the office of the Clerk and Recorder for Adams County, Colorado.

2. The rights, title and interests of the City and County of Denver in and to the East 30 feet of said section and the North 30 feet of said section for road, public highway, right of way, and other statutory purposes.

3. A reserved right of way for ditches or canals constructed by authority of the United States, as reserved in the following United States Patents: (a) recorded April 13, 1915 in Book 68 at Page 170 in the office of the Clerk and Recorder for Adams County, Colorado (affects NE¼), and (b) recorded May 27, 1910 in Book 25 at Page 533 in the office of the Clerk and Recorder for Adams County, Colorado (affects SE¼).

4. Reservations contained in Deed from Box Elder Farms Co. to J. H. Monaghan and N. M. Monaghan recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado.

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same and sufficient use of the

surface thereof, and the right to lay, maintain, and operate pipeline for oil and gas, and to erect, maintain, and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it, provided however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the second part, their heirs, successors and assigns, shall be entitled to one-half of the landowner's royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the second part, their heirs, successors and assigns by any lessee. (Affects S½ and NW¼).)

Appendix B

Parcel 15

N½ of Section 5, Township 3 South, Range 65 west of the 6th P.M., a portion of which is located in the City and County of Denver and a portion of which is located in the County of Adams, State of Colorado.

Together with:

All "Surface Owner's" rights and privileges identified in the Surface Owner's Agreement recorded July 8, 1979 in Book 2363 at Page 880 in the office of the Clerk and Recorder for Adams County, Colorado.

Subject to:

1. The rights, title and interests of the City and County of Denver and Adams County in and to the East 30 feet of said Section for road, public highway, right of way, and other statutory purposes.

2. Terms, conditions and provisions of the Surface Owners Agreement recorded July 8, 1979 in Book 2363 at Page 880 in the office of the Clerk and Recorder for Adams County, Colorado,

3. Reservation as set forth in Deed from Union Pacific Land Company to Watkins Real Estate and investment Company recorded December 18, 1907 in Book 25 at Page 190 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> All oil, coal and other minerals within or underlying said lands. The exclusive right to prospect in and upon said land for coal and other Minerals therein, or which may be therein, and to mine for the removal from said land, all coal and other minerals which may be found thereon by any one. The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right of way to and from prospect places or mines and for the convenient and proper operation of such prospect places, mines and roads and approaches thereto or for removal therefrom of all coal, machinery or other material. The right to Union Pacific Railroad Company to maintain and operate its railroad in its present form of construction, and to make any change in the form of construction or method of operation of said railroad.

4. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County as follows:

> Box Eider Farms Co. excepts and reserves to itself, its successors And Assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and

exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon 'aid land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled to one-half of the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second Part, their heirs, successors and assigns by any lessee. (Affects N½ and SE¼.)

Appendix B

Parcel 16

E½ of Section 9, Township 3 South, Range 65 West of the 6th P.M., County of Adams, State of Colorado.

Subject to:

1. Right or way as granted to Panhandle Eastern Pipe Line Company in Instrument recorded January 22, 1974 in Book 1910 at Page 210 in the office of the Clerk and Recorder for Adams County, Colorado.

2. The rights, title and interests of Adams County in and to the East 30 feet of said Section for road, public highway, right of way, and other statutory purposes.

3. Reservations as contained in Deed from Box Elder Farms Co. recorded December 6, 1949 in Book 385 at Page 324 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

> Box Elder Farms Co. excepts and reserves to itself, its successors and assigns all the oil, gas and other subsurface minerals of whatsoever nature or description in and under said lands, with the exclusive right to prospect for and exploit the same, and sufficient use of the surface thereof, and the right to lay, maintain and operate pipe lines for oil and gas, and to erect, maintain and operate telephone and telegraph lines with the right reserved to remove any buildings, machinery, pipe lines

or other property erected or placed on said land in connection therewith, such pipe lines, telephone and telegraph lines and the use of the surface, however, not to infringe upon or interfere with any improvements upon said land without payment of a reasonable amount for any damage caused thereby.

