**CAUSE NO. DA 21-0360**
**IN THE SUPREME COURT OF THE STATE OF MONTANA**

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ELGIN FABER and COLLEEN FABER,

Appellants and Cross-Appellees,

-vs-

KEITH RATY, COLLEEN RATY, et al.,

Appellees and Cross-Appellants.

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# APPELLEES' OPENING BRIEF AND OPENING CROSS-APPEAL

*On Appeal from the Montana Twelfth Judicial District Court*
*Hill County Cause No. DV-16-003*
*Hon. John A. Kutzman, District Court Judge*

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## STATEMENT OF ISSUES ON APPEAL

Based upon the arguments presented by the Appellants and Cross-Appellees Elgin and Coleen Faber (Fabers), the Appellees and Cross-Appellants Keith and Coleen Raty (Ratys) would rephrase the statement of issues as follows:

1. Whether Fabers are precluded from raising the issue of the frequency of use of the Olson Road easement on appeal.

2. Whether the District Court complied with the mandate of this Court's holding in *Faber v. Raty*, 2023 MT 227, ¶ 2, 414 Mont. 144, 539 P.3d 1096 (*Faber I*) to amend the findings to conform with the views expressed in this Court's opinion.

3. Whether this Court's remand instruction required the District Court to make additional clarifications related to the scope of the Olson Road easement.

As to Ratys' statement of issues under their Cross Appeal:

4. Whether the District Court erred by not amending the findings of fact and conclusions of law to allow for the trailing of "approximately" 200 cow-calf pairs.

## STATEMENT OF THE CASE

Following a bench trial in 2018, the District Court held that the Ratys had prescriptive easements on Olson Road and Quarter Gulch Road based on the historical use of the roads. (Findings of Fact, Conclusions of Law, and Judgment (hereinafter "FFCL") (Doc. 80)). The Court found that the Ratys' predecessors in

interest had used Olson Road "[s]ince the homestead days" to trail cattle, walk, ride horseback, drive agricultural equipment, use 4-wheel drive vehicles, pull trailers, spray weeds, maintain or develop water sources, maintain the road, haul firewood, and harvest hay. (*Id*., at p. 8, ¶ 36). The District Court found that the historical amount of cattle trailed on the road was "up to 200 head." (*Id*.). The Ratys and their predecessors also used Olson Road for recreational and residential uses, such as "picnics, holiday parties, hunting, fishing, and overnight stays at the cabin there." (*Id*., at ¶ 37). The Court explicitly found:

> The Ratys' predecessors used the Olson Road for these purposes under a claim of right, whenever they wanted. It did not even occur to them that they might need permission. They never considered it.

(*Id*., at p. 9, ¶ 38 (emphasis added)). The District Court went on:

> What the record does establish is that Fabers and their predecessors had to know the Ratys and their predecessors were using the Olson Road to move cattle, vehicles, and equipment without asking permission. The record further establishes that the Fabers and their predecessors chose not to discuss this with the Ratys and their predecessors. Generations of neighboring ranchers in this area simply moved cattle as necessary without discussing the legal basis for how they were doing do.

(FFCL, at p. 16, ¶ 20 (emphasis added)). The Court's FFCL held that the easement on Olson Road was for "ingress to and from the Upper and Lower Setty Ranch properties and other purposes as described in these *Findings and Conclusions*, including all agricultural purposes associated with cattle operations . . . that have

been historically established by the Ratys and their predecessors." (*Id*., at p. 21, ¶ 2 (emphasis in original)).

After the initial FFCL was entered, the Ratys filed Rule 52 and Rule 59 motions to amend specific aspects of the same. (Doc. 82). The Ratys sought to amend the language of "up to 200 head of cattle," to "approximately 200 to 300 cow-calf pairs." (Doc. 83, at pp. 1-5). The Ratys also sought to amend the "30 feet of ground on either side of it" language to take into consideration the fact that cattle don't always follow straight lines and the Ratys would use best efforts to keep the cattle as close to the road as possible. (*Id*., at pp. 5-7). Finally, the Ratys sought the incorporation of language to include an injunction related to Quarter Gulch Road. (*Id*., at 7-8).

