

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 22-0742

Little Big Warm Ranch, LLC,

Appellant and Cross Appellee,

v.

Wilfred Doll,

Cross-Appellant and Appellee.

**OPENING BRIEF OF APPELLANT/CROSS-APPELLEE,
LITTLE BIG WARM RANCH, LLC**

*On Appeal from the Seventeenth Judicial District Court, Phillips County,
Cause No. DV 2018-30 Consolidated with DV 2021-34
Honorable Blair Jones*

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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court exceeded its jurisdiction and erred as a matter of law when it failed to apply the Water Court's Order, Abstracts, and the Preliminary Decree as Modified by the Water Court.

STATEMENT OF THE CASE

In September of 2018, Little Big Warm Ranch, LLC ("LBWR") filed suit (Cause No. DV-18-30) against Wilfred L. Doll ("Doll"), alleging that Doll interfered with LBWR's ability to use its water rights when Doll placed a lock and chain on the headgate located in Big Warm Creek. Doc. 1. The headgate in Big Warm Creek is unusual. It is located *in* Big Warm Creek, unlike other headgates that usually are placed at the head of a ditch. When the headgate in the creek is lowered, the water level in Big Warm Creek rises until it flows into the Ester



Conveyance Ditch. When the headgate is raised, water flows downstream past the headgate and does not enter the Ester Conveyance Ditch. There is no headgate on the Ester Conveyance Ditch.



The District Court held a preliminary injunction hearing on September 19, 2018. At the hearing, per the stipulation of the Parties, the District Court reinstated Brian Robinson as Water Commissioner to administer the Big Warm Creek water rights at issue in this case. Doc. 21. LBWR and Doll also stipulated to have the contested water rights certified to the Water Court. Doc. 23. On September 19, 2019, the Water Court issued its final order determining the parties' water rights on Big Warm Creek. 40M-400 Final Order, Supplemental Appendix attached as Ex.

A. On appeal, this Court affirmed the Water Court's Order in Case 40M-400. *Little Big Warm Ranch, LLC v. Doll*, 2020 MT 198, ¶ 50, 400 Mont. 536, 555, 469 P.3d 689, 701.

While DV-18-30 was pending in District Court, on July 16, 2021, LBWR filed a Verified Dissatisfied Water User Complaint and Request for Hearing (filed as DV-21-34). Doc. 141. LBWR filed this case separately because a Water Commissioner was now administering the parties' water rights on Big Warm Creek and Brian Robinson was not a party to DV-18-30. Among other claims, LBWR's Count I: Dissatisfied Water User Complaint made pursuant to § 85-5-301, MCA, pertained to the supervision and distribution of water using the headgate located in Big Warm Creek that diverts water into the Ester Conveyance Ditch and ultimately Ester Reservoir.

On July 23, 2021, Brian Robinson closed the headgate on Big Warm Creek and placed a lock on the headgate. 7.29.21 Water Commissioner report attached as Ex B. In response, On July 28, 2021, Doll filed a motion in DV-18-30 requesting the District Court to issue an "Order directing the Sheriff of Phillips County to open the headgate on Big Warm Creek to allow at least 62.1% of the water in Big Warm Creek to flow downstream to Doll to water Doll's cattle." Doc. 109. On the very same day, the District Court issued an emergency order without a hearing and granted Doll's motion. Doc. 108. After LBWR filed a Motion to Quash the order,

Doc. 112, the District Court scheduled a hearing based on Doll's emergency motion filed in DV-18-30 and LBWR's Verified Dissatisfied Water User Complaint and Request for Hearing filed in DV-2021-34. Doc. 114.

At the combined hearing, the District Court ordered the parties to provide proposed orders and supporting briefs to the Court for how the parties' water rights on Big Warm Creek should be administered. Docs 131, 131.5, and 132. No evidence was presented at the hearing and the District Court did not conduct any additional evidentiary hearing.

