IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 24-0576

FRANK A. APECELLA AND SHIRLYNNE APECELLA

Plaintiffs/Appellees,

and

v.

LILLIAN A. OVERMAN AND LARRY ROBINSON

Defendants/Appellants.

On Appeal from the Montana Twenty-First Judicial District Court
Cause No. DV-41-2021-240-IJ
Hon. Howard F. Recht, Presiding

APPELLEES' RESPONSE TO OPENING BRIEF

David B. Cotner
Taylor N. Eisenzimer
COTNER RYAN BLACKFORD, PLLC
321 W. Broadway, Suite 500
Missoula, MT 59802
(406) 541-1111
dcotner@cotnerlaw.com
teisenzimer@cotnerlaw.com

Attorneys for Plaintiffs/Appellees Frank A. Apecella and Shirlynne Apecella

Rick C. Tappan
Connlan W. Whyte
Tappan Law Firm, PLLC
7 West 6th Avenue, Suite 516
Helena, MT 59601
(406) 449-3383
rctappan@tappanlawfirm.com

Dale Schowengerdt
Landmark Law, PLLC
7 West 6th Avenue, Suite 518
Helena, MT 59601
(406) 457-5496
dale@landmarklawpllc.com

Attorneys for Defendants/Appellants Lillian A. Overman and Larry Robinson

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I. STATEMENT OF ISSUES

1. Did the district court err in awarding Appellees their attorney fees under §70-17-112(5), MCA where Appellees prevailed on all claims relating to their ditch interference claim, brought pursuant §70-17-112, MCA?

2. Did the district court err in finding that Appellees' claims of reverse adverse possession and abandonment failed, where the evidence established that the elements of a prescriptive easement were satisfied and that the subject ditch had been continuously used from 1966 to the present?

II. STATEMENT OF THE CASE

Defendants appeal from the district court's Findings of Fact and Conclusions of Law ("FOFCOL") (FOFCOL, (March 18, 2024), Doc. 112) and the subsequent Order on Attorney Fees ("Order on Fees") (Order on Fees, (May 16, 2023), Doc. 120), which granted declaratory relief recognizing Plaintiffs' implied easement and awarded attorney fees under §70-17-112, MCA, after a three-day bench trial and post-trial briefing. This Response Brief ("Response") is submitted on behalf of Plaintiff/Appellees Frank and Shirlynne Apecella ("Plaintiffs" or "Apecellas") in opposition to the Opening Brief ("Brief") filed by Defendant/Appellants Lillian Overman and Larry Robinson ("Defendants").

1. Response to Defendants' Statement of Case

In their Statement of the Case, Defendants claim that "although two of the Apecellas' predecessors [namely Rick Kelm ("Kelm") and Wayne Anderson ("Anderson") stated there was no easement in existence or that the Overmans prevented use of the easement for over five years, the district court disregarded much of the testimony and found the opposite." (Brief, at 1.) However, the district court did not disregard the testimony. Rather, it carefully considered substantial evidence—including significant the testimony of both Anderson and Kelm—before concluding that a prescriptive easement had been established. The district court found that the easement originated during Ted Sr. and Felsie Decker-Boldt's ownership prior to 1966 and continued through successive conveyances from Ted Sr. to Ted Jr. and Patti Boldt in 1985, to Wayne and Cindy Anderson in 2005, to Richard Kelm in 2010, and ultimately to the Apecellas in 2020 (time period hereinafter referred to as "1966 to 2020") (COL, ¶¶ 16). The district court found no evidence of abandonment or reverse adverse possession at any point, including between 2005 and 2020 (during Anderson and Kelm's ownership), as a prescriptive easement was proven from 1966 to 2020.

