

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0323

On Appeal from the Montana 14th Judicial District Court,
Musselshell County,
The Honorable Randal I. Spaulding, Presiding

MUSSELSHELL DITCH COMPANY,

Plaintiff/Appellee,

v.

JD BAR D, LLC, JAMES D. HARRIS, AND JODY WACKER,

Defendants/Appellants

Plaintiff/Appellee Musselshell Ditch Company's Answer Brief

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ISSUE PRESENTED

1. Whether substantial evidence supports the district court's finding that Appellants' permanent pump structure (consisting of a cement pump box, pump, electrical cable and conduit, and pipeline buried in Appellee's flood structure) and a wooden bridge requiring heavy equipment to move – all of which are located within Appellants' express ditch easement – unreasonably interfere with Appellee's ditch easement rights in violation of Mont. Code Ann. § 70-17-112 and this Court's case law interpreting that statute.

STATEMENT OF THE CASE

Plaintiff/Appellee Musselshell Ditch Company (hereafter, "MDC") filed a Complaint against Defendants/Appellants JD Bar D, LLC, James D. Harris, and Jody Wacker (hereafter, collectively, "Defendants") in October 2020, seeking the removal of a permanent pump structure and temporary but difficult-to-move bridge that Defendants had installed within MDC's express ditch easement and asking the district court to award MDC its attorneys' fees. In support of its claims, MDC relied on Mont. Code Ann. § 70-17-112, which prohibits encroachments on ditch easements, and *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570, which interpreted that statute to prohibit unreasonable interference with ditch easements.

The parties engaged in discovery, which included deposing every shareholder of MDC and the individual defendants (who are also the members of Defendant JD Bar D). In August 2021, MDC moved for summary judgment. After that motion was fully briefed, the parties jointly moved the district court to vacate an upcoming bench trial, to allow the parties to submit any additional evidence to the district court, and to decide the matter on the record in lieu of trial. Each side submitted proposed findings and conclusions to the court.

On May 3, 2024, the district court issued its Findings of Fact, Conclusions of Law, and Order, entering judgment in favor of MDC on all claims. The district court ordered Defendants to remove from MDC's ditch easement the cement pump box, pump, pipe, pipeline, electrical conduit, and wooden bridge, and awarded MDC its attorneys' fees pursuant to Mont. Code Ann. § 70-17-112(5). Defendants now appeal.

STATEMENT OF FACTS

A. The Parties.

Defendant/Appellant JD Bar D, LLC owns real property located in Musselshell County. Dkt. 1, ¶ 7; Dkt. 5, ¶ 7; Dkt. 39, p.4, ¶ 2. JD Bar D's members are Defendants/Appellants James D. Harris ("Harris"), who owns 95% of JD Bar D, and Jody Wacker ("Wacker"), who owns the remaining 5%. Dkt. 15, Ex. C, p.1.

MDC owns, operates, and controls the Musselshell Ditch canal system (hereafter, the “Musselshell Ditch”) which crosses the real property owned by JD Bar D. Dkt. 1, ¶ 5; Dkt. 1, ¶ 5; Dkt. 39, p.4 ¶ 4. Shares in the Musselshell Ditch Company are currently owned by five shareholders: Bergin Land & Livestock LTD (~17.5%); Bergin Farm and Ranch LLC (~15.5%); Keith Nelson (~33%); Amy and Brian Korell (~6.5%); and Defendant/Appellant Wacker (~26.5%). Dkt. 16, Bergin Jr. Aff. ¶ 2. JD Bar D is not a shareholder of MDC. Dkt. 15, Ex. C, p.7; Dkt. 39, p.4, ¶ 13. Defendants use the Musselshell Ditch to convey decreed water from the Musselshell River to places of use pursuant to their own decreed water rights. Dkt. 15, Ex. L.

B. The Easement

The water and ditch rights of the parties – through their predecessors – date back to 1891 for MDC and 1904 for JD Bar D. Dkt. 15, Exs. K and L. After more than a century of having nothing in writing with respect to ditch easement rights, R Bar Farms, Inc., through its president William Murnion, granted an easement to MDC across the land now owned by JD Bar D on February 24, 2005 (hereafter, the “Ditch Easement”). Dkt. 15, Ex. A. The Ditch Easement (which was recorded with the Musselshell County Clerk and Recorder) provided in part as follows:

R Bar Farms, Inc., hereafter referred to as “Grantor” hereby grants unto Musselshell Ditch Company and Chandler Ditch, their successors and assigns, hereafter referred to as “Grantee” a perpetual easement for the

canal operated by the Grantee and the maintenance of said canal.

