

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0742

LITTLE BIG WARM RANCH, LLC, and
MARK FRENCH

Appellants and Cross Appellees,

v.

WILLIE DOLL,

Appellee and Cross Appellant.

APPELLEE'S RESPONSE BRIEF AND CROSS-APPEAL

On Appeal from the Montana Seventeenth Judicial District Court
Phillips County, Cause No. DV-2018-30
The Honorable Blair Jones, Presiding

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to M.R.App.Pro. 12(2), Doll frames the appeal issue as follows:

Whether the District Court failed to follow the Water Court's Order in Case 40M-400 when it entered its Memorandum and Order Directing Administration of Water Rights.

The cross-appeal issue is whether the District Court abused its discretion in finding Doll was not the prevailing party on LBWR's claims to enforce a 1975 Water Agreement.

STATEMENT OF THE CASE

In 2019 the Water Court held a trial adjudicating the parties water rights out of Big Warm Creek. LBWR argued in the Water Court trial that a 1975 Water Rights Agreement controlled the distribution of Big Warm Creek water. The Water Court rejected LBWR's arguments. LBWR appealed the Water Court's Final Order. This Court affirmed in *LBWR v. Doll*, 2020 MT 198.

Prior to and after this Court's decision affirming the Water Court, LBWR filed two different District Court actions seeking distribution of Big Warm Creek water right under the 1975 Water Rights Agreement. Doll counterclaimed based on a 2014 settlement agreement. The District Court cases were consolidated.

LBWR's claims based on the 1975 Agreement were dismissed based upon this Court's affirmation of the Water Court's Final Order. The District Court held that the 1975 Water Rights Agreement no longer retained vitality. The District Court issued a Memorandum and Order Directing Administration of the Big Warm Creek rights

according to the Water Court's Final Order, as affirmed by this Court.

The remaining claims were dismissed, or settled. LBWR reserved its right to appeal the District Court's October 21, 2021, Memorandum and Order Directing Administration of Water Rights on Big Warm Creek. Doll reserved his right to appeal the District Court's Order on Doll's Motion for Attorney Fees.

LBWR appeals. Doll cross-appeals.

STATEMENT OF FACTS

This case involves water right claims on Big Warm Creek, located south of Malta, Montana, in Phillips County. These parties, and these Big Warm water rights, have been before this Court before. Many of the relevant facts here were set out in *LBWR v. Doll*, 2020 MT 198.¹

Phillips County takes its namesake from B.D. Phillips (Phillips), who arrived on Big Warm Creek in the late 1800s and assembled a large ranch south of Malta. The water rights at issue were claimed on three ranches presently owned by LBWR, Willie and Cheri Doll (Dolls), and the Gilmore family (Gilmores), which were all once part of the larger Phillips Ranch.

Big Warm Creek rises on the north side of the Little Rocky Mountains east of Lodge Pole, Montana, and from its headwaters winds northeast to land owned by the Gilmores.

¹ Appendix Document 1, Final Order in Case 40M-400, *On Motion of the Montana Water Court*, pp. 2-3, Doc. Seq. 078 in Cause No. 2018-30; also *LBWR v. Doll*, 2020 MT 198 ¶ 3, 400 Mont. 536, 469 P.3d 689, affirming Final Order.

From there, Big Warm Creek flows east through land owned by LBWR. After crossing Highway 191, it flows north through land owned by Doll.² Doll, LBWR, and Gilmore own a portion of the Seiben/Ester and Marshall/Mercer water rights out of Big Warm Creek. The Seiben/Ester right is the most senior with a priority date of September 25, 1889, and a total flow rate of 12.5 CFS.³

In September of 2018, LBWR filed a complaint in District Court seeking to have the parties' Big Warm water rights distributed according to a 1975 Water Rights Agreement.⁴ On September 25, 2018, the District Court appointed a Water Commissioner to distribute Big Warm Creek water between LBWR and Doll:⁵

The distribution of water between the parties herein is a temporary resolution of the water distribution controversy which exists. Upon adjudication of the parties existing water rights by the Montana Water Court, this Court or the Montana Water Court will fashion the appropriate modification to this Order, and give subsequent direction to any water commissioner.⁶

In May of 2019, a trial was held in Water Court adjudicating the Big Warm rights held by LBWR, Doll, and Gilmore. LBWR claimed the entirety of the Phillips rights based in part on the 1975 water agreement.⁷

The Water Court rejected LBWR's arguments, finding LBWR's arguments concerning the 1975 Agreement had no merit.⁸ The Water Court noted that the attorney fee

² *LBWR v. Doll*, 2020 MT 198 ¶ 3.

³ App. Doc. 1, Final Order pp. 24-26; *LBWR v. Doll*, 2020 MT 198 ¶¶ 24-25.

⁴ Supplemental Appendix Document 5, LBWR Complaint ¶ 17, ¶ 23, Cause 2018-30 (Doc. Seq. 1.000).

⁵ Supplemental Appendix Document 9, *LBWR v. Doll* Cause No. 2018-30, Order Appointing Water Commissioner, Doc. Seq. 021.

⁶ Supp. App. Doc. 9, Cause No. 2018-30 Order Appointing Water Commissioner ¶ 6.

⁷ *LBWR v. Doll*, 2020 MT 198 ¶ 15 ¶¶ 19-21; App. Doc. 1, Final Order, p. 12, 19, 22.

⁸ App. Doc. 1 Final Order, p. 22.

agreement in the 1975 Agreement was a cost-sharing provision: “The 1975 Agreement’s cost-sharing provision indicates a desire by each party to protect their separate rights to divert Big Warm Creek water via the Sieben/Ester Ditch.”⁹

The Water Court held “each grantee received a pro-rata share of the Sieben/Ester and Marshall/Mercer water rights used on their property”¹⁰ decreeing Doll 62.17% of the rights in Big Warm Creek and Ester Reservoir, LBWR 22.46%, and Gilmore 15.36%.¹¹ The Water Court concluded, and this Court affirmed:

“In the absence of actual water measurement records, the most equitable way to allocate the flow rate for those rights is based on the amount of irrigated acreage occurring on each claimant’s property.”¹²

Of the 12.5 CFS of the most senior right (Sieben/Ester) the Water Court decreed 7.77 CFS to Doll’s and 2.81 CFS to LBWR.¹³ The Marshall/Mercer rights total 7.5 CFS with a priority date of October 1, 1889, of which 4.66 CFS is allocated to Doll and 1.68 is allocated to LBWR.¹⁴ The Water Court allocated a total combined flow rate of 12.43 CFS out of Big Warm Creek to Doll.¹⁵

The most upstream point of diversion for the Seiben/Ester and Marshall/Mercer rights is the headgate located in the NWSE of section 20, T27N, R27E, which Doll installed in October of 2008, and is referred to as the “Ester headgate” in the District Court

⁹ App. Doc. 1 Final Order, p. 15.