The district court relied on the testimony of the Apecellas' predecessors, Ted Boldt Jr. ("Ted") and Patti Boldt ("Patti"), who confirmed that the easement remained in existence until they sold the property to Wayne Anderson in 2005. The

district court also considered Anderson's testimony, as reflected in its detailed findings, finding that even though he had no recollection of a ditch coming to Apecellas' property from the west, he never intended to abandon any rights of water use. (FOF ¶¶ 83–88). Anderson's testimony that no ditch existed is directly contradicted by the testimony of his predecessors, Ted and Patti, who confirmed that the ditch conveyed Roaring Lion Water until they sold the property to Anderson in 2005; by his successor, Kelm, who had water flowing through the ditch immediately after acquiring the property from Anderson; and by Brown, who personally observed water flowing through the ditch during Anderson's ownership.

Kelm never testified that "there was no easement in existence or that the Overmans prevented use of the easement for over five years," as Defendants claim. (Brief, at 1). To the contrary, Kelm testified that during his residency on the Apecella's property from 2009[1] to 2020, the easement consistently conveyed water each year, and he made every effort to maintain his rights. (FOF, ¶¶ 89–104). Further, factual witness and hydrologist Clint Brown ("Brown")—whom Defendants notably omit from their Brief—testified that in 2006 he personally observed the Ditch in Question flowing at a rate of at least 120 gallons per minute. (*Id.,* ¶¶ 75-79). Thus, contrary to Defendants' assertion, the district court carefully

[1] Kelm resided on the Apecella Property beginning in 2009 and purchased the property from Anderson in 2010.

considered substantial evidence, including testimony from both Kelm and Anderson, in reaching its findings and conclusions.

The district court explicitly found that Apecella proved by clear and convincing evidence the existence of an enforceable easement for the conveyance of Roaring Lion Creek water, and that Overman failed to prove abandonment, extinguishment, or adverse possession. (*Id.,* ¶¶ 8–9). The court further concluded that the implied and prescriptive easement originated before 1966 and continued through 2020. (COL, ¶ 16). The district court's Conclusions of Law also emphasized that Defendants' argument—that no ditch ever existed—is fundamentally inconsistent with their alternative claim that any easement was extinguished through non-use, abandonment, or reverse prescription, and that Defendants ultimately failed to prove their claims by clear and convincing evidence. (*Id.,* ¶¶ 18–19).

Defendants further contend that "Apecellas did not assert any facts or law in support of their intentional interference with property rights or private nuisance claims." (Brief, at 4). Based on this, Defendants argue that because the Apecellas did not prevail on those two claims, they are not entitled to attorney fees under §70-17-112, MCA. This argument is contrary to Montana law. The Apecellas prevailed on all claims brought pursuant to §70-17-112, MCA, and are therefore entitled to attorney fees under subsection (5). Their entitlement to such fees does not depend

on prevailing on separate, unrelated common law claims that were not asserted under the statute. The district court acted within its discretion in issuing the order.

Lastly, Defendants assert that "the district court did not include any conclusions regarding Overmans' claim of reverse adverse possession." (Brief, at 4). However, the district court correctly applied the law regarding reverse adverse possession. The district court recognized that Defendants bore the burden of proving, by clear and convincing evidence, that their claim to extinguish the Apecellas' easement met all required elements—namely, that their use was open, notorious, exclusive, adverse, continuous, and uninterrupted. Ultimately, the district court concluded Defendants failed to meet their burden of proof and rejected their claims of reverse adverse possession and abandonment.

The district court specifically noted "[n]o clear and convincing evidence was presented to prove that Roaring Lion Creek water was not conveyed to the Apecella Property via the Ditch in Question for five or more years." (FOF, ¶ 168). Reverse adverse possession and abandonment are fundamentally incompatible with the establishment of a prescriptive easement during the same period. A party cannot simultaneously extinguish an easement by reverse adverse possession or abandonment while another party is actively perfecting that same easement through prescriptive use. The district court explicitly held that the Apecellas, and their predecessors in interest, successfully established both implied and prescriptive

easement rights, found the ditch easement originated prior to 1966 and was continuously used and passed with each subsequent conveyance until reaching the Apecellas in 2020.