Box Elder Farms Co., for itself and for its successors and assigns, retains and reserves the sole and exclusive right to lease said land or any part thereof for oil, gas and other minerals reserved to and owned by it; provided, however, that the grantees, their successors and assignees, shall be entitled to receive one-half of the net proceeds of all bonuses and rentals paid under any such lease or leases after deducting the cost and expenses in connection with the granting of any such lease; provided also, the parties of the Second Part, their heirs, successors and assigns, shall be entitled to one-half of the Landowner's Royalty paid under any such lease or leases, which one-half royalty may be paid direct to parties of the Second Part, their heirs, successors and assigns by any lessee. (Affects SE¼.)

4. Reservation as contained in Deed from Kansas Pacific Railway Co. recorded December 22, 1876 in Book Al at Page 321 in the office of the Clerk and Recorder for Adams County, Colorado as follows:

Appendix B

Reserving to said Company and its assigns the right of way for said railway in width and in manner and form as provided by the acts of Congress in relation thereto, and it is agreed further that whenever it is required by Law that the company shall fence its road such fence along the line of the road upon the land hereby conveyed shall be erected and maintained by the Party of the Second Part, his heirs and assigns in all respects as required by law, and this Agreement is hereby declared a covenant running with the land herein conveyed, and provided also that said Company shall be exempt from all claim for damages to the possession and use of said Land that may accrue to the Party of 2nd party or his assigns in construction and operating of said railway.

APPENDIX C — ORDER OF THE DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO, FILED APRIL 27, 2022

DISTRICT COURT, CITY AND
COUNTY OF DENVER, COLORADO

Case Number: 21CV33498

CITY AND COUNTY OF DENVER,
A COLORADO MUNICIPAL CORPORATION,

Plaintiff,

v.

MONAGHAN FARMS, INC.,
A COLORADO CORPORATION,

Defendant.

Filed April 27, 2022

ORDER
(DEFENDANT MONAGHAN FARMS' MOTION FOR DENIAL OR CONTINUANCE OF RULING ON CITY AND CITY AND COUNTY OF DENVER'S MOTION FOR SUMMARY JUDGMENT ON FIRST AND SECOND CLAIMS FOR RELIEF PURSUANT TO C.R.C.P. 56(F) AND CITY AND COUNTY OF DENVER'S MOTION FOR SUMMARY JUDGMENT ON FIRST AND SECOND CLAIMS FOR RELIEF)

The matter is before the Court on Defendant Monaghan Farms' Motion for Denial or Continuance

of Ruling on City and County of Denver's Motion for Summary Judgment on First and Second Claims for Relief Pursuant to 56(f) and the City and County of Denver's Motion for Summary Judgment on First and Second Claims for Relief. The Court, having reviewed the motions, the responsive briefs, the Court's file, and the applicable legal authority, finds, concludes, and orders as follows:

PROCEDURAL BACKGROUND

1. On November 3, 2021, the City and County Denver ("Denver") filed its Complaint, asserting claims for quiet title and declaratory judgment. The Complaint presents the following three issues: (1) Is Denver entitled to an order under C.R.C.P 105 quieting its title to the Monaghan Parcels and rejecting any claims to a right of reverter by Monaghan Farms, Inc. ("Monaghan Farms"); (2) Is Denver entitled to a declaration under C.R.C.P. 57(a) and § 13-51-101, *et seq.*, C.R.S. (2021) that the 1992 Settlement Agreement bars Monaghan Farms from pursuing any claims that it has any reversionary interest in or to the Monaghan Parcels; and (3) Is Denver entitled to a declaration under Rule 57(a) and Section 1-51-101, *et seq.*, that the development of commercial non-aeronautical land uses at Denver International Airport ("DEN"), including within any Monaghan Parcels, is in the service and support of DEN, and therefore is a "public airport use." Compl. ¶¶ 41, 45, 53.

2. On December 6, 2021, Monaghan Farms filed a Motion to Dismiss for Failure to Join an Indispensable

Party Pursuant to C.R.C.P. 12(b)(6). On April 21, 2022, after entertaining full briefing of the motion and conducting an evidentiary hearing, the Court denied the motion to dismiss.

