

**IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 24-0323**

MUSSELSHELL DITCH COMPANY,

Plaintiff/Appellee,

v.

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

Defendants/Appellants/Counterclaimants.

APPELLANTS' REPLY BRIEF

On Appeal from the Montana Fourteenth Judicial District Court, Musselshell
County, Docket No. DV 20-85, the Honorable Judge Randal I. Spaulding,
Presiding.

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I. INTRODUCTION

The parties agree on the source of the law that controls this matter. Pursuant to § 70-7-112(1), MCA, the Appellee Musselshell Ditch Company (“MDC”) has a “secondary easement to enter, inspect, repair, and maintain” for the portion of their ditch that runs through Appellants’, JD Bar D, LLC, James D. Harris and Jody Wacker (“JD Bar D,” collectively). Ostensibly, the parties agree that JD Bar D may not *unreasonably* interfere with MDC’s secondary easement rights. Yet, substantively, MDC asks this Court to ignore its prior instructions that only unreasonable interferences with secondary easements are prohibited and that reasonableness is determined by balancing each party’s right and considering the factual circumstances surrounding the encroachments.

Similarly, the parties do not raise any substantial factual disputes, yet MDC asks the Court to ignore that the encroachments have not affected MDC’s easement rights, the flow of water, or the maintenance of the ditch. Additionally, MDC defends the District Court’s disregard of JD Bar D’s rights to extract water from the ditch and its role in analyzing reasonableness of its encroachments.

II. ARGUMENT

1. **MDC mischaracterizes this Court’s holding in *Musselshell Ranch*.**

Both parties agree that *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570, sets forth the foundation upon which secondary

easement rights are interpreted and enforced. However, MDC's response misstates this Court's holding and subsequent analysis stemming from *Musselshell Ranch*.

MDC's argument is a defense of the District Court's apparent holding: that *Musselshell Ranch* set forth a bright line rule that permanent, immovable structures universally unreasonably interfere with secondary ditch easement rights. However, "what constitutes a reasonable use and unreasonable interference is a question of fact and uniform rules are difficult to formulate." *Earl v. Pavex Corp.* 2013 MT 343, ¶ 44, 372 Mont. 476, 313 P.3d 154 (quoting Bruce & Ely, *The Law of Easements and Licenses in Land* §§ 8:3, 8:21, 8-13 to 8-14 & 8-70). In fact, in *Musselshell Ranch*, this Court rejected the notion it was creating distinct rules against permanent encroachments. "Some permanent encroachments may not justify a finding of unreasonable interference. The particular facts of a situation are always controlling and what is reasonable or unreasonable is often a close call." *Musselshell Ranch*, ¶ 27.

The District Court erred by applying a bright line rule that permanent encroachments are unreasonable. This Court has emphasized "that the determination whether the encroachments must be removed from the easement requires a balancing of the parties' interests, with reasonableness being the controlling standard." *Earl*, ¶ 44.

2. The District Court’s failure to consider JD Bar D’s rights to utilize water in a reasonable manner was a reversible error.

It is undisputed that JD Bar D has the right to extract water from the ditch. JD Bar D does not argue, as MDC suggests, that this right gives it “an unfettered authority to encroach” upon the easement. As demonstrated above, JD Bar D’s right to extract water must be considered, as this Court has repeatedly affirmed, in determining the reasonableness of the encroachments upon the ditch.

It is presumed, if an easement does not outline the parties’ rights, that the parties intended a fair balance of their interests. *Musselshell Ranch*, ¶ 19. A servient owner is entitled to utilize its rights in any manner that does not *unreasonably* interfere with the easement holder’s operation. *Mattson v. Montana Power Co.*, 2009 MT 286, ¶ 52, 352 Mont. 212, 215 P.3d 675. MDC’s Response conflates the significance of JD Bar D’s right to extract water from the Musselshell Ditch in an attempt to undermine the reasonableness of the cement pump and related implements.

Appellant cited below and argued in its Opening Brief, the ancient and universally accepted law that a person with rights to take water from a ditch may do so in a reasonable manner. This doctrine was never challenged. Also unchallenged is that JD Bar D’s positions means of extraction were reasonable.

Amy Korrell, a land owner and ditch member, testified that the pump did not cause any known inconveniences or impediments, but that she, like other members, simply wanted to impede JD Bar D's ability to exercise its rights to extract water.

Q. Okay. And have you heard about the pipe over the 48-inch culvert?

A. Uh-huh.

Q. You have heard?

A. I was there.

Q. And you've heard about the wire over the ditch?

A. Yes. I was not there but saw it, yes.

Q. I'm talking about you personally now.

A. Yep.

Q. Has that pipe or that wire affected your operation at all?

A. No, not at this time. Not as of yet.

Q. And do you know if that pipe or that wire has affected any water user at all ever?

A. Not as of yet.

Q. And do you know if that pipe or that wire has affected Musselshell Ditch Company at all?

A. I guess the only way, in my opinion, that it has affected it, is that it could cause problems down the road. But as of yet, no.