This unbroken chain of use confirms that the Apecellas met the requirements for a prescriptive easement—open, notorious, exclusive, adverse, continuous, and uninterrupted use for at least five years—further undermining Defendants' claims of reverse adverse possession and abandonment during any period from 1966 to 2020.

2. <u>Plaintiffs' Statement of Case</u>

The Plaintiffs, Apecellas, acquired Lots 1 And 2, Roaring Lion Estates, being located in the S½NW¼, Section 14, Township 5 North, Range 21 West, Ravalli County, Montana, (the "Apecella Property") on December 29, 2020.

Defendant, Lillian Overman, acquired Tract II, Certificate of Survey No. 5737-F, also located in the NW¼ Section 14, Township 5 North, Range 21 West, Ravalli County, Montana, (the "Overman Property") in June 2002. The Overman Property lies directly to the west of the Apecella Property, and the entire eastern boundary of the Overman Property is adjacent to and is shared with the Apecellas' western boundary.

An irrigation ditch, called the Decker Ditch, originates from Roaring Lion Creek in Section 16, Township 5 North, Range 21 West, conveys water under Springhill Road to the western boundary of the Overman Property. The current ditch

runs in an open half culvert through the western portion of the Overman Property and divides into two lateral ditches. One lateral runs due north across the Overman's northern property boundary, turns east and travels north of Timber Point Road. The other lateral continues due east from the split and just before the Overman's eastern boundary splits again with a lateral traveling north and terminating on the Overman Property. The main ditch continues in a slightly southeast direction, through a pipe within a rock wall and onto the Apecella Property—this section is the "Ditch in Question." From there, water is conveyed on the Apecella property in a buried pipeline that empties into a north/south ditch referred to as the Spring Ditch, that turns east and travels along the southside of the Apecella home and into Lot 2 of the Apecella Property.

Attached as Appendix "1" ("Appx. 1") to this Response Brief is an aerial photograph, showing an overlay of the properties and ditches relevant to this litigation. The "Ditch in Question" referred throughout this Response is depicted as beginning just west of the Overman/Apecella boundary, on the Overman Property and continuing east to the Apecella Property. On Appx. 1, the Ditch in Question begins on the Overman Property about halfway across the yellow line then traverses to the Apecella Property. The district court concluded the Apecellas have an "implied irrigation ditch easement and a prescriptive easement for the Ditch in Question that runs from Roaring Lion Creek under Springhill Road entirely through

the Overman Property via the Ditch in Question to the Apecella Property western boundary for the purpose of delivering the Apecella Roaring Lion Creek water right." (FOFCOL Order, ¶ 1, at 42).

On or about May 29, 2021, Defendants admitted they filled in a portion of the Ditch in Question on the Overman Property stopping the flow of water to the Apecella Property. The Plaintiffs filed a complaint for Declaratory Judgment on June 21, 2021, requesting the Court affirm their ditch easement rights and that Defendants interfered with those rights in violation of MCA §70-17-112. Defendants denied the Ditch in Question existed from 2002 when the Overman Property was first acquired, or, in the alternative, if the Ditch in Question did exist, it had been abandoned, extinguished, or reverse adversely possessed back.

On March 18, 2024, the district court entered its FOFCOL in favor of the Apecellas declaring they established an implied and prescriptive irrigation ditch easement for the Ditch in Question. (FOFCOL Order, ¶ 1). The court also recognized a secondary easement entitling the Apecellas to enter, maintain, and repair the ditch and issued a permanent injunction prohibiting Defendants from further interfering with or damaging the ditch. (*Id.*).