3. Meanwhile, on January 28, 2022, Denver filed the instant motion for summary judgment. Denver seeks summary judgment on its first two claims for relief. Denver further submits that a favorable ruling on either of these claims would alleviate the need for consideration of its third claim for relief.

4. On March 21, 2022, Monaghan Farms filed a response to the motion for summary judgment as well as a Rule 56(f) motion for denial or continuance of the ruling on the motion for summary judgment.

5. The Court now has received full briefing on the summary judgment motion and the Rule 56(f) motion.

STANDARDS OF REVIEW

C.R.C.P. 56(f) provides, as follows:

> Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

A trial court abuses its discretion in denying a C.R.C.P. 56(f) request "where the movant has demonstrated that the proposed discovery is necessary and could produce facts that would preclude summary judgment." *Bailey v. Airgas-Intermountain, Inc.*, 250 P.3d 746, 751 (Colo. App. 2010). A trial court may, however, deny the request "if the movant has failed to demonstrate that the proposed discovery could produce [such] material facts." *Id.* Moreover, a trial court does not abuse its discretion in denying requests for discovery if legal issues can be determined without additional discovery. *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 n.2 (10th Cir. 2001).

Under C.R.C.P. 56(c), summary judgment is proper only if the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Civil Service Commission v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The moving party bears the burden of establishing the non-existence of a genuine issue of material fact. If the moving party meets that initial burden, the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987).

UNDISPUTED FACTS

1. Denver is a home rule city and county established and organized pursuant to Article XX of the Colorado Constitution.

2. Denver owns and operates DEN.

3. Monaghan Farms, Inc. is a Colorado corporation with a principal location at 7950 East Prentice Avenue, Suite 101, Greenwood Village, Colorado.

4. On July 28,1988, Denver filed a Petition in Condemnation against Monaghan Farms to acquire approximately 8,360 acres of land, constituting the Monahan Parcels (the "Condemnation Action").

5. On November 12, 1992, Denver and Monaghan Farms executed a Stipulation and Settlement Agreement (the "1992 Settlement Agreement").

6. On November 19, 1992, the Denver District Court issued a Second Amended Rule and Order.[1]

7. On May 3, 2017, Monaghan Farms sent Denver a letter, stating, in part, a "demand that Denver cease from using the property acquired from Monaghan Farms via eminent domain for [DEN] for private commercial uses or otherwise return the property being issued for private uses back to Monaghan Farms."

8. In the May 3, 2017 letter, Monaghan Farms threatened to sue Denver if the concerns of Monaghan Farms could not be resolved.

---

1. In its Response to Denver's motion for summary judgment, Monaghan Farms refers to the Second Amended Rule and Order as the "Third Rule and Order." In this Order, the Court will refer to the document as the Second Amended Rule and Order.

9. On April 20, 2020, Monaghan Farms sent a letter to Denver in which Monaghan Farms reasserted its intent to pursue claims for reversion.

ANALYSIS

I. Rule 56(f) Request

Monaghan Farms requests a continuance of Denver's application for summary judgment to conduct extensive discovery as to whether Denver's specified land use is a "public airport use." The Court denies this request, finding that the determination of this factual issue is irrelevant, for the reasons and authorities stated below, to the legal issues presented in Denver's First and Second Claims for Relief. These claims for relief present issues that can be determined as a matter of law.

II. First Claim for Relief

In its First Claim for Relief, Denver seeks to quiet its title to a portion of DEN identified as the Monaghan Parcels. Denver maintains that it acquired title to the Monaghan Parcels in fee simple absolute and that Monaghan Farms lacks a right to reversion in these parcels.

C.R.C.P. 105(a) governs quiet title actions "for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property[.]" The court is tasked with granting "full

and adequate relief so as to completely determine the controversy and enforce the rights of the party." *Id.* "In an action to quiet title to condemned property, courts generally consider the nature of the interest in issue and determine the intent, express or implied, of the condemnation decree awarding the interest." *Hutson v. Agric. Ditch & Reservoir, Co.*, 723 P.2d 736, 739 (Colo. 1986).