The Fabers opposed the Ratys' motions, focusing their argument on the fact that they disagreed with the District Court's findings related to the prescriptive easements and "[c]onsequently, the Fabers will be appealing these and other issues raised by the Court's Findings of Fact, Conclusions of Law and Judgment." (Fabers' Response in Opposition to Ratys' Rule 52(b) and Rule 59(e) Motions, Doc. 84, at p. 2 (emphasis added)). The Fabers went on to argue that if the Court correctly found that the prescriptive easements were valid, "the Ratys' post-trial attempts to broaden the scope of their easement claims must be denied." (*Id*., at p. 7). The Fabers did

not move the District Court to amend, broaden, or clarify its Findings of Fact, Conclusions of Law and Judgment.

After the parties fully briefed the motions and a hearing was held, the District Court issued its Order on Ratys' Motion[s] to Amend Judgment. (Doc. 89). The District Court initially noted that "[t]he Fabers intend to appeal but the Ratys are also dissatisfied. [The Ratys] timely moved to amend the decision . . . ." (*Id*., at p. 1). The District Court held that the Ratys were correct as to the amount of cattle to be trailed (200-300 cow-calf pairs) and also agreed with the Ratys that a strict 60-foot easement was unworkable in practice. (*Id*., at pp. 3-5). Finally, the Court denied the Ratys' request for language related to the Fabers being permanently enjoined, and determined such language would be struck from its amended Findings and Conclusions. (*Id*., at p. 6).

On July 16, 2021, the District Court issued its Amended Findings of Fact, Conclusions of Law and Judgment. (Amended Findings of Fact, Conclusions of Law, and Judgment (hereinafter "Amended FFCL") (Doc. 91)). Through in-line deletions and additions, the District Court found that the historical use of Olson Road "included trailing up to 200 cow-calf pairs" and the "Ratys increased their use of the Olson Road to about 300 cow-calf pairs." (*Id*., at p. 8, ¶ 36). In its Amended FFCL, the District Court held that the historical use of Olson established by the Ratys included "moving up to 300 cow-calf pairs" and that the "sixty-foot width" of the

easement "is a guideline, not an inflexible requirement: the Ratys are expected to use best efforts to keep their cattle as close to the road as possible." (*Id*., at p. 21, ¶ 2). The language in the initial Findings and Conclusions related to the Olson Road easement being used by the Ratys' predecessors "whenever they wanted" and moving cattle "as necessary" was not altered in the Amended FFCL. (*Id*., at p. 9, ¶ 28; p. 16, ¶ 20).

The Fabers did not file a motion to amend, clarify, or broaden the Amended FFCL, and filed notice of their first appeal on July 26, 2021.

In their Opening Brief, the Fabers framed four issues on appeal for this Court. (Appdx. 1, Fabers' Opening Brief - First Appeal, at p. 1). Of these issues, three dealt with the District Court findings that the Ratys held prescriptive easements. (*Id*.). The fourth issue was framed as "[w]hether the District Court erred expanding the Ratys' easement claim upon the Olson Road." (*Id*.). Specifically, the Fabers argued that the District Court erred in expanding the easement to include an additional "100 cow-calf pairs." (*Id*., at 27-29). Importantly, the Fabers did not raise the issues they currently appeal related to the frequency of use the Olson Road easement.

In their Answer and Cross-Appeal, the Ratys raised the additional issue of "[w]hether the District Court failed to set forth the full scope of the Ratys' prescriptive easement." (Appdx. 2, Ratys' Answer and Cross-Appeal Brief - First Appeal, at p. 1). Specifically, the Ratys argued "[i]n this regard the District Court's

only failure on the scope of the prescriptive easement relates to the Boyces' and Ratys' use of the Olson Road on the Faber property when trailing cattle to 'stop and rest their cattle.'" (*Id*., at p. 37 (emphasis added)).