The district court concluded that the Apecellas proved the existence of an implied and prescriptive easement by clear and convincing evidence, that an enforceable easement was created for the conveyance of Roaring Lion Creek water

through the ditch system and pipe to the Apecella Property from the time Ted Sr. owned the property, prior to 1966, until the transfer to the Apecellas, in 2020. (FOF, ¶¶ 8, 164–168; COL, 16). The court rejected Defendants' arguments that the easement had been abandoned, extinguished, or defeated by adverse possession, noting that no clear and convincing evidence supported those claims. (FOF, ¶¶ 9, 165-168; COL, 17–22). The district court cited the proper legal precedent clarifying that abandonment requires both a relinquishment of possession and intent not to resume use, and that nonuse alone is insufficient. (COL, ¶ 20). The district court further concluded that Defendants failed to establish extinguishment by reverse adverse possession using the proper legal precedent, which requires open, notorious, exclusive, adverse, continuous, and uninterrupted use for five years, proven by clear and convincing evidence. (COL, ¶¶ 18-19, 21-22).

Finally, the district court held that Defendants' act of filling in the ditch constituted unlawful interference under §70-17-112, MCA. (COL, ¶ 24). The FOFCOL directed the parties to brief the issue of attorney fees and costs by April 5, 2024. Following extensive briefing—including competing motions, responses, and replies—the court issued its Order on Fees on May 16, 2024, granting the Apecellas' motion and awarding them attorney's fees and costs. In its ruling, the district court found that the Apecellas prevailed on all claims brought under their First, Second, and Fourth Causes of Action, pursuant to §70-17-112, MCA. Conversely, the

Overmans failed to prove their counterclaims by clear and convincing evidence. As a result, the district court determined the Apecellas were the prevailing party entitling them to fees under §70-17-112(5), MCA.

The district court further clarified that the Apecellas' water use is governed solely by the pipe's capacity, not by subjective limits such as a "trickle." Additionally, it warned that any future obstruction of the Apecellas' easement could result in further damages and attorney fees under §70-17-112(5), MCA.

The two questions before this Court are: (1) whether the district court abused its discretion in awarding attorney fees to the Apecellas under §70-17-112, MCA, and (2) whether the district court clearly erred in finding that the ditch easement was neither abandoned nor extinguished by reverse adverse possession. Both inquiries must be answered in the negative. The district court's comprehensive factual findings and correct application of the law demonstrate a well-reasoned decision that aligns with both statutory intent and common sense. The Apecellas prevailed on their statutory claims and are properly considered the prevailing party under §70-17-112(5), MCA. The trial evidence overwhelmingly confirmed the ongoing existence of the easement and completely refuted Defendants' counterclaims of abandonment and reverse adverse possession. Therefore, the district court's rulings should be affirmed in their entirety.

III. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

1. Historical Timeline of the Ownership of Properties.

a. Apecella Property.

From 1943 to 1966, Ted Boldt Sr. and Felsie Boldt owned approximately 600 acres of land encompassing what are now the Apecella Property and the Overman Property. During this period, the properties were held in unified ownership. (Ex. 28-E).

In 1966, the Boldts sold the majority of their 600-acre tract while retaining approximately 36 acres in the S½NW¼ of Section 14 (the "36-Acre Remainder"). This transaction marked the formal separation of the Apecella Property from the Overman Property. (Ex. 28-E; Trial Transcript ("Tr. Trans.") of Patti, 146:8–18 (July 10, 11, 14, 2023)).

On May 30, 1986, the Boldts conveyed the 36-Acre Remainder to their son, Ted, and his wife, Patti. (Ex. 28-G). This parcel passed to Anderson in 2005. (Ex. 28-I), then from Anderson to Kelm (Exs. 28-K, 28-M), and finally, on December 29, 2020, to the Apecellas. (Ex. 28-N).

b. Overman Property.

The Overman property was separated in 1966 when the Boldts retained only the 36-Acre Remainder, selling the rest—including what would become Tract F. (Ex. 28-E). Tract F underwent multiple ownership changes before it was acquired

by Clifford and Anita Belew in 1993, who had resided there since 1979. (Ex. 28-Q; Deposition ("Dep") of Clifford Belew ("Belew"), 7:15–16 (February 23, 2022)). In 1998, Tract F was subdivided into Tracts I and II by Certificate of Survey No. 5737-F. (Ex. 2). Later that year, Tract II was transferred to the Belews' son, Charles, who conveyed it to Joseph and Amber Williams in 1999. (Ex. 28-T). Following a 2001 default, title passed to the Bank of New York, which conveyed Tract II to Defendant Lillian Overman in 2002. (Ex. 28-V).