In the Condemnation Action, Denver expressed the intent to acquire "all property interests in, above, on and below the surface of the [Monaghan] parcels" and stated that the condemnation was "necessary for the protection and preservation of the health, safety, welfare, and convenience of the citizens of the City and County of Denver, and to carry out the public project." Mot. Ex. 1, ¶ 5, Ex. A. In the Second Amended Rule and Order, the District Court approved the stipulation of Denver and Monaghan Farm and ordered, adjudged and decreed:

> [T]hat the property and interests therein described in Exhibit A attached hereto and incorporated herein by reference have been duly and lawfully taken by [Denver] pursuant to the statutes and the Constitution of the State of Colorado; that *all interests* of the Respondents *in said property* have been acquired by [Denver]; and that title to the property described in Exhibit A, together with all appurtenances thereto belonging, *free and clear of all liens*

> *and encumbrances*, is hereby vested in [Denver][.]

Mot. Ex. 3. (Emphasis added). Exhibit A describes the property acquired by Denver as including "[a]ll property interest in, above, on and below the surface of the Parcels." *Id.* Ex A.[2] Notably, the Second Amended Rule and Order does not contain any reference to a reversionary interest by Monaghan Farms.

Denver contends that the use of the phrase "all property interests" meant that Denver sought and received title to the Monaghan Parcels in fee simple absolute. Monaghan Farms challenges this contention, arguing that any such determination circumvents the issue of "public use," that the phrase only refers to the location of the property or, at best, Denver's present possessory interests, and that the failure of the pertinent documents to use the term "fee simple absolute" raises a genuine issue of material fact.[3] The Court agrees with Denver's contention, rejecting the arguments of Monaghan Farms.

As a preliminary matter, neither the First nor the Second Claims for Relief require a determination as

---

2. "All property interests" was subject to specifically identified and preexisting mineral and easement rights which are not pertinent to the present dispute.

3. Monaghan Farms also raises arguments as to the initial condemnation. Because these arguments do not impact the Court's resolution of the instant motion, the Court declines to address those arguments.

to Denver's intended use of the Monaghan Parcels. The intended use of the Monaghan Parcels is only relevant to Denver's Third Claim for Relief, a claim which Denver has asserted as an alternative claim for relief.[4] The Court only needs to address the issue of the intended use of the Monaghan Parcels if it determines that Monaghan Farms retained a reversionary interest in the Monaghan Parcels. Additionally, as noted below, any change in the purpose for which Denver may use the Monaghan Parcels does not impact the propriety of the initial condemnation.

Here, the phrase "all interests . . . in said property . . . free and clear of all liens and encumbrances" clearly and unambiguously expresses the intent to convey the Monaghan Parcels in fee simple absolute. "Conveyances of real estate are deemed to be fee simple unless expressly limited." *Campbell v. Summit Plaza Assocs.*, 192 P.3d 465, 473 (Colo. App. 2008). "A good title in fee simple means the legal estate is in fee, free and clear of all claims, liens, and encumbrances whatsoever, except as listed in the deed." *Id.*; *see also* § 38-30-107, C.R.S. (2021); *see also* § 38-1-105(4) (in a condemnation action, "[u]pon the entry of such rule, the petitioner shall become seized in fee unless a lesser interest has been sought . . . of all such lands, . . . described in said rule as required to be taken"). Here, Denver's interests in the land were only subject to specified exceptions for each identified parcel.

4. Motion at 3 n.1.

These exceptions generally related to mineral rights and prior right-of-way easements. Most significantly, the Second Amended Rule and Order does not grant any reversionary right to Monaghan Farms. While the pertinent documents do not recite the term "fee simple absolute," the nature of the interest and the expressed intent of Denver and Monaghan Farms confirm that the Monaghan Parcels were conveyed in fee simple absolute.