It is further hereby covenanted and agreed by and between the parties hereto that this easement shall be for the exclusive use of the Grantee herein, its successors and assigns forever, for the operation and maintenance of the canal and shall not be an easement for the use of the general public.

C. Defendants' Encroachments on the Ditch Easement.

Between approximately 2014 and 2017, Defendants sought and received permission from MDC to complete a number of specific projects on the JD Bar D property that impacted the Musselshell Ditch. Dkt. 15, Ex. C, Resp. to RFA Nos. 1-3. Because Defendants sought and received permission to complete those projects, they are not the subject of this lawsuit.

In Spring of 2017, however, Defendants installed a wooden bridge over the Musselshell Ditch near a pivot pump *without* permission from MDC. Dkt. 51, Ex. C, Ans. to Int. No. 4,; Dkt. 16, Bergin Jr. Aff. ¶ 12. Between February and April 2018, a cement pump box for what Defendants refer to as the “No Name” pump was built into the bed and bank of the Musselshell Ditch *without* permission from MDC. Dkt. 15 Ex. C, Resp. to RFA No. 7; Dkt. 15, Ex. F, Harris Depo., 50:2-50:24 and Depo. Ex. 1.

At MDC's shareholder meeting on May 14, 2018, the MDC shareholders voted to require Defendants to remove the cement pump box. Dkt. 15, Ex. F, Harris Depo., 51:18-52:7; Ex. G, Wacker Depo., 30:16-31:10.

Defendants refused to remove the pump box. Instead, in July 2019, Defendants ordered the remaining work on the pump to be completed. Dkt. 15, Ex. F, Harris Depo., 53:14-53:25; 58:7-23; Ex. G, Wacker Depo., 31:11-31:20. Harris testified that he "told the vendor to put the pump in place, make it operational." Dkt. 15, Ex. F, Harris Depo., 58:10-58:11. That same year, Defendants also installed electrical conduit across the Musselshell Ditch and constructed a pipeline crossing a critical flood structure, all within the Ditch Easement but *without* permission from MDC. Dkt. 15, Ex. C, Resp. to RFA Nos. 15-16. The cement pump box, pump, electrical cable and conduit, and pipeline are collectively referred to as the "permanent pump structure" throughout this brief.

D. Interference with Ditch Easement Rights.

Defendants' encroaching permanent pump structure and temporary, but hard-to-move bridge make it more difficult for MDC to maintain the ditch. MDC's maintenance contractor will have to work around the pump box and pump, as well as around the pipe extending from the pump. Dkt. 15, Ex. B. Additionally, the contractor will have to work around the permanent pump structure to access the downstream cement structure that takes the ditch across McLean Coulee. Dkt. 16,

¶¶ 17-22 and Exs. 5-8 thereto. This will require the contractor to travel outside of the Ditch Easement to get around the pump should work be necessary on that coulee crossing structure. *Id.*

The contractor will have to exit the Musselshell Ditch and work around the electrical conduit, taking special care not to hit the electrical line. Dkt. 16, Ex. 3. Bill Bergin, Sr. testified that the electrical conduit is “a potential hazard if somebody gets electrocuted,” which creates potential liability for MDC. Dkt. 15, Ex. H, Bergin, Sr. Depo., 33:21-25. The contractor will likewise have to exit the ditch and work around the wooden bridge or cause it to be removed before maintenance. Dkt. 16, Bergin, Jr. Aff., Exs. 1 and 2 thereto.

When MDC’s flood structure requires replacement or maintenance (e.g., to reinforce the dirt on top of the culvert where Defendants buried their pipeline), MDC’s maintenance contractor will have to work around the pipeline installed by Defendants. Dkt. 16, Ex. 4; Dkt. 15, Ex. H, Bergin, Sr. Depo., 28:3-29:10.

MDC shareholder Keith Nelson testified that the encroaching pump structure is different than headgates along the Musselshell Ditch because the pump structure extends into the ditch whereas headgates are on the edge of the ditch. Dkt. 15, Ex. J, Nelson Depo., 17:8-17:16. Further, when asked about the issue caused by the pump being in the ditch in terms of maintenance, Nelson testified: “It’s an

inconvenience” *Id.*, 17:1-7. Nelson stated further, “Every time you do stuff . . . it adds to the maintenance” *Id.*, 22:20-22:25.