The District Court, on October 14, 2021, issued its Memorandum and Order Directing Administration of Water Rights on Big Warm Creek. Doc. 134, attached as Appendix Ex. 1. This Order is inconsistent with the Water Court's determination of the parties' rights. The District Court also consolidated DV-18-30 and DV-21-34. The remaining issues in the consolidated cases were litigated in DV-18-30 and the parties eventually settled the matter. Doc. 226. However, in the stipulated dismissal of DV-18-30, LBWR reserved the right to appeal the District's Court's order directing and administering the water rights. *Id.* LBWR filed this appeal on December 21, 2022.

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STATEMENT OF THE FACTS

A. The Water Court Final Order

Water Court Case 40M-400 concerned competing claims by LBWR, Doll, and Gilmores to decreed water rights in Big Warm Creek. The Water Court ultimately issued a Final Order with revised abstracts of the parties' water rights on Big Warm Creek. Based on the Water Court's abstracts, Doll has a total of 12.43 CFS of Big Warm Creek water that he can either divert into Ester Reservoir by lowering the headgate on Big Warm Creek so that the water level rises and water flows into the Ester Conveyance Ditch or by raising the headgate so that water remains instream and flows past the headgate to his points of diversion downstream of the headgate on his property in sections 8, 9, and 10. Abstracts of 40M 30122575 and 40M 168765-00, Attached as Ex. C and D. LBWR has a total of 4.49 CFS of Big Warm Creek water that can also be diverted using the headgate in Section 20 into Ester Reservoir. Abstracts of 40M 186463-00 and 40M 186464-00. Attached as Ex. E and F. This headgate is LBWR's only point of diversion for said water rights. *Id.*

LBWR's water right 40M 186463-00 and Doll's water right 40M 30122575 are co-equal in priority and are the most senior rights on Big Warm Creek. Both water rights share a priority date of September 25, 1889, and both are used for irrigation. LBWR's co-senior water right has a flow rate of 2.81 CFS and

Doll's co-senior water right has a flow rate of 7.77 CFS. The Gilmores also share a priority date of September 25, 1889, but the Water Court found that their water rights should be subordinated in priority to those of LBWR and Doll as a sanction for their failure to answer discovery requests and meaningfully participate in that case. Final Order 40M-400, at p. 21-22.

Doll also has a stockwater claim, 40M 168752-00, that shares the same priority date, September 25, 1889, as Doll's irrigation right and LBWR's irrigation right. Doll's stockwater right does not use the headgate as a point of diversion. Its specified and only points of diversion are for livestock drinking directly from Big Warm Creek in sections 8, 9 and 10. 40M 168752-00, attached as Ex. G.

B. The District Court Order

The District Court, in its Memorandum and Order Directing Administration of Water Rights on Big Warm Creek, ordered:

1. That Doll "may leave his irrigation rights instream for Doll's use downstream." Doc. 134, at p. 6.
2. That Doll could divert a flow of water at points of diversion that contradicted the Water Court's adjudication:

April 1 to September 1:

During periods of adequate flow, the Water Commissioner shall distribute the water flow in Big Warm Creek to Doll, LBWR, and Gilmores in the percentages mandated by the Final Order of the Water Court as set forth above. During times of low flow, when Big Warm

Creek is flowing less than 12.5 CFS at the Ester headgate, 22.46% of the flow at the Ester headgate shall be diverted into the headgate for LBWR's use, with 62.17% of the flow left instream for Doll's use downstream. The remaining 15.36% shall be diverted into the Ester headgate for Gilmore's use.

Should either LBWR or Doll choose to subordinate Gilmore's rights, the Ester headgate shall be adjusted and maintained such that Doll's portion of Gilmore's subordinated water rights remains in the creek for Doll's use downstream, and LBWR's portion of Gilmore's subordinated water rights shall be diverted into the Ester headgate for LBWR's use. The Ester headgate shall be adjusted periodically by the Water Commissioner, as necessary, to maintain the decreed allocations.