¹⁰ *LBWR v. Doll*, 2020 MT 198 ¶ 24.

¹¹ App. Doc. 1 Final Order, at 24-25 at footnote 9, p. 26; *LBWR v. Doll*, 2020 MT 198 ¶ 25.

¹² App. Doc. 1 Final Order, at 24, *LBWR v. Doll*, 2020 MT 198 ¶ 25.

¹³ App. Doc. 1 Final Order, 24, footnote 9, and p. 26.

¹⁴ App. Doc. 1 Final Order, 24, footnote 9, p. 26.

¹⁵ App. Doc. 1 Final Order, 24, footnote 9, p. 26, *LBWR v. Doll*, 2020 MT 198 ¶ 44.

Order.¹⁶ The Ester headgate diverts water out of Big Warm Creek into the Ester Conveyance Ditch, and then into Ester Reservoir. This is the point at which the Water Commissioner distributes these rights.¹⁷

The Ester headgate is located directly in Big Warm Creek and completely dams the creek when it is closed, as opposed to the typical situation where the headgate would be located in the ditch at the diversion point.¹⁸ When the Ester headgate is closed, all water is diverted out of the creek and into the Ester Conveyance Ditch, thus filling Ester Reservoir and totally drying up the creek. When Ester headgate is fully open, all water stays in the creek, and no water is diverted out of the Ester headgate location.¹⁹ Water may be diverted out of the creek downstream by other users, but opening the Ester headgate is not a diversion, it is simply leaving the water in the creek. A total of 7 ranchers depend on Big Warm Creek downstream of the Headgate for stock watering.²⁰

LBWR and Gilmore's sole primary point of diversion is the Ester headgate. Doll has the option of diverting his irrigation rights at this Headgate or further downstream where Big Warm Creek winds through his ranch. Doll's stockwater right 40M 168752-00 is for livestock drinking directly from Big Warm Creek.²¹ To divert water at Ester headgate, the

¹⁶ Supplemental Appendix Document 4, Doll Jan. 29, 2020 Affidavit ¶ 6, Doc. Seq. 093.3.

¹⁷ Appendix Document 2, Memorandum and Order Directing Administration of Water Rights, October 14, 2021, Doc. Seq. 135 in Cause No. 2018-30, p. 7, ¶ 1.

¹⁸ Supp. App. Doc. 4, Doll Supplemental Affidavit ¶ 6.

¹⁹ Supp. App. Doc. 4, Doll Supplemental Affidavit ¶ 6.

²⁰ Supp. App. Doc. 4, Doll Supplemental Affidavit ¶ 6.

²¹ App. Doc. 1, Final Order, p. 25, Footnote 10; Supplemental Appendix Document 6, Post Decree Abstracts of Doll, LBWR, and Gilmore Big Warm Creek Sieben/Ester and Marshall/Mercer Water rights as adjudicated in Water Court Case 400 and aff'd at *LBWR v. Doll*, 2020 MT 198; App. Doc. 2 p. 7, ¶ 1.

headgate must be closed or partially closed, which diverts water out of the creek and into Ester Conveyance Ditch. For Doll to divert water from Big Warm Creek, water must first be left in-stream at the Ester headgate, then he may divert it from downstream points of diversion in accordance with his water rights.²²

The Water Court’s Final Order was affirmed on August 11, 2020.²³ This Court held: “One meaning is derived from all three deeds, the 1975 Agreement, and the Agreement to Sell and Purchase—resulting in each party being entitled to its share of the water historically used on its individual property.”²⁴ The Water Court’s determination regarding the 1975 Agreement was correct and the Water Court correctly allocated Dolls’ and LBWR’s respective share of the senior Big Warm Creek right.²⁵ This Court noted:

“In order to ensure this historical use of the appurtenant rights was properly determined, and in the absence of actual water measurement records, the Water Court used the most appropriate method available to allocate the flow rate of the Seiben/Ester and Marshall/Mercer rights, based on the amount of irrigated acreage occurring on each claimant’s property. This method ensured that each party received its historical share of the Seiben/Ester and Marshall/Mercer rights which were “appurtenant to or used in connection with the propert[ies],” as contemplated in the original deeds”²⁶

After this Court rejected LBWR’s interpretation of the 1975 Agreement, LBWR filed a second complaint in July of 2021, seeking a declaratory judgment that Doll is bound by the 1975 Water Rights Agreement.²⁷ Mark French joined as a personal plaintiff in the

²² App. Doc. 1, Final Order, p. 25 FN 9.

²³ *LBWR v. Doll*, 2020 MT 198.

²⁴ *LBWR v. Doll*, 2020 MT 198 ¶37.

²⁵ *LBWR v. Doll*, 2020 MT 198, ¶¶ 28-37 and ¶¶ 38-42.

²⁶ *LBWR v. Doll*, 2020 MT 198, ¶41.

²⁷ Supplemental Appendix Document 7, *LBWR v. Doll*, Complaint in 2021-34, filed July 7, 2016.

2021 litigation and water commissioner Brian Robinson was named personally as a defendant. On Doll's motion, the Court consolidated the 2018 and 2021 cases.²⁸

Following this Court's Order affirming the Water Court's Final Order on the Big Warm rights, the District Court issued an order:

the Court concludes the 1975 Water Rights Agreement has been superseded by the Water Court's Final Order in Case No. 40M-400.

...

Because the 1975 Water Rights Agreement no longer retains vitality to be determinative of the parties' water rights as now decreed by the Water Court, the Court concludes that LBWR and French cannot prevail, as a matter of law, on [...] Count III.²⁹

In late July of 2021, the headgate in Big Warm Creek was completely closed without notice to Doll or other downstream users. The District Court granted Doll's emergency motion to open the headgate.³⁰ The District Court requested briefing and proposed orders on distribution of Big Warm water.³¹

Doll proposed to distribute water at the Headgate in accordance with the Tabulation of the parties' water rights identified in the Water Court Order and Post-Decree Abstracts, with each party's pro-rata share of the Sieben/Ester and Marshall/Mercer rights.³²

LBWR argued that in low flow periods, it should be able to take the entire amount

²⁸ Supplemental Appendix Document 8, Oct. 14, 2021, Order on Motions in Consolidated Cause No. 2018-30, Doc. Seq. 159.000.

²⁹ Appendix Document 3, Order on Attorney Fees, p. 3, Doc. Seq. 237 in Cause No. 2018-30, citing Supp. App. Doc. 8, Order on Motions, p. 4, and *LBWR v. Doll*, 2020 MT 198 ¶¶ 22, 36.

³⁰ App. Doc. 2 Memo and Order, p. 1, see also Supplemental Appendix Document 10, Emergency Order to Open Headgate, Cause No. DV-2018-30 (Doc. 108.00, vacated by Memo and Order, 135.000).

³¹ App. Doc. 2 Memo and Order, pp. 1-2, see also Supplemental Appendix Document 11, Minutes from Hearing (August 8, 2021), Cause No. DV-2018-30 (Doc. 125.000).