In the Fabers' Reply Brief/Response to Cross Appeal, they reframed the issue on cross-appeal as "[w]hether the Ratys acquired an easement to continue to occupy the Faber Property after the lease ended." (Appdx. 3, Fabers' Reply Brief – First Appeal, at p. 1). The Fabers argued that resting cattle on the easement is the equivalent of grazing and that such activity was not supported by the historic use of the easement (if one existed). (*Id*., at pp. 18-19).

The Fabers did not seek any relief from the District Court or this Court (in *Faber I*) related to amending or clarifying the frequency of the use of the easement on Olson Road.

This Court's decision in *Faber v. Raty*, 2023 MT 227, ¶ 2, 414 Mont. 144, 539 P.3d 1096 (*Faber I*) affirmed in part and reversed in part the District Court's Amended Findings of Fact, Conclusions of Law and Judgement. First, this Court held that the Ratys did not hold a prescriptive easement on Quarter Gulch Road. *Id*., at ¶ 36. Second, this Court held that the Ratys did hold a prescriptive easement appurtenant on Olson Road. *Id*., at ¶ 45. Third, this Court held that the District Court failed to properly set forth the scope of the Ratys' Olson Road easement by increasing the amount of trailing cattle from 200 cow-calf pairs to 300 cow-calf

pairs. *Id*., at ¶¶ 49-50. This Court found "no clear error in the District Court's factual findings regarding the historical uses of Olson Road by the Ratys and their predecessors," but held that the Ratys' easement is properly limited to "trailing approximately 200 cow-calf pairs." *Id*., at ¶¶ 31, 50. This Court found the remaining factual findings by the District Court were "otherwise well-supported." *Faber I*, at ¶ 50. Finally, this Court rejected the Ratys' cross-appeal, finding that this Court's review of whether the historical use of Olson Road included resting cattle was precluded "because the Ratys did not raise this issue before the District Court." *Id*., at ¶ 51. This Court remanded the matter to the District Court "with instructions to conform the Amended Findings of Fact, Conclusions of Law, and Judgment to reflect our holding that the Ratys' prescriptive easement is limited in scope to the historic agricultural, recreational, and residential uses of the road by the Ratys and their predecessors between approximately 1948 and 1997." *Id.*, at ¶ 53.

The Ratys sought a rehearing from this Court related to the *Faber I* holding that the Ratys failed to preserve the issue of resting cattle for appeal. This Court denied the Ratys' Petition, finding:

> W]here a party fails to raise an issue in the pleadings, does not present argument on the issue during the hearing on the merits of the case, does not move to amend the pleadings to conform to any evidence presented and raises the issue for the first time in a post-hearing memorandum which the district court does not address in its order, the issue has not been timely raised and may not be raised on appeal.

*Faber v. Raty*, 2024 Mont. LEXIS 7, at *2 (quoting *Nason v. Leistiko*, 1998 MT 217, ¶ 18, 290 Mont. 460, 963 P.2d 1279 (citing *Marsh v. Overland*, 274 Mont. 21, 29, 905 P.2d 1088, 1093 (1995)). This Court noted that "[t]he Ratys' general reference to the scope of any existing easement when identifying issues prior to trial does not overcome their failure to substantively raise the issue, especially given the extent to which other specific uses of the easement were identified and argued both before and after trial." *Id*., at *3 (emphasis added).

On remand, the District Court entered its Second Amended Findings of Fact, Conclusions of Law, and Judgment, and Order to Close. (Appdx. 4 (hereinafter "Second Amended FFCL") (Doc. 101)). The District Court made changes "to comply with the Supreme Court's remand instructions," including reducing the amount of cattle the Ratys can move to "up to 200 cow-calf pairs to and from the Upper Setty Ranch along the Olson Road." (*Id*., at p. 22, ¶ 2). The District Court also changed its Second Amended FFCL to show "that the Ratys did not prove their claim to any prescriptive easement on the Quarter Gulch Road." (*Id*., at p. 22, ¶ 3). The District Court ordered the Court Clerk to close the file. (*Id*., at p. 23, ¶ 7).