Doc. 134, at p. 7-8.

STANDARD OF REVIEW

The Court's standard of review for a question of law is whether the legal conclusions of the trial court are correct. *Vitullo v. IBEW, Local 206*, 2003 MT 219, ¶ 9, 317 Mont. 142, 145, 75 P.3d 1250, 1252. This includes the conclusions of law made when ruling on a dissatisfied water user's complaint. *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 9, 383 Mont. 523, 526, 373 P.3d 836, 839. In addition, the "interpretation of a judgment or decree is a question of law, which this Court reviews to determine whether it is correct." *In re Quigley*, 2017 MT 278, ¶ 9, 389 Mont. 283, 285, 405 P.3d 627, 630 The same is also true of a district court's statutory interpretation: "The interpretation of a statute is a question of law that we review for correctness." *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 18,

384 Mont. 503, 380 P.3d 771; *quoting City of Missoula v. Fox*, 2019 MT 250, ¶ 8, 397 Mont. 388, 392, 450 P.3d 898, 901.

SUMMARY OF ARGUMENT

Based on statute, the Water Court “adjudicates” water rights, and the district courts have the jurisdiction to supervise distribution of water rights or, in other words, to implement the Water Court’s determination of existing water rights. In this case, the Water Court adjudicated Doll’s and LBWR’s water rights and issued a Final Order and abstracts on September 17, 2019. 40M-40 Final Order.

Even though the Water Court issued an order on the parties’ water rights, the parties disagree with how the court-appointed Water Commissioner was distributing the water. Both LBWR and Doll requested the District Court to supervise distribution of the water according to the Water Court’s findings during adjudication.

Without a hearing or evidence and based upon the District Court’s review of the parties’ proposed orders, the District Court ordered the Water Commissioner to administer the water rights in a manner that is inconsistent with the Water Court’s adjudication. Since the District Court failed to follow the Water Court’s determination of water rights, the District Court exceeded its jurisdiction and erred as a matter of law.

Specifically, the District Court failed to follow the Water Court’s

determination of flow rates and points of diversion for Doll's irrigation rights and stock water rights. The Water Court allocated to LBWR 4.49 CFS to be diverted in Section 20 into Ester Reservoir. The practical effect of the District Court's legal errors is that LBWR is deprived of being able to divert the 4.49 CFS into Ester Reservoir. The District Court determined that Doll had the equivalent of an instream flow rate to bypass Doll's right to divert in Section 20 into Ester Reservoir and that Doll could force that water to be left instream and carried to Doll's downstream diversion points. This allocation of water rights conflicts with the Water Court's Order of adjudication and violates Montana statutes regarding instream flow not being allowed for irrigation or stock water rights.

The District Court erred as a matter of law, exceeding its subject matter jurisdiction and substituted its judgement instead of following the Water Court's determination of Doll's and LBWR's water rights. The District Court's Order should be overturned, and this case should be returned to the District Court with direction to follow the Water Court's ruling on adjudication of the Parties' water rights.

ARGUMENT

I. The Water Court Issued a Decree and Abstracts Setting Forth the Parties' Water Rights on Big Warm Creek, including the Priority Dates and Points of Diversion for Each Right

Under the Post Decree Abstracts of Water Right Claims issued with the

Water Court's Final Order, Doll has a total of 12.43 CFS of Big Warm Creek water that he can divert in Section 20 into Ester Reservoir. Abstracts of 40M 30122575 and 40M 168765-00. Similarly, LBWR has a total of 4.49 CFS of Big Warm Creek water that can be diverted in Section 20 into Ester Reservoir. Abstracts of 40M 186463-00 and 40M 186464-00. LBWR's and Doll's senior water rights are co-equal in priority because they share a priority date of September 25, 1889. Abstracts of 40M 186463-00 and 40M 30122575. Thus, LBWR and Doll share a common priority date and point of diversion into Ester Reservoir.