³² App. Doc. 1, Water Court Final Order at 26; Supp. App. Doc. 6 (Post Decree Abstracts) and Supplemental Appendix Document 12 (Doll Exhibit 33, Tabulation from Water Court Order).

of water in the creek up to its share of 2.81, before any water would be allowed to Doll's points of diversion further downstream. For any Big Warm Creek flows less than or equal to 2.81 CFS – LBWR's allocated share – LBWR would get 100% of the flow. Doll would receive nothing when flows are lower than 2.81 CFS despite the fact that Doll owns 7.77 CFS (62.17%) of the senior Sieben/Ester right with the same priority date.

The District Court issued its Memorandum and Order Directing Administration of Water Rights On Big Warm Creek, directing distribution of the historic Seiben/Ester and Marshall/Mercer water rights according to the Water Court's Decree in Case 40M-400.³³

The district court rejected LBWR's approach:

“Adopting a scheme that would allow a claimant with only a 22.46 per cent share of the flow rate to utilize all of the available water in a low water year to the detriment of a claimant of equal priority with a 62.17% share of the flow rate is inequitable and in derogation of the purpose of ‘ensuring that each party receive its historical share of the rights which are appurtenant to or used in connection with the properties.’”³⁴

LBWR sought a writ of supervisory control, arguing that it is entitled to the entirety of Big Warm water under a “first in diversion, first in right” theory.³⁵ After briefing, this Court denied LBWR's Application, and the case was set for trial on the remaining claims unrelated to the 1975 agreement.³⁶

After the District Court addressed the various motions, and shortly before trial, the

³³ App. Doc. 1, Final Order at 24.

³⁴ App. Doc. 2, Memo and Order, p. 6, citing *LBWR v. Doll*, 2020 MT 198, ¶ 41.

³⁵ *LBWR v. Seventeenth Judicial District Court*, OP 21-0531, December 28, 2021.

³⁶ *LBWR v. Seventeenth Jud. Dist.*, OP 21-0531; App. Doc. 3, Order on Attorney Fees, p. 3.

parties resolved LBWR's remaining claims.³⁷ Pursuant to the stipulation for dismissal, Doll filed a motion for attorney's fees, indicating an intent to seek recovery of fees in excess of \$324,000.00, under the explicit fee provision of the 1975 Agreement and § 28-3-704, MCA.³⁸

LBWR filed a Notice of Appeal on December 21, 2022. Doll filed a Notice of Cross Appeal on December 22, 2022.

STANDARD OF REVIEW

Interpretation of a judgment or decree is a question of law, which this Court reviews to determine whether it is correct.³⁹

This Court reviews the District Court's determination of "prevailing" or "losing" parties for an abuse of discretion.⁴⁰

An abuse of discretion occurs if a lower court exercises granted discretion based on a clearly erroneous finding of fact, erroneous conclusion or application of law, or otherwise arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice.⁴¹ Abuse of discretion⁴² and whether a party is entitled to recover attorney fees are questions of law reviewed for correctness.⁴³

³⁷ App. Doc. 2, Memo and Order, pp. 3-4.

³⁸ App. Doc. 2 Memo and Order, p. 4; also App. Doc. 3, Order on Attorney Fees.

³⁹ *In re Quigley*, 389 Mont. 283, 405 P.3d 627, 2017 MT 278 ¶ 9, citing *Granite Cnty. Bd. of Comm'rs v. McDonald*, 2016 MT 281, ¶ 5, 385 Mont. 262, 383 P.3d 740.

⁴⁰ *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, 485 P.3d 731 ¶ 14, citing *Whipps, L.L.C. v. Kaufman, Vidal, Hileman & Ramlow, P.C.*, 2007 MT 66, ¶ 6, 336 Mont. 386, 156 P.3d 11.

⁴¹ *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 13, citing *Larson v. State*, 2019 MT 28, ¶ 16.

⁴² *Larson*, 2019 MT 28 ¶ 16.

⁴³ *Rafes v. McMillan*, 2022 MT 13 ¶9, citing *Chase v. Bearpaw Ranch Ass'n*, 2006 MT 67, ¶ 14, 331

SUMMARY OF THE ARGUMENT

LBWR's appeal is the latest variation on a much-litigated theme: it claims the entirety of the water in Big Warm Creek.

At the 2019 trial in Water Court, LBWR failed to convince the Water Court that the 1975 Agreement gave it rights that supersede historic use. LBWR brought the same argument in District Court and failed. Having failed in those arguments to the entirety of Big Warm Creek water based on the 1975 Agreement, LBWR now claims that it is entitled to the entirety of the Big Warm Creek water during periods of low flow.

LBWR's latest variation on its theme asks this Court to reverse over 100 years of Montana law and give LBWR all the Big Warm Creek water in low flow periods under a "first in diversion, first in right" theory. Under this novel claim, LBWR would get all the Big Warm Creek water during times of drought or low flow, by virtue of its geographic position as the most upstream user. LBWR argues that because it is upstream from Doll, LBWR is entitled to divert the entirety of the stream flow – up to its decreed flow rate of 2.81 CFS, before a single drop is allowed downstream for Doll's use, even though Doll has a decreed flow rate of 7.77 CFS and the parties share the exact same priority date. In other words, LBWR claims that "first in diversion is first in right."

Doll has successfully opposed LBWR's claims over multiple years, through numerous venues. Doll is entitled to attorney fees under the 1975 Agreement as the prevailing party on the viability of the 1975 Agreement.

Mont. 421, 133 P.3d 190 (internal citations and quotations omitted).

ARGUMENT IN REPOSE

I. The Water Court's Decree is not at issue.

LBWR appealed the Water Court's Final Order in Case 40M-400. The Water Court Order was affirmed by this Court. The Water Court's Final Order in Case 40M-400, the Abstracts, and the factual bases for the District Court's Memorandum and Order Directing Administration of Water Rights, including the Abstracts (Exhibit 30) and the Tabulation of Water Rights (Exhibit 33), are not at issue.

II. The District Court did not re-adjudicate water rights.

A. The District Court correctly applied the Water Court Order.

There is no jurisdictional question before this Court. The District Court's Order directs the Water Commissioner to follow the Water Court's Decree in its Final Order in Case 40M-400. There has been no re-adjudication, and jurisdiction is not relevant here.