Q. What structure along the ditch, what -- isn't it true that every pond, every headgate, every check, every pump that has been placed along that ditch could cause problems down the road?

A. Sure. Yes.

A. I would not approve the pumping station.

Q. Why?

A. Because I am worried at how that pumping station will affect me. It didn't last year. I was already gone. My cows were already gone. I was already shut off. But I am worried how that pumping station will affect me. I'm second-to-the-last, so I have a lot of issues already to deal with. And to add to that, if I can't get my water, then that will make me very angry.

Q. The pumping station has been there for quite awhile.

A. But it has never been used. So when it starts getting used, it may become an issue.

Q. We're talking two different things here.

A. Okay.

Q. First of all, we're talking the presence of the pumping station itself without it being turned on.

A. I would still say no.

Q. It hasn't affected you a bit?

A. Right.

Q. So now what you're talking about is if it gets turned on and takes too much water, you won't get your water?

A. Correct.

Q. Well, isn't that true of any means of diversion ever since the history of the ditch company?

A. No, because it's been working just fine, but now they've added another. And you don't know. I'm looking out for me.

Q. Yes.

A. I don't care about anybody else but myself and my cows. And if I don't get the water, I am going to be very unhappy.

Dkt. Doc. 37, Ex. 5; 13:14—14:14, 17:13—18:24.

These are not the concerns this Court was addressing in establishing the guidelines set forth in *Musselshell Ranch*. The deposition testimony from the ditch members, detailed in JD Bar D's Opening Brief, reveal that the complained of encroachments caused no tangible interruptions to ditch operations, let alone unreasonable interferences.

The District Court's finding that the encroachments were unreasonable was largely in reliance of Affidavits filed in support of Summary Judgment, not its members' deposition testimony. This is because the deposition testimony universally acknowledges the lack of interference with MDC's rights. This Court has held this type of revision testimony should be discredited. *See Kaseta v. Northwestern Agency of Gr. Falls*, 252 Mont. 135, 140, 827 P.2d 804, 807 (1992); *Stott v. Fox*, 246 Mont. 301, 309, 805 P.2d 1305, 1310 (1990).

MDC's response, and the record at the District Court level, failed to establish any impediment to the ditch operation outside of conjecture. This is particularly true in consideration of the nature of the ditch and JD Bar D's right to extract water.

MDC points out that the pump would need to be worked around during maintenance and would prohibit traversing the ditch with machinery. However, such impediments are the norm within the subject ditch which is, itself, too small for machinery to enter. It is undisputed that the path of the ditch contains over 70 other permanent obstructions and impediments including culverts which must be worked around and which prevent machinery from traveling along the ditch bottom. Dkt. Doc. 20, ¶¶ 4-8, Ex. 1—5.

3. The District Court improperly relied on the absence of permission in determining the reasonableness of the encroachments.

After review of MDC's Response Brief, there seems to be no disagreement that prior permission, or the lack thereof, is of no consequence in determining this matter. The easement itself does not require encroachments to be approved if they are reasonable. MDC acknowledges this in their brief. The unreasonableness of encroachments could be waived with prior approval, but it is not argued that approval was given. Thus, it was improper for the District Court to give any consequence to the lack of prior approval. Relying on the lack of prior approval to

find the encroachments unreasonable applied illogical circular reasoning and amounted to reversible error.

4. This Court's reasoning in *Fox* supports the reasonableness of the encroachments complained of in this matter.

MDC argues that this Court's reasoning in *Fox v. BHCCII, Inc.*, 2017 MT 218, ¶ 28, 388 Mont. 443, 401 P.3d 705, does not apply here. In *Fox*, this Court recognized that historical use and the full context of the impediments in the ditch suggested that the complaint of encroachments were reasonable. As demonstrated above, the same reasoning should apply here. The pump system provides JD Bar D use of its rights without materially affecting MDC's ditch rights.

III. CONCLUSION/RELIEF SOUGHT

The Court should reverse the District Court's finding that the encroachments unreasonably interfere with MDC's ditch rights, and the award of attorneys fees to MDC. The Court should remand the matter back to the District Court for a finding that the encroachments do not interfere with MDC's rights, that declaratory judgment should be granted in favor of JD Bar D, and award JD Bar D its reasonable attorneys fees, determined by the trial court.

DATED this 18th day of November, 2024.

/s/ Geoffrey T. Cunningham

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and quoted and indented material; and the word count calculated in Microsoft Word is 1,707 words excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED this 18th day of November, 2024.

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I hereby certify that I have filed a true and accurate copy of the foregoing Appellants' Reply Brief with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing Appellants' Reply Brief upon each attorney of record in the above-referenced District Court action as follows:

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