The Fabers first sought to "clarify" the scope of the Olson Road easement on July 15, 2024, by requesting the District Court re-open the case to "specify the frequency of the Ratys use as limited by the historic use between 1948 and 1997,"

and clarify that the Ratys could not "stop and rest their cattle upon the Faber property." (Fabers' Motion to Re-Open (Doc. 102)).

In response, the Ratys noted that this Court's holding and remand instructions were clear, which the District Court complied with. (Ratys' Response to Fabers' Motion to Re-Open (Doc. 104). The only issue raised by the Ratys was the fact that the District Court used the phrase "up to" 200 cow-calf pairs instead of the language this Court used of "approximately" 200 cow-calf pairs. (*Id*., at p. 6). Further, the Ratys also noted "Fabers never sought to challenge [the scope of historical use of the easement] with their own pre-appeal District Court Motion to Amend the Findings and Judgment nor was it challenged as being in error on appeal." (*Id*., at fn. 1).

To address the "up to" vs. "approximately" language, the Ratys filed a Rule 59 Motion to Amend the Second Amended Findings of Fact, Conclusions of Law, and Judgment, and Order to Close, along with a brief supporting their position. (Doc. 105 and Doc. 106).

On August 12, 2024, the District Court addressed both the Fabers' and Ratys' motions. (Appdx. 5, Order Refusing Further Amendments to the Judgment (Doc. 108)). The District Court held that the Ratys were not entitled to relief on the language of "up to" versus "approximately." (*Id*., at ¶¶ 8-9). The District Court also denied the Fabers' requested relief:

> The Court further doubts that the law of the case doctrine permits the two-bites-at-the-apple procedure the Fabers appear to be setting up. The Fabers appealed to try to get the Olson Road and Quarter Gulch Road easements overturned. They completely succeeded as to one and got the other one limited. But in their appeal they did not complain that this Court's specification of the Olson Road easement was too vague. The appeal was their chance to complain about supposedly missing subatomic granularity in the judgment. They did not do it. Now it is too late.

(*Id*., at ¶ 10). The District Court once again ordered the Clerk to close the file. (*Id*., at ¶ 11). [1]

The Fabers timely appealed the District Court's August 12, 2024 Order. The Ratys timely cross-appealed.

## STATEMENT OF FACTS

The Ratys hold a prescriptive easement over Olson Road to access the Upper Setty Ranch for agricultural, recreational, and residential purposes. *Faber I*, at ¶ 31.

The Ratys' cattle operation is their livelihood. (Appdx. 7, Colleen Raty Testimony Transcript, p. 84:20-25; p. 85:1-2). Without the Olson Road easement, the Ratys would likely have to sell the Upper Setty Ranch. (*Id*.).

The Ratys and their predecessors have used Olson Road to trail cattle since the homestead days. (Second Amended FFCL, at p. 8, ¶ 36).

[1] Both the Fabers and Ratys timely submitted additional motion briefs after the District Court's August 12, 2024 Order. Doc. 109, Doc. 110. As such, the District Court issued an Order Maintaining [the] August 12 Order on August 19, 2024, finding the additional briefs did not change the Court's position. (Appdx. 6, Order Maintaining August 12 Order (Dkt. 111)).

Bud Boyce is the Ratys' predecessor in interest. *Faber I*, at ¶ 11.

Bud Boyce lived on the Lower Setty starting in 1955 and assisted his father Steve with the cattle operations on the Upper and Lower Setty, with the main route between the two properties continuing to be across the Olson Road. (Appdx. 8, Robert "Bud" Boyce Testimony Transcript, at p. 8:13-25, p. 9:1-3 and 16–23, p. 12:9–24).