B. The District Court did not contravene the Water Court's Order but properly administered it.

1. The District Court followed the Water Court's adjudicated flow rates.

LBWR claims that the District Court "re-wrote" the flow rates rather than enforcing the Water Court's Order. No facts support this conclusion. The District Court's Order does not use pro-rata flow rates *instead* of the quantified flow rates listed on the Post Decree Abstracts as LBWR contends. During times of adequate flow, the Order directs the Water Commissioner to distribute the water at the Ester headgate "in accordance with the

allocation of the parties' flow rates identified in the Water Court Final Order . . . and Post-Decree Abstracts.”⁴⁴

During low flow periods when there is insufficient water to satisfy the decreed flow rates, the Order uses pro-rata flow rates to fairly allocate what water is available.⁴⁵ When there is not enough water to satisfy each party's full flow rate as shown on the Abstracts, the Order directs the Water Commissioner to divvy up what water there is on a pro-rata basis, based on the percentages shown in the Decree, because the parties share the exact same priority date. The District Court's Order is consistent with the Conclusions of Law in the Decree: each party is entitled “to a pro-rata division of flow rates.”⁴⁶

LBWR's argument depends on the premise that the pro-rata distribution that led to the flow rates on the Abstract cannot be applied during times of low flow to reach a fair division of available water. LBWR's argument fails factually and legally.

First, as a matter of fact, the District Court administered, and did not deviate from, the Water Court's holding that each party is entitled to a pro-rata division of flow rates. It would be senseless to apply that holding only when there is more than enough water to fulfill all users' claimed rights. The Water Court routinely provides tabulations of water rights to district courts.⁴⁷ The District Court implemented the pro-rata share of Big Warm Creek rights in accordance with the pro-rata share set out by the Water Court. Each of the

⁴⁴ App. Doc. 2 Memo and Order at 7, Abstracts, and Supp. App. Doc. 12 (Tabulation).

⁴⁵ App. Doc. 2 Memo and Order at 8.

⁴⁶ App. Doc. 1 Water Court Final Order at 25; *LBWR v. Doll*, 2020 MT 198 ¶ 50.

⁴⁷ *In re Pondera Cnty Canal & Reservoir Co.* (Montana Significant Water Court Decisions, 2020).

owners of water rights gets their allotted percentage of the water: no more, no less.

But LBWR wants it all. LBWR argues that the entire flow rate shown on the abstract should be applied during low flow periods, and only to the upstream user. At heart, LBWR is seeking to negate the Water Court's Final Order on page 24 stating that the parties would share the Sieben/Ester and Marshall/Mercer rights on a pro-rata basis of 62.17% for Doll, 22.46% for LBWR, and 15.36% for Gilmore. LBWR claims that because this percentage split is not shown on the water right abstracts, it therefore has no authority. LBWR contends it always gets its full 2.81 CFS of the senior Sieben/Ester right at the Headgate, and *only* if there is water left over, would that be left in stream for Doll's use.

LBWR would have the Water Commissioner administer one abstract at a time, starting at the upstream point regardless of priority: abstracts in hand, the Commissioner would start upstream and turn out water based on the flow rate claimed by the upstream user, then march downstream and turn out any water that remains in the stream based only on the flow rate of the downstream user. Priority dates have no meaning in this application.

A fatal flaw with LBWR's theory is that the percentage split stated by the Water Court is taken directly from the abstracts. Simple arithmetic using the flow rates for the Sieben/Ester rights on the abstracts shows the following:

Water Right No.	Owner	Flow Rate	Percentage of Total
40M 30122575	Doll	7.77 CFS	62.17%
40M 186463	LBWR	2.81 CFS	22.46%
40M 37027-00	Gilmore	1.92 CFS	15.36%
TOTALS		12.5 CFS	99.99%

These same percentages result from applying simple arithmetic to the Maximum Acres Irrigated listed on the abstracts:

Water Right No.	Owner	Maximum Acres Irrigated	Percentage of Total
40M 30122575	Doll	1,550.00 Acres	62.17%
40M 186463	LBWR	560.00 Acres	22.46%
40M 37027-00	Gilmore	383.00 Acres	15.36%
TOTALS		2,493.00 Acres	99.99%

As stated in the Water Court’s Final Order, “*the most equitable way to allocate the flow rate* for those rights is based on the amount of irrigated acreage occurring on each claimants’ property.”⁴⁸ LBWR contends that the pro-rata allocation cannot apply “a second time” to Doll’s 7.77 CFS or to LBWR’s 2.81 CFS as shown on the abstract. LBWR claims that in low flow periods, all the water in Big Warm Creek up to 2.81 CFS must go to it; only if there is more than 2.81 CFS flowing in the creek would Doll get any water. LBWR makes Doll’s co-senior right junior to LBWR’s right, simply because Doll is downstream.

The pro-rata percentages that the Water Court allocated are taken directly from the Maximum Acres Irrigated shown on the abstracts, and the Decree says that. The District Court did not award a flow rate other than the one decreed by the Water Court. The Order Directing Administration of Water rights does exactly what the Abstracts and the Water Court determined should happen.

LBWR relies on *Deadman’s Basin*⁴⁹ to support its argument. In *Deadman’s Basin*, this Court reversed a District Court decision that prioritized domestic water use over

⁴⁸ App. Doc. 1 Water Court Final Order at 24, ¶ 2 (emphasis added).

⁴⁹ *In re Deadman’s Basin Water User Ass’n*, 2002 MT 15, ¶ 17, 308 Mont. 168, 173, 40 P.3d 387, 390-91.

irrigation use, finding that the District Court does not have authority to prioritize one purpose of water use (domestic) over another purpose (irrigation).⁵⁰

In fact, the water purchase contracts in *Deadman's Basin* provided for pro-rata sharing of co-equal reservoir water during times of shortage, and this Court held that the District Court should have honored these contract provisions.⁵¹ This is the same type of pro-rata sharing of co-equal water rights that the District Court ordered between Doll and LBWR in this case. Under the District Court's Order, neither party would be required to suspend its water use in preference of the other. Both Doll and LBWR would receive their pro-rata share of water as decreed by the Water Court, even in times of low flow, when it matters most. Neither party is awarded a *de facto* senior right simply by virtue of its physical location (upstream) relative to the other. *Deadman's Basin* does not support the outcome LBWR seeks, and in fact, points to the opposite conclusion.

LBWR argues that the Water Court did not explicitly state that the flow rates should be allocated on a pro rata basis when the streamflow is low. Accordingly, LBWR concludes that there can be no pro-rata allocation of a low flow, and that LBWR gets the entirety of the flow to satisfy its entire water right, *simply because it is the upstream user*. LBWR offers no authority to ignore the pro-rata allocation of water set out by this Court when it is most necessary – during low flow. LBWR has not met its burden of showing that the District Court's Order is incorrect.⁵²

⁵⁰ *In re Deadman's Basin Water User Ass'n*, at ¶ 17.

⁵¹ *In re Deadman's Basin Water User Ass'n*, at ¶¶18-19.

⁵² *In re Williams*, 2023 MT 72 ¶ 16, citing *In re Estate of Kuralt*, 2003 MT 92, ¶ 15, 315 Mont. 177, 68

2. The District Court did not curtail LBWR's rights.

LBWR claims that its water rights cannot be curtailed “for the benefit of Doll.”

LBWR argues that Doll can't place a call on LBWR to curtail its use of water and the District Court's administration of water during low flow to allocate the water on a pro-rata basis consistent with adjudicated rights means that LBWR's rights are being “curtailed.” LBWR claims it is entitled to the entirety of the flow during low flow periods, as a function of its geographic position upstream of Dolls.