The Court further rejects Monaghan Farms' argument that it retains a reversionary interest if the Monaghan Parcels are subjected to a non-public purpose. The Colorado Court of Appeals decision in and *Steamboat Lake Water & Sanitation Dist. v. Halvorson*, 252 P.3d 497 (Colo. 2011), lends guidance on this point. There, a water and sanitation district condemned a parcel of land pursuant to its eminent domain powers. The district determined that it needed to develop a well on the land to ensure sufficient water supply to its residents and, in meeting this goal, it needed to construct a water treatment plan on the land. The trial court concluded that the district required immediate possession of the parcel of land and, after a trial in which a jury awarded damages and interest, the trial court granted absolute fee simple title to the district. The condemnees appealed, challenging the trial order describing the district's title as an absolute fee "free of all rights of reversion or reversionary interests, including . . the possibility of reverter and rights of entry for conditions broken." *Id* at 499. The Court of Appeals rejected the challenge,

determining that a title obtained by a water and sewer district through condemnation is not subject to a right or reentry or a reversionary interest if it is abandoned or subjected to a non-public purpose. *Id.* at 503. The Court noted, consistent with statutory amendments to eminent domain legislation,[5] that the seminal question is "the purpose for which property may be condemned (furthering a public use; here, providing an adequate residential water supply), not the uses to which it may be put after it is condemned or the type of interest that may be condemned." *Id.* at 504 (emphasis in original).

Another division of the Colorado Court of Appeals earlier reached a similar conclusion in *Wall v. City of Aurora*, 172 P.3d 934 (Colo. App. 2007). There, the Court held that "a condemnor may use condemned property for a different purpose, so long as the original purpose was valid at the time of the taking." *Id.* at 937. The Court reasoned that the need for the taking of particular land parcels and the compensation for that taking are "judged solely by the conditions

5. Section 38-1-101(1)(b)(I), C.R.S. (2021), the "*Kelo* amendment," provides as follows: "For purposes of satisfying the requirements of this section, 'public use' shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. Private property may otherwise be taken solely for the purpose of furthering a public use." This amendment was passed in reaction to the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). Monaghan Farms concedes that the Kelo Amendment does not apply retroactively to the condemnation at issue in this case. Resp. 15.

existing at the time of the taking." *Id.* at 938 (quoting *Beistline v. City of San Diego*, 256 F.2d 421, 424 (9th Cir. 1958)). The Court further indicated that the change in the corporate mind of the sovereign body to use the condemned property for a different purpose does not establish that the initial taking was in fact for a private purpose or otherwise improper. *Id.*

The Court reaches the same conclusions in the instant case. Here, during the Condemnation Action, pursuant to the request of Denver and Monaghan Farms, the District Court issued a Second Rule and Order which conveyed the Monaghan Parcels to Denver in fee simple absolute for an undisputable public purpose. Monaghan Farms did not retain any reversionary interest in the Monaghan Parcels following the condemnation of those whole parcels of property. Thus, Denver's title to the Monaghan Parcels is not subject to a reversionary interest even if Denver's use of the land changes.

Accordingly, for these reasons and authorities, the Court grants Denver's motion for summary judgment as to the First Claim for Relief. Denver shall file, within 21 days of the date of this Order, a proposed decree, pursuant to C.R.C.P. 105(a), confirming that Denver holds title to the Monaghan Parcels in fee simple absolute, and that Monaghan Farms retains no current or future interest in the Monaghan Parcels other than certain mineral rights and prior right-of-way easements identified in the Second Amended Rule and Order.

II. Second Claim for Relief

In its Second Claim for Relief, Denver seeks a declaration that, by entering into the 1992 Settlement Agreement, Denver acquired title to the Monaghan Parcels in fee simple absolute and that Monaghan Farms released any claim for a reversionary interest in the Monaghan Parcels. The Court determines that Denver is entitled to summary judgment on this claim.