Bud Boyce offered the following testimony related to the frequency of trailing cattle on Olson Road:

> Q [Atty Hatley]. How many times a year would you travel cattle up along Little Box Creek to Upper Setty Ranch?
>
> A [Bud Boyce]. Well, the main bulk of them, you would just go once each way. Take them up in the spring and bring them back down in the fall.
>
> Q. I mean, would that be the only time that you take cattle up and down the road though?
>
> A. Oh, no. We took them whenever we needed to do something different. . . .
>
> Q. What route would you take?
>
> A. Right down the creek. Little Box Elder Creek.

(Appdx. 8, p.14:23-25, p. 15:1-15 (emphasis added)).

Bud Boyce historically trailed approximately 200 cow-calf pairs. (Appdx. 9, Keith Raty Trial Testimony, p. 26:8-15). The historical use of Olson Road was continued by the Ratys. *Faber I*, at ¶ 11.

The District Court found that "[t]he Ratys' predecessors used the Olson Road for [trailing cattle, residential uses, agricultural uses, etc.] under a claim of right, whenever they wanted." (FFCL, Amended FFCL, Second Amended AFFCL, p. 9, ¶ 38). The District Court also found that the record established that the Ratys and their predecessors moved cattle along Olson Road "without asking permission" and "[g]enerations of neighboring ranchers in this area simply moved cattle as necessary . . . ." (FFCL, Amended FFCL, Second Amended AFFCL, p. 16, ¶ 20).

## STANDARD OF REVIEW

Ratys agree with the Fabers' stated Standard of Review with the exception of adding thereto that it is the province of the trial court to weigh the evidence and resolve any conflicts between the parties' positions, and this Court will not second-guess the trial court's determinations regarding the strength and weight of any conflicting testimony (*Lyndes v. Green*, 2014 MT 110, ¶ 15, 374 Mont. 510, 325 P.3d 1225) and will give great weight to the findings of the District Court. *Tomlin Enterprises, Inc. v. Althoff*, 2004 MT 383, ¶22, 325 Mont. 99, 103 P.2d 1069

## SUMMARY OF ARGUMENT

The Fabers are attempting a second bite at the apple, arguing for the first time in this (second) appeal that the District Court's Second Amended FFCL failed to address the frequency of which the dominant estate (currently, the Ratys) is entitled to utilize the Olson Road easement. The Fabers failed to raise any such argument before the District Court or before this Court in *Faber I*. The Fabers did not timely raise the question of frequency or request any other "clarity" on the scope of the easement previously and cannot do so now.

Even if the Fabers had preserved their argument for appeal, the trial testimony and the District Court's "otherwise well-supported factual findings regarding the historical use of Olson Road between 1948 and 1997" (*Faber I*, at ¶ 50) show that the Ratys and their predecessors used Olson Road to trail cattle "whenever they wanted." The Fabers' arguments to clarify the scope of the easement are unnecessary and untimely.

Finally, this Court explicitly held that "the Ratys' easement is properly limited to trailing approximately 200 cow-calf pairs, as established by the evidence at trial." *Faber I*, at ¶ 50 (emphasis added). On remand, the District Court should have amended the Findings and Conclusions to conform with this Court's holding related to the amount of cow-calf pairs that were historically trailed at any given time.

## ARGUMENT

### I. The Fabers are Precluded from Seeking "Clarity" on the Scope of the Olson Road Easement as they Failed to Raise the Issue During the Trial on the Merits, in Post-Trial Motions Related to the Scope of the Easement, or on Appeal in *Faber I*.

The Fabers failed to seek clarity on the scope of the Olson Road easement at the following junctures:

- During trial
- In the Fabers' Proposed Findings of Fact, Conclusions of Law, and Order (Dkt. 70).
- In the Fabers' Revised Proposed Findings of Fact, Conclusions of Law, and Order (Dkt. 77).
- (The Fabers did not file a Motion to Amend the District Court's Findings of Fact, Conclusions of Law and Judgment).
- In the Fabers' Response in Opposition to Defendants' Rule 52(b) and Rule 59(e) Motions.
- (The Fabers did not file a Motion to amend the District Court's Amended Findings of Fact, Conclusions of Law, and Judgment).
- On appeal in *Faber I*, the Plaintiffs did not request that this Court clarify the scope of the Olson Road easement, except for addressing the District Court's expansions involving the increase in trailing cattle from 200 cow-calf pairs to approximately 300.
- In response to the Ratys' cross appeal in *Faber I*, the Fabers did not address the frequency or scope of the easement outside of Ratys' claim that they could stop and rest cattle.