Unlike LBWR's water rights, Doll's irrigation right also has a right to divert water downstream from points of diversion that are on his property. Abstract of 40M 30122575 and 40M 168765-00. Doll's points of diversion downstream of the headgate are equal in priority to LBWR's and Doll's point of diversion into Ester Reservoir. Also, pursuant to the Water Court's adjudication, Doll also has the right for livestock to drink out of the stream in Sections 8,9, and 10. Abstract 40M 168752-00.

II. The District Court Exceeded Its Jurisdiction by Adjudicating Water Rights

A. The Water Court Adjudicates Water Rights and the District Court Must Distribute Water as Adjudicated by the Water Court

In Montana, the legislature has developed a scheme where the water court "is responsible for interpreting and determining the nature and extent of existing

water rights,” and “the district courts are responsible for supervising the distribution of water as adjudicated by the Water Court and for enforcing water rights decrees.” *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 19, 383 Mont. 523, 530, 373 P.3d 836, 841 (emphasis added). The Water Court has exclusive “jurisdiction to determine existing water rights.” *In re Petition of the Deadman's Basin Water Users Association*, 2002 MT 15, ¶ 15, 308 Mont. 168, 40 P.3d 387, citing *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991); § 3-7-501, MCA. In contrast, a District Court only has authority to supervise and enforce distribution that has already been adjudicated by the water court. *Id.* (citing *Baker Ditch Co. v. District Court*, 251 Mont. 251, 255, 824 P.2d 260, 262 (1992)); see also § 85-2-406(1) and § 85-5-101, MCA. Thus, district courts lack authority to adjudicate water rights. *Id.*; § 85-2-406, MCA; see also *Kruer v. Three Creeks Ranch of Wyo., L.L.C.*, 2008 MT 315, ¶ 21, 346 Mont. 66, 72, 194 P.3d 634, 638 (“a district court may not have jurisdiction to reallocate disputed water rights absent a contract.”).

“A district court hearing a dissatisfied water user's complaint may not adjudicate water rights but may only enforce rights determined in a prior decree.” *Fellows v. Office of Water Comm'r*, 2012 MT 169, ¶ 16, 365 Mont. 540, 545, 285 P.3d 448, 453 (citing *Luppold v. Lewis*, 172 Mont. 280, 288-289, 563 P.2d 538, 542 (1977)). As this Court has explained:

The law is clear the only matters for decision relative to the appointment of a water commissioner and petitions in relation to his duties, is whether or not the commissioner is distributing water to existing water right holders pursuant to the adjudication decree. *See Quigley v. McIntosh* (1940), 110 Mont. 495, 103 P.2d 1067. The only purpose of the petition of a dissatisfied water user is to enforce rights determined by the decree.

Baker Ditch Co. v. Dist. Court, 251 Mont. 251, 256, 824 P.2d 260, 260 (1992).

B. The District Court's Order Contravened the Water Court's Determination of the Parties' Respective Water Rights in the Creek

1. The District Court Failed to Follow the Water Court's Adjudicated Flow Rates

The District Court's Order essentially rewrote the Water Court's determined flow rates, instead of enforcing the rights decreed by the Water Court and depicted in the parties' abstracts. The District Court impermissibly substituted its own judgment for that of the Water Court, exceeding its own power and infringing on that of the Water Court. *In re Petition of the Deadman's Basin Water Users Association*, 2002 MT at ¶ 15. The District Court was bound, as a matter of law, to follow the Water Court's abstracts for each water right in administering the parties' water rights and to measure the flow rates of each water right at the points of diversion decreed by the Water Court. *Id.*

The District Court does not have jurisdiction to award a flow rate other than the flow rate decreed by the Water Court and appearing on a water right's abstract.

Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991)

(jurisdiction to interpret and determine existing water rights rests exclusively with the Water Court). The District Court's jurisdiction is to distribute water according to the Water Court's adjudication, as memorialized on a water right abstract. § 85-5-101, MCA. An abstract summarizes a water right. Rule 2(a)(1), W.R.C.E.R. It is the go-to document for water users and water commissioners to administer and enforce a water right:

It needs to be remembered that the abstract of water right claim is the document that most future water users and water commissioners will follow.

In re Adjudication of the Existing Rights to the Use of All the Water, 2003 Mont. Water LEXIS 3, *3.

The District Court erred by awarding different flow rates than the Water Court's adjudication determinations. The Water Court explained how it determined the flow rates that appear on the parties' abstracts. 40M-400 Final Order at p. 24. In its Final Order the Water Court said it allocated the flow rates of the decreed water rights on a pro-rata basis according to the amount of acreage each party owned. Final Order at p. 24. Specifically, the Water Court stated:

The Sieben/Ester and Marshall/Mercer decreed rights became appurtenant to the lands they were used upon. The deeds issued by David Drum to predecessors of the current parties stated the grantees were to receive water rights appurtenant to the lands granted. No mention of specific water rights was made in those deeds. Accordingly, each grantee received a pro-rata share of the Sieben/Ester and

Marshall/Mercer water rights used on their property. In the absence of actual water measurement records, the most equitable way to allocate the flow rate for those rights is based the amount of irrigated acreage occurring on each claimant's property. The table below shows this allocation.

Final Order, p. 24.

In 2020, this Court was asked to review the Water Court's adjudication of these water rights. *Little Big Warm Ranch, LLC v. Doll*, 2020 MT 198, 400 Mont. 536, 469 P.3d 689. In that case, the Court upheld the Water Court's rationale of how it made its decision to adjudicate the water rights. *Id.*, ¶ 5. As this Court noted, the use of a pro-rata allocation was merely a method the Water Court used to determine historic use to adjudicate the flow rate of the parties' Big Warm Creek water rights. *Id.*, ¶ 41.

The District Court took the "pro-rata" words and then improperly applied this allocation a *second time* to the flow rates appearing on the parties' water right abstracts. Instead of distributing the parties' water rights according to the flow rates on their abstracts, the District Court allocated each party a percentage of the streamflow in Big Warm Creek when streamflow is low:

During periods of adequate flow, the Water Commissioner shall distribute the water flow in Big Warm Creek to Doll, LBWR, and Gilmores in the percentages mandated by the Final Order of the Water Court as set forth above. During times of low flow, when Big Warm Creek is flowing less than 12.5 CFS at the Ester headgate, 22.46% of the flow at the Ester headgate shall be diverted into the headgate for LBWR's use, with 62.17% of the flow instream for Doll's use

downstream. The remaining 15.36% shall be diverted into Ester headgate for Gilmore's use.

Doc 134 at pp. 7-8. Thus, according to the District Court, LBWR does not receive the full flow rate of its co-equal water right during times of low flow. LBWR receives its full flow rate only during times of "adequate flow." Nowhere did the Water Court condition LBWR's adjudicated flow rate of 4.49 CFS on how much water is currently available. The Water Court adjudicated 4.49 CFS to LBWR to be diverted in Section 20 flowing into Esther Reservoir. Instead of administering the Water Court's determination, the District Court decided that it had the authority to determine if and when LBWR received its 4.49 CFS, as adjudicated by the Water Court. In essence, the District Court's order contravenes the Water Court's Order by directing the Water Commissioner to deliver less water to LBWR than it is entitled. The District Court's determination of flow rate distribution therefore contradicts the Water Court's Final Order and its abstracts and impermissibly re-adjudicates the parties' water rights. Doc 134, at p. 6.