The 1992 Settlement Agreement provided for the release by Monaghan Farms of all interests it may have had in the Monaghan Parcels in exchange for a cash payment. Mot. Ex. 2. Monaghan Farms further agreed to move the District Court for entry of the Second Amended Rule and Order which conveyed "all property interests" in the Monaghan Parcels to Denver. *Id.* § 2(A); Ex. 2, Ex. B. As the Court has set forth above, pursuant to the Second Rule and Order, Denver holds title to the Monaghan Parcels in fee simple absolute and Monaghan Farms retains no current or future interest, other than certain identified mineral rights and prior right-of-way easements, in the Monaghan Parcels

Additionally, in the Settlement Agreement, Monaghan Farms released, and agreed not to sue, Denver, for, among other things:

> each and every cause of action, claim, contract, obligation, liability, damage, costs, indebtedness, or loss of every kind and nature whatsoever, known

and unknown, in law and in equity, which the releasing parties had, may now have, or which may hereafter arise against [Denver] by reason of any act, omission, matter, event, cause or other thing whatsoever occurring prior to the date hereof (collectively referred to as "the claims") arising under or in any way relating to (i) the acquisition of the Monaghan property for the new Denver International Airport project; (ii) City's authorization and implementation of said project; (iii) the parties' attempt, lack of attempt, or manner of attempt to negotiate a settlement and acquisition of the Monaghan property; (iv) the filing of the Condemnation Action and pleadings connected therewith for the acquisition of the Monaghan property; (v) the course of proceedings and conduct undertaken by City in acquiring the Monaghan property; (vi) the claims raised or which could have been raised by Monaghan or any of the releasing parties in the Condemnation Action, and the action filed by Monaghan entitled Monaghan Farms, Inc. v. City and County of Denver, et al. Civil Action No. 89 M 1532, United States District Court, District of Colorado; (vii) the appeals undertaken by any releasing party in any of the above-referenced actions; and (viii) any other matters relating to any of the foregoing; and further, the releasing parties covenant not to sue any of the released parties for any of the claims stated or unstated which could have been brought relating to said matters.

Ex. 2, § 3. This broad release includes any purported right of reversion following condemnation.

In concluding that Denver is entitled to summary judgment on its Second Claim for Relief, the Court finds that the 1992 Settlement Agreement is unambiguous, rendering inadmissible the interpretations of language during negotiations and prior to the execution of the agreement. *Burns v. Burns*, 454 P.2d 814, 818 (Colo. 1969). Indeed, Denver and Monaghan Farms agreed that the Settlement Agreement "constitute[ed] the entire understanding and agreement of the parties relating to the subject matter hereof" and "supersed[ed] all prior negotiations, understandings, offers, correspondence, stipulations, and agreements, whether oral or written[.]" Mot. Ex. 2 § 7.

The Court further rejects the arguments of Monaghan Farms suggesting a breach of the 1992 Settlement Agreement by Denver. Monaghan Farms first claims that Denver failed to engage in good faith negotiations prior to the initiation of this proceeding. However, as the undisputed facts establish, Monaghan Farms has threatened to institute legal proceedings since 2017. Monaghan Farms set the stage for litigation without requesting negotiations before the institution of this lawsuit and thus any good faith negotiations requirement by Denver was satisfied. Monaghan Farms next claims that a breach "may" occur if Denver does not use the Monaghan Parcels for a "public use." Resp. 25. Again, as the Court concluded above, this argument is not supported by the law.

Appendix C

CONCLUSION

For the foregoing reasons and authorities, the Court denies Defendant Monaghan Farms' Motion for Denial or Continuance of Ruling on City and County of Denver's the City and County of Denver's Motion for Summary Judgment on First and Second Claims for Relief Pursuant to 56(f) and grants the City and County of Denver's Motion for Summary Judgment on First and Second Claims for Relief. Denver shall file, within 21 days of the date of this Order, a proposed decree.

DATED: April 27, 2022

BY THE COURT:

/s/
SHELLEY I. GILMAN
District Court Judge

APPENDIX D — DENIAL OF CERTIORARI OF THE COLORADO SUPREME COURT, FILED AUGUST 5, 2024

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Supreme Court Case No: 2023SC580

MONAGHAN FARMS, INC.,
A COLORADO CORPORATION,

Petitioner,

v.

CITY AND COUNTY OF DENVER, A COLORADO MUNICIPAL CORPORATION,

Respondent.