In *Faber I*, this Court precluded the Ratys from seeking the same relief the Fabers now seek:

> In our review of the record below, we see no reference to the issue of whether the Ratys' historic use of Olson Road included the resting practices as alleged on appeal. While there are a couple of passing references to this practice in testimony, there is nothing to suggest the District Court

> had the opportunity to consider specifically whether the resting practice was within the scope of the prescriptive easement over Olson Road. The Ratys sought clarification of the scope of their easement after the District Court's initial judgment on four other specific grounds, leading to the Amended Findings of Fact, Conclusions of Law, and Judgment at issue here. Conspicuously absent from this clarification is any reference to resting cattle.

*Faber v. Raty*, 2023 MT 227, ¶ 52, 414 Mont. 144, 539 P.3d 1096. As noted by the District Court, the Fabers' current argument fails for the same reason:

> [I]n their [*Faber I*] appeal [the Fabers] did not complain that this Court's specification of the Olson Road easement was too vague. The appeal was their chance to complain about supposedly missing subatomic granularity in the judgment. They did not do it. Now it is too late.

(Appdx. 5, Order Refusing Further Amendments to the Judgment (Doc. 108), at ¶ 10). *See also Bucy v. Edward Jones & Co., L.P.*, 2019 MT 173, ¶ 23, 396 Mont. 408, ¶ 23, 445 P.3d 812 ("A party aggrieved by any aspect of an appealable judgment waives appellate review absent timely appeal in accordance with the Montana Rules of Appellate Procedure. Similarly, a party aggrieved by any issue 'separate and distinct' from the issue(s) raised by an opposing party on appeal must generally cross-appeal to preserve the issue for appellate review.") (citations omitted); *Two Leggins v. Gatrell*, 2023 MT 160, ¶ 11, 413 Mont. 172, 534 P.3d 668 ("To properly preserve an issue or claim for appeal, a party must timely raise the issue or claim in the first instance in the trial court.") (citations omitted).

The Fabers' attempt to litigate the scope of the easement at this juncture is untimely.

## II. The District Court Complied with this Court's Remand Instruction Aside from Changing the Term "Up To" to "Approximately".

Recognizing their failure to timely raise the issue they now appeal, the Fabers attempt to reframe it, arguing the District Court failed to conform its Second Amended Findings and Conclusions to this Court's remand instruction. In essence, the Fabers posit that this Court's directive was for the District Court perform a re-write of its "otherwise well-supported factual findings." *Faber I*, at ¶ 50.

On remand, "a district court must proceed in conformity with the views expressed by the appellate court. Trial court proceedings on remand should comport with the mandate and the result contemplated by the appellate court's opinion." *Brown & Brown of MT, Inc. v. Raty*, 2013 MT 338, ¶ 10, 372 Mont. 463, 313 P.3d 179 (citations omitted). *See also, In re Marriage of Becker*, 255 Mont. 357, 360-61, 842 P.2d 332, 334 (1992):

> When this Court on appeal affirms in part the judgment of the District Court, and remands for reconsideration other parts of the appeal, those parts of the judgment which are affirmed become the law of the case and are binding upon the trial court and the parties in subsequent proceedings on remand. Once a decision has been rendered by this Court on a particular issue between the same parties in a case, that decision is binding upon the courts and the parties and cannot be relitigated in a subsequent appeal.

(citations omitted). Whether this Court's "decision is right or wrong, such decision is binding on the parties and the courts and cannot be relitigated in a subsequent appeal." *Grenfell v. Anderson*, 2002 MT 225, ¶ 19, 311 Mont. 385, 56 P.3d 326 (citations omitted).