STANDARD OF REVIEW

MDC agrees with the standard of review identified by Defendants, that the district court’s findings of fact are reviewed to determine whether they are clearly erroneous, while its conclusions of law, including its interpretation of statutes, are reviewed *de novo*. *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 11, 362 Mont. 1, 261 P.3d 570. A finding is clearly erroneous if it is not supported by substantial credible evidence, if the district court misapprehended the effect of the evidence, or if this Court has a definite and firm conviction that the district court made a mistake. *Fox v. BHCC II, Inc.*, 2017 MT 218, ¶ 18, 388 Mont. 443, 401 P.3d 705. In determining whether the district court’s findings are supported by substantial credible evidence, this Court must view the evidence in the light most favorable to the prevailing party, here MDC. *Guthrie v. Hardy*, 2001 MT 122, ¶ 24, 305 Mont. 367, 28 P.3d 467.

SUMMARY OF THE ARGUMENT

MDC’s primary and secondary easement rights are firmly rooted not only in the express 2005 Ditch Easement, but also in § 70-17-112 and this Court’s case law interpreting it. In short, MDC has “a secondary easement to enter, inspect, repair, and maintain a canal or ditch.” Mont. Code Ann. § 70-17-112(1). No one

else – including servient landowner JD Bar D – may encroach upon or impair MDC’s ditch easement. Mont. Code Ann. § 70-17-112(2). This Court has tempered the legislature’s absolute language by invoking a “reasonableness standard,” thereby prohibiting encroachments that “unreasonably interfere” with the rights of the easement holder. *Musselshell Ranch Co.*, ¶¶ 19, 31.

In *Musselshell Ranch*, this Court held that permanent and immovable encroachments, like Defendants’ pump structure here, unreasonably interfere with a ditch easement. *Id.*, at ¶ 24. Unreasonable interference also encompasses an encroachment that requires the ditch owner to “exit and re-enter the ditch” at one or more points along the maintenance route. *Id.*, at ¶¶ 24, 29. Defendants’ permanent pump structure and wooden bridge both require exit and re-entry. Unreasonable interference is found where the servient owner’s encroachment makes the easement more inconvenient to use or creates hazardous conditions. *Id.*, at ¶ 20. The evidence presented by MDC establishes that the permanent pump structure (which includes electrical cable and conduit) make the Ditch Easement potentially hazardous and more inconvenient to maintain for maintenance workers. Finally, unreasonable interference may be found where the dominant owner is forced to defend an easement right in court, as Defendants have forced MDC to do with this lawsuit. *Id.*, at ¶ 23.

Here, the district court reviewed all deposition transcripts, affidavits, and exhibits submitted to it by the parties, and found that Defendants' encroaching permanent pump structure and bridge unreasonably interfered with MDC's ditch easement rights for the above-stated reasons. The district court's factual findings must be viewed by this Court in the light most favorable to MDC. Since there is substantial evidence to support the district court's finding of "unreasonable interference," it should not be disturbed.

The district court properly applied its factual findings to the governing law of ditch easements, *i.e.*, § 70-17-112 and *Musselshell Ranch Co.*, when it ordered Defendants to remove the encroaching structures and awarded MDC its attorneys' fees. This Court should affirm the district court.

ARGUMENT

I. MDC'S EXPRESS DITCH EASEMENT CREATED EASEMENT RIGHTS THAT ARE PROTECTED BY STATUTE AND THIS COURT.

It is undisputed that JD Bar D's predecessor-in-interest granted a valid and enforceable ditch easement to MDC in 2005. *See* Dkt. 1, ¶ 14; Dkt. 5, ¶ 14. The Ditch Easement expressly grants MDC "a perpetual easement for the canal operated by [MDC] and the maintenance of said canal." Dkt. 15, Ex. A. By the language of the Ditch Easement itself, MDC is entitled not only the right to use the Musselshell Ditch, but also the right to maintain it.