The District Court, relying on this Court's Order in *LBWR v Doll*, 2020 MT 198, and citing to the Water Court's pro-rata allocation of water based upon acreage historically irrigated, flatly rejected LBWR's argument.⁵³ The District Court relied on 100 plus years of Montana law:

Montana Courts have long applied the first in time, first in right rule relative to appropriation of water rights and the rule is now part of the Montana Water Use Act. Section 85-2-401, MCA. LBWR inappropriately extrapolates the rule into first in diversion, first in right by arguing that because LBWR's point of diversion at the Ester headgate in Section 20 is upstream from points of diversion for Doll, LBWR can utilize all of its smaller percentage of stream flow to the detriment of Doll, who has a greater percentage of stream flow and equal priority with LBWR. Under LBWR's rationale, during periods of drought when water levels are low, LBWR could divert all the available water for impoundment in Ester Reservoir and no water would flow downstream for Doll's use notwithstanding Doll's equal priority and greater percentage of streamflow as allocated by the Water Court. This cannot be the result envisioned by the Water Court. In fact, LBWR's argument runs counter to the reasoning employed by the Water Court in allocating the water rights relative to Big Warm Creek.

P.3d 662 and also *In re Estate of Lande* 1999 MT 162, ¶ 30, 295 Mont. 160, 983 P.2d 308, overruled, in part, on other grounds by *In re Estate of Bradshaw*, 2001 MT 92, ¶ 16, 305 Mont. 178, 24 P.3d 211.

⁵³ App. Doc. 2, Memo and Order p. 4.

LBWR provides no argument to support reversing Montana's first in time, first in right rule (codified in 1895) and replacing it with a "first in diversion, first in right rule."⁵⁴ The rights have the same priority date – neither can be curtailed in favor of the other, and LBWR cannot receive the entirety of the water in low flow periods, effectively making Doll's right junior to LBWR's.

LBWR wants to *ignore* priority dates. But LBWR and Doll share the exact same priority dates, and neither is subordinate to the other. Doll has the right either to divert his irrigation rights into Ester Reservoir at the Headgate, or to leave his irrigation rights instream at the Headgate for his use downstream. Doll's stock right is for "Livestock Direct From Source,"⁵⁵ and in order for Doll to use this right, his share of the water must be left in the stream at the Headgate in order for there to be any water downstream from which his stock can drink directly. The Water Court Decree was affirmed by the this Court. Doll was decreed 62.17% of the rights in Big Warm Creek, water must be distributed at the Headgate, otherwise, Doll's rights are simply subordinated to LBWR's.

3. The District Court correctly directed administration of the points of diversion.

LBWR claims that the Ester headgate is not a point of diversion for Doll, and therefore, all water must flow through Ester Reservoir. LBWR's factually unsupported argument that all water diverted out of Big Warm Creek at the Ester Headgate in Section

⁵⁴ *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19 FN. 2; Section 1885, MCA (1895); § 89-807, RCM (1947); § 85-2-401, MCA (2019).

⁵⁵ Supp. App. Doc. 6, Doll's Abstract 40M 168752-00; App. Doc. 1, Final Order at 25, FN 10.

20 must be diverted through Ester Reservoir was not raised in the District Court and need not be considered here.⁵⁶ If the Court does address LBWR's new claim that all water diverted out of Big Warm Creek must first go into Ester Reservoir, the argument should be rejected. Doll may leave his water in Big Warm Creek or divert it through Ester. The Water Court held:

In addition to a pro-rata division of flow rates, each party is entitled to a pro-rata division of water stored in Ester Reservoir. The Gilmores, LBWR, and the Dolls are entitled to a point of diversion in the NWSE of section 20, T27N, R27E for both the Sieben/Ester and Marshall Mercer rights. The Dolls are entitled to use their point of diversion to divert their share of water for these rights into Wild Horse Reservoir. ***The Dolls are also entitled to divert their shares of these rights through points of diversion on the Dolls' property east of the state highway.***⁵⁷

Doll may divert his share of water at the Section 20 Headgate by keeping it in Big Warm Creek for use further downstream. The Order simply implements the Conclusion of Law in the Decree.

LBWR quotes language under the secondary point of diversion in Doll's abstracts, implying that Ester Reservoir should be Doll's only point of diversion out of Section 20, and that the Ester Headgate is not actually a primary point of diversion. That is not true. Doll's Abstracts identify the Ester Headgate in NWSE Section 20 as a primary point of diversion, along with additional points of diversion further downstream.⁵⁸

LBWR ignores the Water Court's determination of the parties' points of diversion,

⁵⁶ See *Paschen v. Paschen*, 2015 MT 350, ¶ 39, 382 Mont. 34, 363 P.3d 444; see also *State v. Thompson*, 2017 MT 107, ¶ 17, 387 Mont. 339, 394 P.3d 197.

⁵⁷ App. Doc. 1, Water Court Final Order Case at 25.

⁵⁸ Supp. App. Doc. 6 (Post Decree Abstracts).

misrepresents the Abstracts, and is completely illogical. Doll's right to take water at Ester Headgate for use downstream, due to the nature of the headgate being in the creek itself, is a fully adjudicated right to keep the water in the creek, or "in stream." The District Court did not "move" Doll's point of diversion upstream: that point of diversion was adjudicated by the Water Court, after a full trial in which LBWR put on its evidence, appealed and lost. LBWR has no excuse for misrepresenting Doll's point of diversion in Section 20.

While Doll may divert into Ester, he is not required to do so. Dolls' rights allow full discretion to either administer them instream at the Headgate for downstream diversion and use on their property, or diversion into Ester. Dolls are in no way obligated to divert their water into Ester as LBWR contends. The District Court correctly directed the Water Commissioner to administer the Big Warm water rights, and its Order should be affirmed.

4. Difficulty in splitting low flows does not allow LBWR the entirety of the water.

LBWR's argument about "impossibility" was not raised in the District Court and should not be addressed for the first time on appeal.⁵⁹

If the Court does consider the argument, LBWR's representation that there is some sort of evidence establishing "impossibility" misrepresents the record. The water commissioner, Brian Robinson, testified and stated in his report that "in Willie's words it is "impossible" to regulate the headgate so everyone gets the right amount of water all the time."⁶⁰ Robinson never testified that it was impossible to set the headgate to distribute the

⁵⁹ *Paschen*, 2015 MT 350, ¶ 39; *Thompson*, 2017 MT 107, ¶ 17.

⁶⁰ LBWR App. Doc. H.

water on the percentages allocated by the Water Court and set out in the District Court's Memorandum and Order Directing Administration of Water.