As noted by the District Court, this Court's remand instructions were "clear, detailed, and explicit":

> The "holding" to which they refer is obviously the Supreme Court's decision that the Ratys' Olson Road easement is limited to 200 cow-calf pairs and they have no easement at all on the Quarter Gulch Road.

(Appdx. 5, Order Refusing Further Amendments to the Judgment (Doc. 108), at ¶ 5 (citing *Faber I*, at ¶¶ 34-36 & 49-50)).

The Ratys agree with the District Court that the *Faber I* remand instruction was issued for the narrow purposes addressed by this Court: 1) the Ratys did not have a prescriptive easement on Quarter Gulch Road; and 2) the Olson Road easement was defined by historical use until 1997, and therefore the amount of trailing cattle was limited to approximately 200 cow-calf pairs. *Faber I*, at ¶¶ 50, 53. The issues related to the scope of the easement (including frequency) were settled in *Faber I*.

The District Court properly applied this Court's remand instructions to the Second Amended FFCL, aside from defining the trailing of "approximately" 200 cow-calf pairs. The Fabers waived appellate review of questions related to the

frequency of trailing cattle by failing to raise the issue before the District Court and failing to raise the issue in *Faber I*.[2]

## III. The Remand Instruction did not Require the District Court to Make Further Clarifications Related to Frequency of Use and the Trial Record and the District Court's Findings and Conclusions Already Address the Frequency at which the Ratys can Trail Cattle.

Bud Boyce testified that he historically used the Olson Road easement to trail cattle once in the spring and once in the fall, but also "whenever we needed to do something different." App. 7, 14-15. The District Court incorporated Mr. Boyce's historical use into all three versions of its Findings and Conclusions, finding Olson Road was used to trail cattle "under a claim of right, whenever they wanted." (FFCL, Amended FFCL, Second Amended FFCL, at p. 9, ¶ 38).

This Court found that the District Court's factual findings related to the historic use of Olson Road were "well-supported," aside from the easement being limited to trailing approximately 200 cow-calf pairs (vice 300). *Faber I*, at ¶ 50. As noted in *Brown*, 2013 MT 338, ¶ 14, "[t]he District Court's judgment need not catalogue a litany of specific activities each party may undertake . . . ."

The Fabers now argue (for the first time) that there is a "historical limitation of the total number of cattle and/or trips the Ratys are allowed to trail per year, which

[2] The Fabers also argue that the District Court's Second Amended FFCL allows for resting cattle. (Faber Opening Brief, at pp. 7-8). As the Ratys pointed out in *Faber I*, there is no reference to resting cattle in the District Court's Findings and Conclusions. The Fabers incorrectly state that this Court rejected that the Ratys are allowed to rest cattle; this Court simply declined to address the issue as it was not raised before the District Court.

is logically necessary to comply with this Court's remand instructions." (Fabers' Opening Brief, at p. 7). The Ratys disagree. The factual record and the District Court's findings and conclusions support that while cattle were typically trailed in the spring and in the fall, they were also trailed whenever the need arose. While the Fabers argue allowing for more untimely amendments will help avoid future conflicts between the parties, such precise definitions and scope will only invite conflict. The Fabers "ask for articulation of the historical frequency and total number of cattle the Ratys' may trail in a year for the sake of clarification." (Fabers' Opening Brief, at p. 9). Such narrow definitions would promote the Fabers using the easement as a sword, not a shield, to pursue the Ratys for every perceived infraction. What the Fabers ignore is that the District Court already addressed the issue of frequency in all three of its Findings and Conclusions, noting "[g]enerations of neighboring ranchers in this area simply moved cattle as necessary without discussing the legal basis for how they were doing do." (FFCL, Amended FFCL, Second Amended FFCL, at p. 16, ¶ 20 (emphasis added)). This is all the Ratys intend to do. Simply put, the Fabers seek "clarification" for an issue that was already addressed, after opting to ignore the very same issue during trial, after trial, and on appeal the first time.