2. Evidence Establishing the Historical and Present Existence and Use of the Ditch in Question.

a. Ted and Patti Testified the Ditch in Question Conveyed Roaring Lion Creek water from at least 1966 to 2005.

Ted grew up on the homestead property that, prior to 1966, encompassed both what is now the Apecella Property and the Overman Property. (Dep. Ted, 7:21-9:14, 18:7-18 (February 23, 2022)). He resided in the homestead house, located on the Apecella Property, until he left for college in 1967, returning to visit during his college years and remaining familiar with the property even after the 36-Acre Remainder was divided in 1966. (Tr. Trans. Patti, 184:12–22). Ted and his wife, Patti, moved back to the homestead in 1985 and lived there continuously until selling the property to Anderson in 2005. (Tr. Trans. Patti, 146:19–25, 152:12–13; Ex. 28-H).

Throughout his over 60 years of experience on the property, Ted consistently recalled that there were only two sources of water serving the property: (1) spring water originating from the southwest corner and flowing north in what is known as the "Spring Ditch," and (2) Roaring Lion Creek water conveyed through the Ditch in Question, which traversed the Overman Property, entered through the west fence line, and passed south of the homestead house. (Dep. Ted, 15:17–21; 49:12–50:1; 50:19–51:7; 52:4–7; Def. Ex. CCC). Before selling the 36-Acre Remainder in 2005, Ted informed Anderson that the Ditch in Question running through the Overman Property was the only source of Roaring Lion Creek water. (Dep. Ted, 44:17–45:6; 52:4–7).

Patti corroborated Ted's testimony and provided additional detail regarding the existence and location of the ditch. At trial, she drew and testified to observing the Decker Ditch—including the Ditch in Question—crossing the Overman Property and terminating near a head box located west of the homestead house, close to the boundary line. (Tr. Trans. Patti, 149:8–13). At the request of Defendants during her deposition, Patti marked the ditch's path on an aerial photograph (Ex. BBB), clearly depicting the Decker Ditch's route, inclusive of the Ditch in Question. She replicated this depiction at trial for the district court, again tracing the same route. (Tr. Trans. Patti, 149:1–150:7).

Defendants contend that "Mr. and Mrs. Boldt had drastically different locations for the ditch at issue." (Brief at 8). This characterization, however, is both subjective and unsupported by the record. The district court had the benefit of reviewing both aerial image drawings from depositions and Patti's demonstrative trial drawing and found any discrepancies to be immaterial stating:

> [I]n Ted's deposition, he drew and described the Ditch in Question coming onto the 36- Acre Remainder from the west across the Overman Property with a little bend south to get just south of the homestead house. . . Defendants introduced this Exhibit as Exhibit BBB. The drawing clearly shows a ditch flowing in the path of the Decker Ditch, including the Ditch in Question.

(FOF, ¶¶ 55, 66).

From 1985 to 2005, the Boldts relied solely on the Ditch in Question for their Roaring Lion Creek water, with Patti testifying that the ditch remained intact and actively conveyed water to the Apecella Property during this entire period—including the summer of 2004, shortly before the property was sold. (Tr. Trans. Patti, 150:17–151:9; 160:3–23). Patti unequivocally confirmed that no other ditches carried Roaring Lion water to the Apecella Property. (Tr. Trans. Patti, 151:6-9).

b. Wayne Anderson Had Limited knowledge of the Ditch in Question from 2005 to 2010.