In addition to the written Ditch Easement’s grant of the right to maintain the ditch, Montana law likewise recognizes the existence of maintenance rights as a secondary easement right. As explained below, the common law governing easements has long guaranteed an easement holder such rights. Nearly half a century ago, Montana’s legislature codified secondary easement rights specifically as they relate to ditch easements, which strengthened an easement holder’s ability to enforce them. More recently, this Court applied that statute and reiterated the common law principle that the servient landowner cannot unreasonably interfere with the primary or secondary rights of the easement holder.

A. The Common Law Ensures that Ditch Easement Owners May Enforce Their Rights Against Others, Including Secondary Rights to Maintain, Clean, and Repair the Ditch.

Courts have also long held that easements carry secondary rights in favor of the easement holder. For centuries, the common law has maintained that “conveyances include those rights necessary to make use of the property conveyed.” *Mattson v. Montana Power Co.*, 2009 MT 286, ¶ 37, 352 Mont. 212, 215 P.3d 675. “A maxim dating from the time of Edward I (1239–1307) states that one who grants a thing must be understood to have granted that without which the thing could not be or exist.” *Id.* (quoting Restatement (Third) of Property: Servitudes § 2.15 cmt. a (2000)) (internal quotations omitted).

This Court has repeatedly applied that common law rule to ditch easements over the past century. In 1941, this Court – relying on multiple treatises and earlier case law from within and outside of Montana – concluded that a ditch easement carries with it secondary easement rights to make necessary repairs and clean out the ditch. *Laden v. Atkeson*, 112 Mont. 302, 116 P.2d 881, 883 (1941) (secondary easement rights “are founded on the maxim of the law, that when the use of a thing is granted, everything is granted by which the grantee may reasonably enjoy such use, that is, rights that are incident to something else granted, – here to water and ditch rights.”) “Where a permanent easement has once been acquired over the lands of another, and the ditch or canal has once been constructed, the owner of the primary easement has the right, as a secondary easement, to go upon the lands and remove obstructions from the ditch, or to make other repairs necessary, consistent with the full enjoyment of the easement.” *Harrer v. N. Pac. Ry. Co.*, 147 Mont. 130, 137, 410 P.2d 713, 716–17 (1966).

The remedy sought by MDC in this action is the removal of Defendants’ permanent pump structure and wooden bridge from the Musselshell Ditch, on the grounds that those structures unlawfully encroach on the Ditch Easement and unreasonably interfere with MDC’s easement rights. Dkt. 1. A 1963 opinion by this Court confirmed that a ditch owner’s easement rights are enforceable against a servient landowner who interferes with the use of the ditch. *Hughes v. King*, 142

Mont. 227, 229, 383 P.2d 816, 817 (1963). In *Hughes*, this Court addressed the question of whether the owner of a ditch right has a “property right” in the ditch that would allow it to enjoin the owner of the land on which it is located from interference. *Id.* Answering in the affirmative, the Court reminded the parties that a ditch right is an easement, and anyone interfering with the owner’s enjoyment of its easement – including the servient landowner – can be enjoined from continued interference. *Id.* at 230, 383 P.2d at 818. On those grounds, this Court affirmed the lower court in *Hughes*, holding that “the trial judge in his findings of fact found that the defendant landowner *was interfering* with the respondent’s use of the ditch and such finding will not be disturbed unless the evidence preponderates against it.” *Id.* at 229, 383 P.2d at 817 (emphasis in original).

Similarly, the district court in this case found – based on the evidence before it – that Defendants were interfering with MDC’s use of the ditch. As in *Hughes*, this Court should not disturb the district court’s finding.

B. Ditch Easement Rights Are So Fundamental in Montana, the Legislature Passed a Law in 1981 Codifying Them and Strengthening the Right to Enforce Them.

In 1981, the legislature enacted Mont. Code Ann. § 70-17-112, which serves “the twin purposes of codifying secondary easement rights and . . . of increasing the availability of legal remedies by allowing an award of attorney’s fees and costs to the prevailing party.” *Musselshell Ranch*, ¶ 13.

The relevant subsections of § 70-17-112 provide as follows:

(1) A person with a canal or ditch easement has a secondary easement to enter, inspect, repair, and maintain a canal or ditch or to operate the appropriation works.

(2) A person may not encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.

(3) The provisions of subsection (2) do not apply if the holder of the canal or ditch easement consents in writing to the encroachment or impairment.

(5) If a legal action is brought to enforce the provisions of this section, the prevailing party is entitled to costs and reasonable attorney fees.