To the contrary, Robinson testified that "When there's no water, water is a problem. When there's lots of water, water ain't a problem." Robinson went on to say that he had treated all parties fairly and to the best of his ability, as far as he could do, in a dry year.⁶¹ Robinson testified that it is hard to distribute the water but he does the best he can to get the split, and follows the numbers that Doll had written on the headgate when he built and installed it to make sure everyone was getting their fair share of water.⁶²

Willie Doll's testimony agreed with that. When Doll was asked if he thought it was possible to split the water 70/30, Doll testified:

It is going to be a challenge. And in most years when you got a lot of water, there's no problem whatsoever. I mean, everybody, Little Big Warm is happy, Gilmores are happy, I'm happy, everybody else is happy and that is part of life.

But when it is a drought year like we had this last year and whatnot and this year, then we should work together as neighbors and do the best for everybody, not just one individual.⁶³

Doll operated the headgate exclusively for nearly ten years, from the time he built it in 2008 and set the marks for adjusting the headgate to ensure everyone was treated fairly, without complaint from any neighbors or other water users out of Big Warm Creek, until Mark French interfered with it, and shut it completely in 2017, depriving all downstream users of water without notice.⁶⁴ French shut it completely again in July of 2021, in the

⁶¹ Supplemental Appendix Document 13, Robinson Deposition transcript excerpts, p. 37:16 – 38:3.

⁶² Supp. App. Doc. 13, Robinson Depo., p. 39:7-10; pp. 47:10 – 48:25.

⁶³ LBWR App. Doc. J, Deposition of Willie Doll, p. 72:2-10.

⁶⁴ Supp. App. Doc. 4, Doll Affidavit.

middle of a drought, forcing Doll to seek and obtain an emergency order to open it.

With LBWR repeatedly claiming in court and acting on the ground as if it is entitled to all the water in Big Warm Creek, and absent a very hands-on water commissioner, regulating the headgate *is* a difficult task – but that does not mean LBWR should get the entirety of the water as a reward for causing problems. Rather, LBWR needs to be sent a strong message that filing case after case against Doll, and depriving him of water without notice in the middle of a drought during the hottest days of summer, will not succeed.

5. The water commissioner cannot legally send the entirety of the water through Ester Reservoir.

LBWR cites *Eldorado Coop Canal* as authority that it is entitled to the entirety of Big Warm Creek water being diverted into Ester during low flow. This regurgitates the argument in Section 2, above. The crux of LBWR’s argument is that Doll does not have an instream flow rate. LBWR tosses out the unsupported and irrelevant statement that “Water diverted into Ester Reservoir can reach the places of use of the parties’ water rights.” But the fact that Doll can take his water either via Big Warm Creek, or through Ester, does not require him to use either method.

LBWR removes Doll’s downstream points of diversion and subjugates Doll’s co-senior priority right to LBWR’s right. LBWR also deprive Dolls of his stock water rights, which is for instream use.⁶⁵

Eldorado is not on point. The water commissioners’ job is to distribute to parties

⁶⁵ App. Doc. 1 Final Order p. 25 FN. 10.

owning water rights the water to which they are entitled, according to their rights as fixed by law.⁶⁶ Nothing in *Eldorado* supports a conclusion that LBWR is, by virtue of being upstream of Doll, entitled to the entirety of the water in Big Warm Creek, when Doll has a co-senior right. That argument subverts this Court’s holding in *LBWR v. Doll*, where this Court found that LBWR is not entitled to the entirety of the water in Big Warm Creek.⁶⁷ Section 85-5-101(2) MCA supports the District Court and the Water Commissioner’s efforts to split the water according to what was available – under Montana law, no one gets the entirety of the right during periods of low flow.

Water commissioner Robinson testified that in 2021 “everyone got less water than they were entitled to” but that he did the best that he could to try and get it split.⁶⁸ If no one is going to get their entire share, that does not mean that one person should get all that is available while every other co-senior water right holder gets nothing. There is no law, no set of facts, and no common-sense approach, that would support that outcome.

The Water Court Order specifically held: Dolls are “entitled to divert their shares of these rights [40M 168765-00 and 40M 30122575] through points of diversion on the Dolls’ property east of the state highway.”⁶⁹ The District Court applied the Water Court’s conclusions, and held that “LBWR and Doll share the same priority date, and neither appropriator is subordinate to the other. Doll may divert his irrigation rights into Ester

⁶⁶ *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, 383 Mont. 523, 373 P.3d 836, citing § 85–5–101(1), (2) MCA.

⁶⁷ *LBWR v. Doll*, 2020 MT 198 ¶¶ 14, 14, 21, 24, 32.

⁶⁸ Supp. App. Doc. 13, Brian Robinson Deposition, p. 38:22 – 39:10.

⁶⁹ App. Doc. 1, Water Court Final Order, Case 40M-400, at 25.

Reservoir at the headgate in Section 20, or he may leave his irrigation rights instream for Doll's use downstream. Any other conclusion subverts the stated rationale behind the Water Court's ruling." LBWR is simply trying to end run Doll's adjudicated, co-senior water rights to take all the water for itself, without any legal or factual basis to do so.

The Water Court and District Court determined, while Doll may divert into Ester, he is not required to do so. Doll's rights allow him full discretion to either administer them instream at the Headgate for downstream diversion and use on his property, or diversion into Ester. Doll is in no way obligated to divert his water into Ester as LBWR contends.

6. The District Court did not expand Doll's stock water rights.

LBWR ignores the fact that Ester Headgate is located directly in Big Warm Creek, and works the opposite from a typical headgate located in the ditch at the diversion point. When the Ester Headgate is closed, all water is diverted out of the creek and into the Ester Conveyance Ditch, totally drying up the creek. When the Ester Headgate is fully open, all water stays in the creek. To divert water out of Big Warm Creek, water must first be left in stream at the Ester headgate, then Doll may divert it from downstream points of diversion according to his water rights.

In order for Doll to exercise his stock water right, Big Warm Creek water must remain in the creek. The Water Court noted that "Doll's stock claim, 40M 168752-00, is for livestock drinking directly from Big Warm Creek. Because this claim is for in stream 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.”⁷⁰

Under Montana’s Constitution, all waters “are the property of the state”⁷¹ and one only has the right to divert and appropriate water under the provisions of a valid water right.⁷² Absent a right to divert, water must be left in stream, as it is owned by the state. In this case, opening the Ester headgate is not a diversion of Big Warm Creek, it is merely leaving the water in the Creek. To divert water at Ester headgate, the headgate must be closed or partially closed, to divert water out of the creek and into Ester Conveyance Ditch.

LBWR claims that Doll’s stock water rights “cannot be a basis to split water at the headgate and curtail LBWR’s co-equal irrigation right.” But this ignores the fact that LBWR does not have an irrigation right outside of the April 1 – September 1 period. In its Order the District Court recognized that neither LBWR nor Doll have any claimed rights from November 2 to January 31 (in fact LBWR has no rights whatsoever from September 2 to March 31). LBWR argues that the District Court erred in directing how water should be administered between November 2 and January 31 of each year. But LBWR has no rights from September 2 to March 31. Historically the parties cooperated to fill Ester Reservoir during the winter months, and stock – including stock owned by Mark French, a co-plaintiff with LBWR in this case – have drunk directly from the creek downstream of Ester headgate. In years past, LBWR has benefitted greatly when water was diverted into Ester Lake during the fall and winter months, a period which their Post-Decree Abstracts

⁷⁰ App. Doc. 1, Water Court Final Order at p. 25 FN 10.