Instead of providing a pro-rata allocation in the abstracts, the Water Court provided a flow rate quantified in cubic feet per second, and never stated that the flow rates should be allocated on a percentage basis when streamflow is low. Final Order 40M-400, p. 24. By ordering the Water Commissioner to deliver percentages of streamflow and disregarding the Water Court's adjudication, the District Court

exceeded its jurisdiction and erred as a matter of law based on Montana Code Annotated Section 85-5-101.

2. Because the Water Court Order Gives the Parties the Same Priority Dates, the District Court Erred in Curtailing Little Big Warm's Upstream Water Use for the Benefit of Doll, a Co-Equal Downstream User

It is a cardinal rule of Montana water law that if a senior appropriator is not receiving its full appropriation of water, the “first in time, first in right” rule allows that senior to make a call on junior appropriators to cease diverting water until the senior’s right is fulfilled. *Kelly v. Teton Prairie, LLC*, 2016 MT 179, ¶ 11, 384 Mont. 174, 376 P.3d 143). However, that rule applies only when the appropriators have different priority dates, so that one is senior in time to the other. That is not the case here, so there is no legal basis to curtail Little Big Warm’s use for the benefit of Doll.

The Water Court’s Final Order awarded LBWR and Doll with water rights that share a priority date of September 25, 1889. These are LBWR’s claim 40M 186463-00 and Doll’s claims 40M 168752-00 and 40M 30122575. As LBWR is not junior to Doll, Doll cannot place a call on LBWR to curtail its use of water. *Kelly*, ¶ 11. By directing the Water Commissioner to, in times of low streamflow, to deliver less than the full flow rate of LBWR’s water right so that Doll can receive water downstream, the District Court effectively subordinated LBWR’s

water right to Doll's equal priority water rights. The District Court therefore failed to follow Montana's cardinal rule of "first in time, first in right," which is another error of law.

3. The District Court's Order Also Contravened the Water Court's Order as to the Parties' Points of Diversion

In addition to misapprehending the priority of the parties' water rights, the District Court misunderstood the parties' points of diversion. The point of diversion is where "water is diverted from the source." Rule 2(a)(53), W.R.C.E.R. "Each appropriation includes the right to a particular quantity of water at the appropriate designated point of diversion" Brown, Bryan & McElyea, MONTANA WATER LAW, 66 (2021); *citing Wheat v. Cameron*, 64 Mont. 494, 501-02, 210 P. 761, 763 (1922) ("The amount of an appropriation is gauged by the amount of water taken in at the head of the ditch, rather than by the amount actually delivered at the place of beneficial use.") *Helena v. Rogan*, 26 Mont. 452, 470, 68 P. 798, 800 (1902). It is also the location where flow rate is measured. Rules 2(a)(27), 2(a)(53), W.R.C.E.R.

The District Court was bound, as a matter of law, to follow the Water Court's abstracts for Doll's and LBWR's water rights and to measure the flow rates of each water right at the points of diversion, as decreed by the Water Court. According to Water Court's abstracts, both LBWR's and Doll's water rights for

irrigation that are diverted in Section 20, must be diverted into Esther Reservoir.

An irrigation right is not an instream flow right. Instream flow rights are not for irrigation use and are only legal to protect, maintain, or enhance stream flows to benefit the fishery resource. § 85-2-102(1)(c) & (e), MCA; § 85-2-436, MCA; § 85-2-408, MCA. Irrigation rights have to be diverted from a source and put to beneficial use. § 85-2-102(1)(a), MCA.

Without legal right or jurisdiction, the District Court elevated Doll's irrigation water right and stockwater right into instream flow rights from the point of division at the Ester Conveyance Ditch in Section 20 to Dolls' points of diversion downstream. Order Directing Administration of Water Rights on Big Warm Creek, p. 5. The District Court found that Doll "may leave his irrigation rights instream for Doll's use downstream." Doc. 134, at p. 6. This finding contradicts the water court's adjudication as finalized in the abstract.