Mont. Code Ann. § 70-17-112. As this Court noted in *Musselshell Ranch*, the legislative history of the statute reveals the intent to codify the common law by providing in subsection (1) of the statute that “anyone with a ditch easement does have a secondary easement and the right to maintain that easement.”

Musselshell Ranch, ¶ 13 (citations and quotations omitted). The statute further provided in subsections (2) and (3) that no one may encroach upon or impair the easement *unless* the ditch easement owner consents in writing. Finally, subsection (5) allows a prevailing party in an enforcement action the right to an attorneys’ fees award.

C. The Statute Is Applied Using a Reasonableness Standard, with Guiding Principles Advanced by this Court in *Musselshell Ranch*.

In *Musselshell Ranch*, this Court interpreted the above statute – and subsection (2) in particular – to incorporate a “standard of reasonableness,” *i.e.*, “whether the servient owner’s use *unreasonably* interferes with the easement rights.” *Musselshell Ranch*, ¶ 19 (emphasis in original).¹

The facts presented in *Musselshell Ranch* are similar to the facts here. In *Musselshell Ranch*, the plaintiffs owned easement rights in a ditch that traversed the defendant’s land in Musselshell County. *Musselshell Ranch*, ¶¶ 3-4. The defendant landowner informed plaintiffs of her intention to install a culvert but did not receive written permission to do so. *Id.*, at ¶ 8. The defendant nevertheless placed a culvert in the ditch bottom, surrounded it with rock and gravel, and built up several more feet of rock and gravel to create a bridge across the ditch. *Id.*, at ¶ 6. The easement owners in *Musselshell Ranch* offered testimony that their maintenance crew was forced to exit the ditch to go around the bridge in an “inconvenient and hazardous new route.” *Id.*, at ¶¶ 6, 24.

¹ In his concurring/dissenting opinion, Justice Nelson disagreed with the majority’s interpretation of the statute, explaining that the Legislature itself could have – but did not – include a reasonableness standard. *Musselshell Ranch*, ¶ 50. “Rather, the Legislature chose a more clear, objective, and categorical prohibition: no encroachment or impairment, period.” *Id.*

The district court in *Musselshell Ranch*, however, concluded that the culvert and bridge could remain in place, finding that those structures did not unreasonably interfere with the plaintiffs’ secondary ditch rights. *Id.*, at ¶ 9. This Court reversed the district court, finding that the “construction of a structure *permanently blocking use* of a portion of [plaintiffs’] secondary easement inarguably encroaches on the easement.” *Id.*, at ¶ 32 (emphasis added).

In reaching its conclusion, this Court acknowledged that “whether interference is reasonable depends on the factual circumstances of each particular case.” *Musselshell Ranch*, ¶ 19. Slight and immaterial interference is not objectionable, but a “servient owner’s actions cannot make the easement more ‘inconvenient, costly, or hazardous to use.’” *Id.*, at ¶¶ 19-20 (citations omitted). To that end, this Court offered the following guidance in analyzing whether a servient owner’s actions are more than just a “slight and immaterial interference”:

- Permanent and immovable encroachments constitute unreasonable interference with an easement right. *Id.*, at ¶ 24.
- An encroachment that requires the ditch owner to “exit and re-enter the ditch” at one or more points along the maintenance route is unreasonable interference. *Id.*, ¶ 29.
- Erecting a structure that “prevents normal, historic use of that portion of the secondary easement” violates Mont. Code Ann. § 70-17-112. *Id.*, at ¶ 30
- The servient owner cannot diminish the use of the easement, make it more inconvenient to use, or create hazardous conditions. *Id.*, at ¶ 20.

- Forcing the dominant owner to defend an easement right in court may constitute unreasonable interference. *Id.*, at ¶ 23.

Applying these principles to the facts presented in *Musselshell Ranch*, this Court held that the easement owner's secondary easement rights to enter the ditch for repair and maintenance had been impaired and encroached upon. *Id.*, at ¶ 32. The matter was reversed and remanded to the district court for further proceedings. *Id.*

The district court in this case applied § 70-17-112 and *Musselshell Ranch* to the facts here, concluding that Defendants' pump structure and bridge unreasonably interfered with MDC's easement rights, and ordered them removed. This Court should affirm the district court's decision.