Certiorari to the Court of Appeals, 2022CA956

District Court, City and County of Denver, 2021CV33498

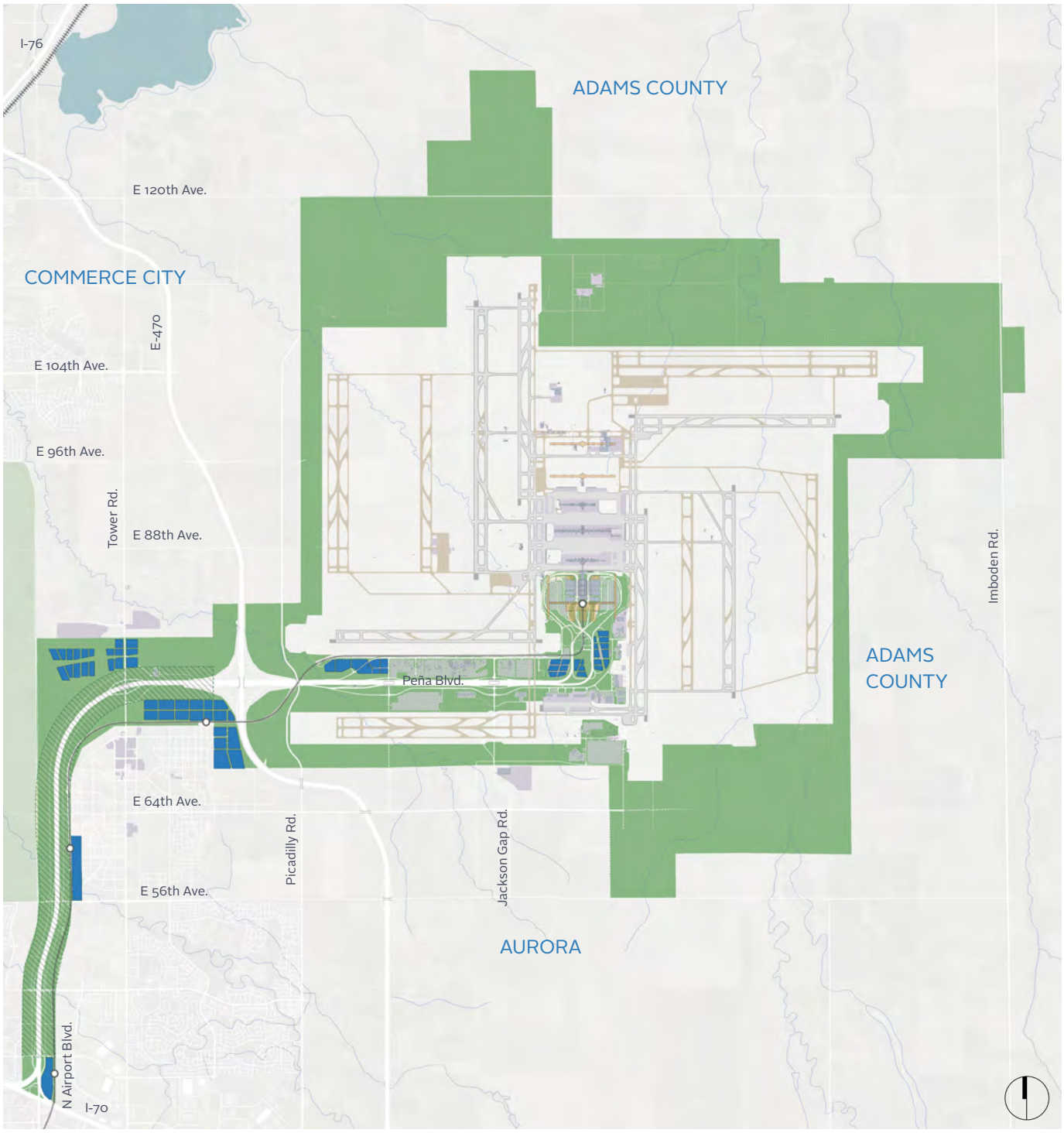
ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

Appendix D

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 5, 2024.



DEN Core Aviation Operational Land
DEN Commercially Developable Land
DEN Development Districts
DEN Scenic Buffer

53%
Core Aviation Operational Land:
18,000 acres

47%
Commercially Developable Land:
16,000 acres

DEN: 34,000 ACRES (13,760 HECTARES)

APPENDIX E