The specific language for Doll's water rights 40M-1687765-00 and 40M 30122575 provides:

WATER DIVERTED FROM BIG WARM CREEK IN THE NWSE OF SEC 20, TWP 27N, RGE 27E, PHILLIPS COUNTY IS IMPOUNDED IN ESTER LAKE. OVERFLOWS FROM ESTER LAKE FLOW NORTH TO SPRING COULEE, WHICH IS USED AS A NATURAL CARRIER TO DELIVER WATER TO WILD HORSE RESERVOIR. WATER IMPOUNDED IN WILD HORSE RESERVOIR CAN CONTINUE FLOWING THROUGH SPRING COULEE OR IT CAN BE DISTRIBUTED TO PLACES OF USE DESCRIBED IN THIS CLAIM.

Abstracts of 40M 168765-00 and 40M 30122575. Nowhere in the abstract does the Water Court provide that Doll's had in instream flow right.

While it is true that Doll has water rights with points of diversion downstream, the fact that the point of diversion is downstream from Section 20 means that the headgate in Section 20 is not the correct place to measure the points of diversion that are on other sections of land downstream. Specifically, for Doll's diversion points in Sections 8, 9, and 10, the abstracts provide that Doll can divert from a headgate in the SWNWSE and the NWNWSE portions of Section 8, in the NE portion of Section 9, and the W2NW of Section 10. Abstracts of 40M 30122575 and 40M 168765-00. Nowhere did the Water Court determine that the downstream diversion points in Sections 8, 9, and 10 could be moved upstream to Section 20, as the District Court ordered.

Instead of following the law, and the Water Court's abstracts, the District Court effectively moved Doll's downstream diversion points up to the headgate in Section 20 by requiring that Doll's water rights be measured at the headgate (where they are not legally or practically diverted by Doll) and left instream for Doll's use downstream and not for use by LBWR. This is a legal error by the District Court and oversteps the Court's jurisdiction.

4. The District's Court Order is Impossible to Implement

The District Court's requirement that the Water Commissioner allocate the

water as a percentage of streamflow is impossible. Brian Robinson, Water Commissioner, stated in his report and deposition that it is impossible to split the water by the percentages ordered by the District Court. 4.19.22 Water Commissioner Report, attached as Ex. H; Robinson Depo: 25:7-11, attached as Ex. I. Doll has also conceded that it is very difficult to split the water by percentages as ordered by the District Court. Doll Depo: 71:25; 72:1-2, attached as Ex. J. The District Court's distribution order not only errs as a matter of law—it is also impossible to implement.

5. The Water Commissioner Should Be Ordered to Send the Full Streamflow into Ester Reservoir

The better practice would be to follow *Eldorado Co-Op Canal Co.* and allow the Water Commissioner to send the full streamflow of Big Warm Creek into Ester Reservoir for the benefit of all parties. In *Eldorado*, this Court held that a water master correctly concluded that, although a diversion of water down the Bateman Ditch in lieu of the Teton River during times of low flow had taken place for many years as a water conservation measure, the future use of the practice depended not upon its historical use, but upon the district court's authority under Sections 85-2-406(1) and 85-5-101, MCA, to admeasure water rights for the benefit of all users. *Eldorado Co-Op Canal Co.*, ¶ 28.

Both parties' equal priority water rights allow for the diversion of water into

Ester Reservoir. Water diverted into Ester Reservoir can reach the places of use of the parties' water rights. Much like the Bateman Ditch, Ester Reservoir is a water management tool for conserving water in times of low flow. By directing the Water Commissioner to short LBWR's water into Ester Reservoir so that water can reach Doll downstream, the District Court's order fails to admeasure water rights for the benefit of all users. Also, the order violates Section 85-5-101(2), MCA, because it fails to direct the Water Commissioner to distribute to LBWR the water to which it is entitled. § 85-5-101(2), MCA ("The water commissioner shall distribute to the appropriators, from the source or in the area, the water to which they are entitled.").