II. THE DISTRICT COURT CORRECTLY FOUND THAT DEFENDANTS' PERMANENT PUMP STRUCTURE AND WOODEN BRIDGE VIOLATE MONT. CODE ANN. § 70-17-112 AND THE CASE LAW INTERPRETING IT.

In making its findings that the encroaching permanent pump structure and wooden bridge unreasonably interfered with MDC's ditch easement, the district court had the opportunity to review all evidence that each party had submitted in support of their own position. In lieu of a bench trial, the parties in this case jointly moved the district court to submit this matter on the record and briefs before the court, along with any additional submissions of deposition excerpts or exhibits provided to the court. Dkt. 32. That motion was granted. Dkt. 33. After reviewing

the evidence, the district court made factual findings that are supported by substantial evidence and legal conclusions that are soundly rooted in this Court's decisions.

A. This District Court's Factual Findings Are Well-Supported by the Evidence.

The district court made the following findings, each of which is well-supported by the record as noted below.

- JD Bar D installed (or caused to be installed) a wooden bridge, cement pump box, water pump, electrical cable and conduit, and a buried water pipeline in MDC's ditch easement. Dkt. 39, Findings 21, 25, 29, 32, 36. Support for these findings is located at Dkt. 51, Ex. C, Ans. to Int. No. 4, and Resp. to RFA No. 7.
- JD Bar D did not have permission to install these items. Dkt. 39, Findings 22, 26, 33, 37. Support for these findings is located at Dkt. 15 Ex. C, Resp. to RFA No. 8 and Ex. F, Harris Depo., 50:2-50:24.
- MDC objected to the installation of each item and ordered JD Bar D to remove the items. JD Bar D refused. Dkt. 39, Findings 23-24, 27-28, 30-31, 34-35, 38-39. Support for these findings is located at Dkt. 15, Ex. F, Harris Depo., 51:18-52:7; Ex. G, Wacker Depo., 30:16-31:10.

- The cement pump box, water pump, electrical cable and conduit, and buried pipeline are permanent. Dkt. 39, Finding 41. Support for this finding is located at Dkt. 15, Ex. C, p.9, Resp. to RFA No. 13.
- The wooden bridge can be moved, but only with the use of heavy equipment. Dkt. 39, Finding 41. Support for this finding is located at Dkt. 20, Harris Aff., ¶ 8 and Ex. 5.
- The cement pump box, water pump, electrical cable and conduit, and buried pipeline render maintenance of the ditch more inconvenient than maintenance prior to installation. Ditch members or contractors will have to work around objects that are on, in, over, and around the ditch. The electrical line and conduit pose a potential electrocution hazard. Maintenance of the flood structure will require workers to exercise extra care to avoid damaging Defendants' pipeline. Dkt. 39, Finding 42. Support for this finding is located at Dkt. 16, ¶ 22 and Exs. thereto; Dkt. 15, Ex. H, Bergin, Sr. Depo., 28:3-29:10 and 33:21-33:25; Ex. J, Nelson Depo., 17:1-17:16 and 22:20-22:25.

Because each of the district court's factual findings are well-supported by the evidence before it, they should not be disturbed on appeal. *First Nat. Bank & Tr. of Wibaux v. Sec. Bank, N. A.*, 199 Mont. 168, 172, 648 P.2d 1166, 1168 (1982).

B. The District Court Correctly Applied the Facts to the Governing Law.

The district court properly applied Mont. Code Ann. § 70-17-112 and this Court's guidance in *Musselshell Ranch* in entering judgment in favor of MDC and requiring Defendants to remove their permanent pump structure and wooden bridge from the Ditch Easement.

Specifically, the district court applied this Court's guidance that an action by the servient owner that makes the ditch easement more "inconvenient, costly, or hazardous to use" is unreasonable interference. Dkt. 39, p.12, ¶ 6, citing *Musselshell Ranch*, ¶ 20. Testimony by MDC's shareholders revealed that maintenance workers would be required to work around the pump structure and bridge, and that the electrical cable and conduit posed an electrocution risk. Dkt. 39, p.7, ¶ 42.

The district court also applied this Court's guidance that a permanent and immovable encroachment almost always "constitutes unreasonable interference" with ditch easement rights, and that construction of a structure permanently blocking use of a portion of the ditch easement holder's secondary easement rights "inarguably encroaches on the easement." Dkt. 39, p.12, ¶¶ 7, 10 (citing *Musselshell Ranch*, ¶¶ 24-29 and ¶ 32). By Defendants' own admission, the pump structure is permanent, and the district court found that fact to be true. Dkt. 39, p.7, ¶ 41.