⁷¹ The Constitution of the State of Montana, Article IX, Section 3(3) (1972).

⁷² § 85-2-301, MCA.

show no water right, for this is the time of year when Ester Reservoir is filled.

The District Court Order administered the water rights that the Water Court adjudicated, and memorialized this historic use.

III. Cross appeal on attorney's fees.

The District Court denied Doll's request for attorney fees based upon its determination that he was not the prevailing party in the underlying litigation. The District Court did not address the legal authority for attorney fees, the contractual fee provision, and whether it applies here. Those issues are not before the Court on appeal. The only question is whether the District Court abused its discretion in concluding that Doll was not the prevailing party against LBWR on LBWR's claims arising under the 1975 agreement. Doll incorporates all previous sections of this response brief in this cross-appeal.

A. Doll prevailed on LBWR's claims based on the 1975 Agreement.

No one factor is conclusive in evaluating the prevailing party for the purpose of determining attorney fees.⁷³ In *Kenyon-Noble*, the defendant prevailed on one counterclaim, out of five, and was awarded attorney fees. The Court found that "when a defendant counterclaims and succeeds in having the plaintiff's claims totally denied but recovers only a portion of the relief demanded in the counterclaims, the defendant is

⁷³ *Kenyon-Noble Lumber Co. v. Dependant Foundations, Inc.*, 2018 MT 308 ¶ 24, 393 Mont. 518, 432 P.3d 133, citing *Doig v. Cascaddan*, 282 Mont 105, 112, 935 P.2d 268, 272 (1997), accord *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100 ¶ 27, 485 P.3d 731, citing and quoting *Gibson v. Paramount Homes, LLC*, 2011 MT 112, ¶ 19, 360 Mont. 421, 253 P.3d 903.

entitled to attorney fees and costs.”⁷⁴ Doll successfully defended against LBWR’s claims to enforce the 1975 Agreement in District Court, in Water Court, and on appeal. LBWR did not prevail on any of its claims to enforce the 1975 Agreement. The dismissal of Doll’s counterclaims was exclusively related to the 2014 settlement agreement.

The District Court held that because there were multiple counts for relief, a counterclaim, and a settlement on two counts, there was no “prevailing party” for purposes of awarding attorney’s fees. The District Court failed to recognize the specific outcome of the 1975 Agreement and the “cost-shifting” or attorney fee provision in the Agreement:

11. All reasonable costs, including attorneys’ fees, which any party may incur in enforcing any covenants in this agreement shall be paid by the unsuccessful litigant in the amount fixed by the court hearing such proceeding or any appeal.⁷⁵

Contractual attorney fees are reciprocal.⁷⁶ In *Schmidt v. Colonial Terrace*, this Court held that where there is a contractual award for attorney fees, a successful defendant is entitled to attorney fees and costs even where the final outcome is not a binary “all in” or “all out.”⁷⁷ Here, as in *Schmidt*, and as in *Kenyon-Noble*, Doll ended up realizing at the end of the case a net judgment that completely eliminated any validity of the 1975 Agreement – a net judgment in his favor, in that the Big Warm Water rights are distributed pursuant to the Water Court’s Decree, and not the 1975 Agreement as LBWR advocated. Generally,

⁷⁴ *Kenyon-Noble*, 2018 MT 308 ¶ 24, citing *Schmidt v. Colonial Terrace Assocs.*, 215 Mont. 62, 69-70, 694 P.2d 1340, 1345 (1985).

⁷⁵ Supp. App. Doc. 7 (2021 Complaint and Appendices thereto, p. 12/22 (Exhibit A p. 3) ¶ 11); Supp. App. Doc. 5 (2018 Complaint and Appendices), p. 16/22, (Exhibit C p. 3), ¶ 11.

⁷⁶ *Rafes v. McMillan*, 2022 MT 13 ¶14; § 28-3-704, MCA.

⁷⁷ *Schmidt*, 215 Mont. 62, 69-70; *Kenyon-Noble*, 2018 MT 308 ¶ 24.

the party receiving a net benefit from the judgment is the prevailing party.⁷⁸

This Court considers the term ‘prevailing party’ ‘a legal term of art.’⁷⁹ Whether a party has prevailed for purposes of attorney fees “requires consideration of all the facts and circumstances of a case.”⁸⁰ While the general rule is the prevailing party obtains an affirmative judgment at the conclusion of the entire case, this Court has approved attorney fees to a party that obtained the “very relief it sought to procure through litigation.”⁸¹

In its 2018 Complaint, LBWR asked the Court for emergency, preliminary and final relief to enjoin Doll from interfering with the headgate in Big Warm Creek based on its interpretation of the 1975 Agreement.⁸² LBWR asserted six counts in the 2018 Complaint and four in the 2021 Complaint, contending that the 1975 Agreement controls the parties’ rights to Big Warm Creek water and use of the Burns/Ester Ditch and headgate.⁸³

LBWR’s claims in the 2021 Complaint again claimed that Doll is subject to and bound by the 1975 Agreement – and that was *after* this Court ruled that the 1975 Agreement had been merged into the deeds and was not authoritative.⁸⁴

LBWR filed both of these cases seeking to have the water rights in Big Warm Creek distributed under the 1975 agreement – the same argument it lost in Water Court. It failed.

⁷⁸ *Kenyon-Noble*, citing *Rod & Rifle Inn v. Giltrap*, 273 Mont. 232, 235, 902 P.2d 38, 40 (1995).

⁷⁹ *Heringer*, ¶ 27, citing *MC v. Cascade*, 2015 MT 52, ¶ 41, 378 Mont. 267, quoting *Buckhannon v. W. Va.*, 532 U.S. 598, 603, 121 S. Ct. 1835 1839, 149 L.Ed.2d 855 (2001).

⁸⁰ *Heringer, id.*, *Gibson, id.*, 2011 MT 112, ¶ 19.

⁸¹ *Heringer, id.*, citing and quoting *Avanta Fed. Credit Union v. Shupak*, 2009 MT 458, ¶ 49, 354 Mont. 372, 223 P.3d 863, quoting *Schmidt*, 215 Mont. 62, and also *Citizens for Balanced Use v. Mont. Fish, Wildlife & Parks Comm’n*, 2014 MT 214, ¶ 15, 376 Mont. 202, 331 P.3d 844.

⁸² See Doc. Seq. 002 in Cause No. 2018-30, LBWR’s Application for TRO and PI, (September 7, 2018).