## IV. The District Court failed to Amend the Findings and Conclusions in Accordance with this Court's Explicit Remand Instruction to limit the number of Trailing Cattle to Approximately 200 Cow-Calf Pairs.

In relation to the Ratys' Cross Appeal, this Court in *Faber I* directed the District Court to conform the Amended FFCL to properly address the number of cattle being trailed on the Olson Road during the prescriptive period between approximately 1948 and 1997. In doing so this Court specifically defined this number as "approximately 200 cow-calf pairs as established by the evidence at trial." *Faber I* at ¶50. Although the District Court included the reduction of trailing cattle in its Second Amended FFCL (pp. 21-22), it still reads "up to 200 cow-calf pairs" rather than "approximately 200 cow-calf pairs."

Just as the parties are constrained by the law of the case, so too are the courts:

> [W]hen a case is reversed and remanded, the trial court may not ignore the mandate and opinion of the reviewing court; instead, the trial court "must proceed in conformity with the views expressed by the appellate court."

*In re Marriage of Pfeifer*, 1998 MT 228, ¶ 12, 291 Mont. 23, 965 P.2d 895 (citation omitted). Accordingly, the lower court must take into account the appellate court's analysis of the specific issues and its specific holdings which become the law of the case and are binding upon the trial court and the parties in all subsequent proceedings. *See generally, In re Marriage of Becker*, 255 Mont. 357, 359, 842 P.2d 332, 334; *In re Marriage of Pfeifer*, 1998 MT 228, ¶22, 291 Mont. 23, 29, 965 P.2d 895, 899; and *Muri v Frank,* 2003 MT 316, 318 Mont. 269, 80 P.3d 77.

The historical record shows that approximately 200 cow-calf pairs were trailed at any given time. Bud Boyce historically trailed approximately 200 cow-calf pairs. (Appdx. 9, p. 26:8-15). The Fabers concede that "[t]he Ratys' evidence also established that Boyce would move an approximate total of 200 cow/calf pair through the Faber Property . . . ." (Fabers' Opening Brief, at p. 2).

While the District Court found addressing the "up to" vs. "approximately" ambiguity as unnecessary (Appdx. 5, at ¶ 9), the Ratys disagree. The approximate language corresponds with the nature of trailing cattle. As the trial testimony showed, the Fabers and Ratys changed from a headcount-based lease to a flat rate lease "out of convenience", "because 'it was a headache to keep track of every animal on the property and how long they were there." *Faber I*, at ¶ 9. This same reasoning applies to trailing cattle. As discussed above, having a strict "up to" limitation on the amount of trailed cattle only invites unnecessary future disputes. If the Ratys miscount 201 cow-calf pairs will the Fabers sue? The District Court noted that 60-width of the easement was "not an inflexible requirement."[3] [4] (Second Amended FFCL, p. 22). As with the width of the easement, the Ratys seek to avoid

[3] The Fabers "also request clarification" from this Court related to the sixty-foot easement width. (Faber Opening Brief, at fn 2). Not only have the Fabers waived this issue on appeal by failing to raise it previously, they also attempt to inject additional factual information into their argument related to allegations that have occurred since *Faber I* was decided. *Id*.

[4] The Fabers also misstate the record when they allege that the District Court "now asserts that the Ratys may stop and graze their cattle." (Faber Opening Brief, at fn 3). Nowhere does the District Court state that the Ratys may stop for the purpose of grazing their cattle. As in footnote 2 of their Brief, the Fabers attempt to impermissibly inject new facts into the record for this Court's consideration.

future disputes because they miscounted their trailing herd of approximately 400 head of cattle.

## CONCLUSION

For the reasons noted herein, the District Court's otherwise well-supported Second Amended FFCL should be affirmed with the exception of a remand with direction to the District Court to comply with this Court's *Faber I* remand instruction related to the trailing of "approximately 200 cow-calf pairs."

DATED this 2nd day of January 2025.

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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 a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

DATED this 2nd day of January 2025.

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