Finally, the district court also relied on this Court's guidance that forcing a ditch easement owner to defend its rights in court is an unreasonable interference with the ditch easement rights. Dkt. 39, p. 13, ¶ 17. This Court found that "MDC had an express ditch easement since 2005 which Defendants recognized by seeking and obtaining permission from MDC for various projects prior to Defendants' unauthorized installation of the pump and accompanying structures" in dispute in this matter. Dkt. 39, p.13, ¶ 17.

Applying the facts found by the district court to Mont. Code Ann. § 70-17-112 and *Musselshell Ranch*, the only conclusion to be reached is that Defendants have unreasonably interfered with MDC's ditch easement rights. The pump structure and temporary but difficult-to-move bridge make it more inconvenient and hazardous to maintain the ditch. The pump structure was intended to be permanent. MDC was forced to bring this matter to court after requesting Defendants remove the structures but Defendants refused to do so. The district court correctly applied the law to the facts in this case. This Court should affirm its ruling.

C. The Facts in *Fox v. BHCC II, Inc.* Make that Case Inapplicable Here.

In 2017, this Court relied on *Musselshell Ranch* in reviewing another case involving the encroachment of a servient landowner on the rights of a ditch easement owner. *See Fox v. BHCC II, Inc.*, 2017 MT 218, ¶ 28, 388 Mont. 443,

401 P.3d 705. The facts in *Fox* are distinguishable from those in both *Musselshell Ranch* and the matter at issue here, making Defendants’ reliance on the outcome in *Fox* misplaced.

In *Fox*, the servient landowner (BHCC) was the owner and operator of a large hotel located on the south side of a ditch in Billings. *Fox*, ¶ 7. At the time BHCC acquired the hotel in 1999, two footbridges, multiple mature and immature cottonwood and spruce trees, numerous utility boxes and power poles, and a picnic table were located within ten feet of the center line of the ditch. *Id.* In 2011, the utility company pruned the existing fifty-foot cottonwood trees, but that work rendered the trees unstable, necessitating their removal. *Id.* In 2012, BHCC replaced the cottonwoods with multiple small spruce trees and expanded the landscaped area with additional trees and shrubs. *Id.*

That same year, Fox claimed that BHCC was encroaching upon his easement. *Id.*, at ¶ 8. He claimed the trees and shrubs planted by BHCC blocked his access to the ditch for maintenance, and he demanded the removal of all trees, footbridges, and other improvements within fifteen feet of the center line of the ditch. *Id.* When the parties could not reach an agreement, Fox sued. *Id.*, at ¶ 9.

BHCC made an offer of settlement, pledging “to use reasonable efforts to keep the ditch free from trash, debris, and foliage detritus, and to control the weeds on its side” of the ditch. *Id.*, at ¶ 10. Fox did not respond to the offer. *Id.*

Testimony at the trial in *Fox* revealed that BHCC had regularly maintained its side of the ditch, including tree removal and replacement, debris cleanup, and mowing and weeding the ditch bank. *Id.*, at ¶ 11. The trial court found from the evidence presented that Fox had benefited from BHCC’s “excellent maintenance of the ditch” at BHCC’s own expense. *Id.*, at ¶ 15. In crafting its ruling, the district court imposed on BHCC a duty to continue to clean and maintain the ditch located on BHCC property. *Id.*

Based on the very unique facts of that case and BHCC’s willingness to continue to maintain the ditch, this Court agreed that the district court had “fashioned a unique, workable, and equitable solution for both parties under these facts and circumstances.” *Id.*, at ¶ 34. “We conclude the court’s factual findings are not erroneous, its conclusions of law are correct, and it did not abuse its discretion in accepting BHCC’s judicial admission and tender of its duty to clean and maintain Fox’s irrigation ditch.” *Id.*

Here, there is no proof that Defendants cleaned the Musselshell Ditch at their own expense, nor did Defendants offer to have the district court impose a duty upon them to continue to clean and maintain the Musselshell Ditch in the future. Defendants’ use of *Fox* as support for their arguments is misplaced. The facts here and the facts in *Fox* are so dissimilar, that the outcome of *Fox* cannot be relied on here.