6. The District Court Erred by Expanding Doll's Stock Water Rights Both as to Duration and Point of Diversion

Pursuant to the Water Court's abstracts, Doll has a stock water right with a period of diversion and period of use from February 1 to November 1 of each year. 40M-168752-00. Instead of following the Water Court's Decreed Abstracts, the District Court's order gives Doll a stock water right from November 2 to January 31:

During this time period, the Ester headgate shall be set to the level that has historically allowed filling of Ester Reservoir while at the same time providing stock water for Doll and other downstream users.

Doc. 134, at p. 9. The District Court in deciding that Doll has a stock water right

from November 2 to January 31, essentially gives Doll a year-round stockwater right. By issuing this Order, the District Court ignored Doll's abstract 40M-168752-00 for his stockwater right and extended Doll's period of diversion and period of use beyond February 1 to November 1. This is a clear violation of a District Court's statutory jurisdiction and an intrusion into the exclusive province of the water court to adjudicate existing water rights.

In addition, Doll's stock water right has points of diversion in sections 8, 9 and 10, all of which are downstream of the Big Warm Creek headgate and Ester Conveyance Ditch in section 20. Doll's stock water right does not have a point of diversion at the Big Warm Creek headgate and Doll is not entitled to use the headgate on the Burns/Ester ditch for his stock water right. The Water Court's Final Order held:

The Dolls' stock claim, 40M 168752-00, is for livestock drinking directly from Big Warm Creek. Because this claim is for instream use, the Dolls are not entitled to use of Ester Reservoir, or the point of diversion in the NWSE of section 20, for this stock claim.

Final Order 40M-400, p. 25. Therefore, Doll has no right to measure the flow rate of his stockwater claim, 40M 168752-00, at the Big Warm Creek headgate in section 20.

The District Court's Order instructs the Water Commissioner to administer all the water rights from 40M-400 via the Ester headgate in section 20. However, as discussed *supra*, Doll's stockwater right 40M-168752-00 does not have a point

of diversion in section 20 and this water right cannot be diverted there. The District Court's Order allows Doll to force LBWR to forgo diverting water in section 20 so water stays instream, to fulfill Doll's stockwater claims downstream. This is in violation of the Water Court's Order and issued abstract. Doll's stockwater right must be diverted by livestock drinking out of the stream in sections 8, 9, or 10. Therefore, Doll's stockwater right cannot be a basis to split water at the headgate and curtail LBWR's co-equal irrigation right.

CONCLUSION

Montana law, both statutory and caselaw, clearly places exclusive authority for determination of water rights in the Water Court. This is a matter of subject matter jurisdiction, and a consequence of the special expertise of the Water Court. The only role of the District Courts is to implement and administer those rights, precisely in accordance with the Water Court's abstracts. In this case, the District Court erred as a matter of law, exceeding its subject matter jurisdiction, in essentially substituting its own judgment as to what the parties' water rights instead of ordering the Water Commissioner to allocate the water in accordance with the Water Court Order and abstracts. Therefore, The District Court's Order should be overturned, and this case should be remanded to the District Court with directions to follow the Water Court's ruling on adjudication of the Parties' water rights.

DATED this 5th day of April, 2023.

Lund Law, PLLC

By: /s/ Hertha L. Lund
Hertha L. Lund
Attorney for LBWR

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word calculated by Microsoft Word, is not more than 10,000 words, excluding the table of contents, table of citations and certificate of compliance.

DATED this 5th day of April, 2023.

Lund Law, PLLC

By: /s/ Hertha L. Lund
Hertha L. Lund
Attorney for LBWR

APPENDIX

TABLE OF CONTENTS to the APPENDIX	
<i>Relevant Judgment, Order, Findings of Fact, Conclusions of Law and Decisions</i>	
Exhibit 1	Memorandum and Order Directing Administration of Water Rights on Big Warm Creek

CERTIFICATE OF SERVICE

I, Hertha Louise Lund, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-04-2023:

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