⁸³ Supp. App. Doc. 5 (2018 Complaint) and 7 (2021 Complaint).

⁸⁴ Supp. App. Doc. 7 (2021 Complaint) at p. 2, pp. 6-7; *LBWR v. Doll*, 2020 MT 198.

The Orders in all these cases are unequivocal: LBWR has no claim arising from the 1975 Agreement, it is null, and Doll is not bound by the 1975 Agreement. Doll prevailed completely on the question of the viability and applicability of the 1975 Agreement. As the prevailing party, Doll is entitled to an award of reasonable attorneys' fees pursuant to the fee provision of the 1975 Agreement and Montana's reciprocity statute.

LBWR sought to use the 1975 Agreement to distribute water out of Big Warm Creek, seeking to have more water for itself, and less to Doll. LBWR's 2018 complaint alleges that the 1975 Agreement requires diversion of water to Ester from April 1 to November 1 of each year,⁸⁵ although the adjudicated water rights provide LBWR a legal water right for a specific allocated amount of water that it can legally divert out of Big Warm from April 1 – September 1 of each year.⁸⁶ Doll was forced to defend against LBWR's claim that the 1975 Agreement superseded the Water Court's adjudication.

LBWR lost. It lost the 2018 claims on the 1975 Agreement. It lost the 2019 Water Court trial where it argued vociferously that the 1975 Agreement gave it all the water out of Big Warm Creek. LBWR lost the 2021 case it filed – after the Supreme Court rejected its claims based on the 1975 Agreement – claiming the 1975 Agreement gave LBWR more water out of Big Warm Creek than the Water Court had decreed.

Doll prevailed. The 1975 Agreement has had the final nail put in its coffin. The water out of Big Warm Creek is distributed according to the Water Court's Order. The

⁸⁵ Supp. App. Doc. 5, (2018 Complaint) ¶ 9.

⁸⁶ Supp. App. Doc. 6, Abstracts of water rights.

1975 Agreement has no relevance to the distribution of water out of Big Warm Creek. LBWR alleged a breach of the 1975 contract, specific performance of the agreement, and a judgment that the 1975 Agreement required distribution of Big Warm Creek water in a way that was different from the adjudicated water rights. The 1975 agreement allows for attorney fees for the prevailing party.

The District Court found that both parties obtained part of the relief they sought. But that is not accurate with respect to the 1975 Agreement being a basis for redistributing water as LBWR claimed. LBWR lost every argument it made based on the 1975 Agreement. The District Court erred in concluding that there was not a prevailing party on the 1975 Agreement.⁸⁷ Doll prevailed on the key issue: the validity of the 1975 Agreement. The District Court abused its discretion in failing to award fees to Doll.

B. The District Court erred in finding that attorney fees cannot be awarded because Doll did not win an affirmative final judgement.

The District Court found that the ultimate settlement between the parties means that neither Doll nor LBWR obtained an affirmative judgment.⁸⁸ This finding is an abuse of discretion in light of the entire context of the case and LBWR's claims predicated on the 1975 Agreement.⁸⁹

Regarding the 1975 Agreement, Doll did win affirmative judgments that it is not enforceable. In 2018 LBWR filed its first claim based on the 1975 agreement. Three years

⁸⁷ *Schmidt, Kenyon-Noble, Heringer; Medhus v. Dutter* (1979), 184 Mont. 437, 603 P.2d 669.

⁸⁸ App. Doc. 3, Order on Attorney Fees, p. 5.

⁸⁹ *Chase v. Bearpaw Ranch Ass'n*, 2006 MT 67, ¶ 25, ¶ 28.

later, in 2021, LBWR filed much the same case, raising in one instance the very same count for relief. LBWR filed the 2021 case *after* this Court ruled on the 1975 Agreement.⁹⁰ Doll did win an affirmative judgment regarding the enforceability of the 1975 Agreement. Even considering the settlement, this Court has approved attorney fees where a party did not win an affirmative judgment, but obtained the very relief it sought through litigation.⁹¹

The primary, essential claim LBWR filed its 2018 and 2021 claims on is the validity of the 1975 Agreement. The Water Court, this Court, and the District Court all found, through multiple years, orders, briefings, and even a trial, that the 1975 Agreement has zero viability. The District Court abused its discretion in failing to find for Doll as the prevailing party, simply because there were other claims that resulted in a settlement.

Any other result would have a chilling effect on parties to settle and resolve cases. In fact, it is possible that LBWR had some incentive to settle remaining, unrelated claims to advance the exact argument it has here – that there was a “mixed” outcome and Doll can’t get attorney fees. This is the precise result the *Schmidt* line of cases rejects. A party cannot settle a case after extensive litigation, at the eleventh hour, and facing imminent defeat in an attempt to “dodge [a] fee-shifting statute.”⁹² Where there is a clear outcome in favor of one party, an end result of settlement, mootness, or withdrawal cannot negate the prevailing party’s victory. Doll won on the question of the 1975 Agreement’s viability.

⁹⁰ *LBWR v. Doll* 2020 MT 198 at ¶ 36.

⁹¹ *Heringer*, 2021 MT 100 ¶ 27, 485 P.3d 731, citing *Citizens for Balanced Use v. Mont. Fish, Wildlife & Parks Comm’n*, 2014 MT 214, ¶ 15, 376 Mont. 202, 331 P.3d 844, and also *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 9, 333 Mont. 331, 142 P.3d 864.

⁹² *Heringer*, 2021 MT 100 ¶ 28, citing *Havre Daily News, LLC*, ¶ 44.

The plain language of the 1975 Agreement, together with the savings clause of § 28-3-704, MCA, allows attorney fees to Doll.

The District Court erred in finding that neither party was the prevailing party. Doll seeks attorney fees under the 1975 Agreement and Montana law.⁹³

CONCLUSION

LBWR has come up with one novel theory after the other to argue that it owns all the rights in Big Warm Creek, and that Doll and Gilmore own nothing. LBWR now argues another variation on the theme that it gets all the water: “first in diversion, first in right” making Doll’s rights junior to LBWR’s even though they share the same priority date, and though the Water Court decreed Doll 62.17% of the Seiben/Ester and Marshall/Mercer rights, and 22.46% to LBWR. The Water Court rejected LBWR’s self-serving theories finding that the parties each “received whatever fraction of the Seiben/Ester and Marshall/Mercer rights were used on the land he bought, no more and no less.” This Court should do the same.

Doll is entitled to attorney fees for prevailing on the 1975 Agreement.

Respectfully submitted this 17th day of May, 2023.

By: /s/ Monica J. Tranel
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⁹³ *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100 ¶ 31, citing *R.C. Hobbs Enters., LLC v. J.G.L. Distrib., Inc.*, 2004 MT 396, ¶¶ 51-52, 325 Mont. 277, 104 P.3d 503.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Mac is less than 10,000 words, excluding the certificate of service and certificate of compliance.

/s/ Monica J. Tranel
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CERTIFICATE OF SERVICE

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