III. DEFENDANTS MAKE “RED HERRING” ARGUMENTS THAT THIS COURT SHOULD IGNORE.

A. In the Absence of Written Permission to Encroach, § 70-17-112(2) and *Musselshell Ranch* Apply.

Defendants seemingly misconstrue the significance of their failure to secure written permission from MDC to install the permanent pump structure and wooden bridge within the Ditch Easement. Subsection (3) of Mont. Code Ann. § 70-17-112 provides that the prohibition against encroachment of a ditch easement does not apply if the easement holder consents in writing. Here, it is undisputed that Defendants did not have permission to encroach. Accordingly, the prohibition against encroachment applies, subject to the “reasonableness” standard advanced in *Musselshell Ranch*.

In their opening brief, Defendants argue that there is no legal requirement to receive prior permission before encroachments may be installed. *See* App. Br. at p.17. Certainly, *Musselshell Ranch* stands for the proposition that there is no legal requirement to receive prior permission before installing encroachments that do *not* unreasonably interfere with the ditch easement. The converse, however, is also true. Installing encroachments that unreasonably interfere with a ditch easement without permission is unlawful under § 70-17-112(2) and *Musselshell Ranch*.

Here, no prior permission was received, yet Defendants proceeded with the installation of the encroaching pump structure and bridge anyway. Had they

received permission, this case would not exist. Having not received permission, it is now up to the courts to decide whether the permanent pump structure and wooden bridge unreasonably interfere with the Ditch Easement. This Court should answer in the affirmative and affirm the district court.

B. Water Rights Are Not Ditch Rights.

Several times in their brief, Defendants refer to their right to extract water from the Musselshell Ditch, suggesting that their water rights somehow give them unfettered authority to encroach upon the Ditch Easement. It has long been established that “[w]ater rights and ditch rights are separate and distinct property rights; one may own a water right without a ditch right, or a ditch right without a water right.” *Maclay v. Missoula Irr. Dist.*, 90 Mont. 344, 3 P.2d 286, 290 (1931). Thus, any implication by JD Bar D that it was entitled to place a permanent pump structure in the Musselshell Ditch simply because it has a water right is a red herring. JD Bar D offers no legal support for this argument because there is none.

Notably, Defendants are not without a method to extract water out of the ditch at the same location where the permanent pump was installed. At a May 14, 2018, special meeting of the shareholders, MDC voted that Defendants remove the permanent pump and replace it with a portable, or temporary, pump. *See* Dkt. 15, Ex. C, p.9, Resp. to RFA No. 13. In addition, Defendants installed the permanent pump structure so they could irrigate land that had never before been irrigated. In

other words, there was no “historical” right of Defendants to retrieve water from the Musselshell Ditch at that particular point. *See*. Dkt. 39, p.7, ¶ 43; Dkt. 15, Ex. G, 26:18 – 27:2; Dkt. 15, Ex. H, 25:3 – 26:7.

The simple fact that Defendants had the right to extract water from the Musselshell Ditch has no bearing on whether their actions in installing a permanent pump structure and temporary but difficult-to-move bridge are an unreasonable interference with MDC’s ditch rights. The district court should be affirmed.

IV. MDC IS ENTITLED TO ITS ATTORNEYS FEES.

Subsection (5) of § 70-17-112 allows the prevailing party in a ditch easement dispute to recover its attorneys’ fees. If this Court affirms the district court’s decision, MDC is entitled to its fees. The district court should be affirmed on this issue, as well.

CONCLUSION

The district court reviewed all of the evidence submitted by the parties and properly determined that the encroaching permanent pump structure and wooden bridge made the Ditch Easement more inconvenient and hazardous to use and therefore were an unreasonable interference with the Ditch Easement. Applying § 70-17-112 and this Court’s guidance from *Musselshell Ranch*, the district court reached the correct legal conclusion that Defendants’ structures violated Montana

law and must be removed, and that MDC is entitled to its attorneys' fees. The district court should be affirmed.

DATED this 3rd day of October, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) 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, except for quoted and indented material; and the word count calculated by Microsoft Word is 5,783 words, excluding table of contents, table of authorities, caption, certificate of service and certificate of compliance.

/s/ Michelle M. Sullivan

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CERTIFICATE OF SERVICE

I, Michelle Sullivan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-03-2024:

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