On February 15, 2005, Ted and Patti executed a Warranty Deed to Anderson for the 36-Acre Remainder. (Ex. 28-I). Anderson owned the current Apecella Property from February 15, 2005 to July 29, 2010. (Ex. 28-I; Ex. 28-K). Anderson

leased Lot 1 to renters from 2005 to 2008, Anderson lived on the property from 2008, then leased Lot 1 to Kelm beginning in late 2009. (Tr. Trans. Anderson, 734:1-17; Dep. Kelm, 23:21-24:2 (July 5, 2023)).

In October 2008, Anderson recorded an Irrigation Plan for the four Lots to propose distribution of Roaring Lion Creek water from the Decker Ditch to the Lots in proportion to the lot acreage which accounts for the 404 gallons per minute ("GPM") established in the water right. (Ex. 19). On March 12, 2009, Anderson received approval from the County to subdivide the 36-Acre Remainder into four lots, Lots 1-4, collectively called the Roaring Lion Estates. (*Id.*).

While Anderson had no recollection of a ditch entering the 36-Acre property from the west boundary or the Ditch in Question, the Irrigation Plan attached to Anderson's plat confirms a ditch coming from the west, despite it not being mapped on the plat:

> The irrigation system is described as follows: Water is diverted from Roaring Lion Creek into an unnamed ditch which enters lot 1 from the West. Water is then transported in an existing irrigation culvert until it reenters an irrigation ditch which then exits the property to the east.

(Tr. Trans. Anderson, 744:8-20); (Ex. 19, at 3). As further confirmed by Ted and Patti, the only conveyance of Roaring Lion Creek water is through the Ditch in Question coming from the west as described on the plat. (Tr. Trans. Patti, 150:17–151:9; 160:3–23; Dep. Ted, 44:17–45:6; 52:4–7).

Anderson states that he would preserve any right he had to deliver the water rights he was entitled to and did nothing to extinguish those systems that were to deliver that water. *(Tr. Trans. Anderson, 745:2-753:12).* Anderson did not intend to abandon any rights to a ditch flowing to the Apecella Property. (*Id.).* Anderson's intent was to keep any water rights for the property he purchased. (*Id.).* Thus, Anderson testified he was not aware of the ditch, as he was generally unfamiliar with the property's characteristics or water rights. However, if the Ditch in Question was there, he never assented to abandoning or physically abandoned any rights to water use through the Ditch in Question. *(Id.*).

Defendants' Exhibit DD fails to substantiate the claim that there is "no evidence of an open ditch running from Overman's property to the Boldts' property." (Brief, 11). Defendants painstakingly presented their Exhibit DD at trial. Tr. Trans. 653:13-732:5. A review of Exhibit DD reveals that it primarily consists of photographs depicting unrelated portions of the Apecella Property, many of which appear to have been taken during the winter or early spring. (Ex. DD). Additionally, Defendants' claim that "there is no ditch running along or near the chicken coop" misrepresents the photograph. (Ex. DD-35). The image was taken in winter and is heavily shadowed, making it impossible to see whether a ditch is present or not. (*Id.*). The court considered this evidence and concluded a prescriptive and implied easement persisted through Anderson's ownership. (COL, ¶ 16).

While Anderson testified that there was no ditch where the rock wall was built, he acknowledged "[i]t could be a depression in that area. . . I don't know if water ever flowed. . ." (Tr. Trans. 737:5-10). Further, Anderson confirmed that he did not build the rock wall—his sons did. (*Id.*, 736:7-12). Further, the assertion by Anderson that there was no ditch that ran through the same location that the rock wall was built is contradicted by the testimony of Patti, Brown, and Kelm. (*Dep. Kelm, 32:14-23*); (*Tr. Trans Patti* 160:6-13); *(Dep. Brown; 19:18-20:1; 31:14).*

c. Clint Brown Testified that the Ditch in Question Flowed at a Rate of 120 GPM in 2006.

Defendants do not cite Brown's testimony, which establishes that in 2006 the Ditch in Question was flowing at a rate of 120 GPM. (*Dep. Brown;* 20:22-21:1; 43:20-44:7; 39:9-21 (May 23, 2022)). In spring of 2003, Brown became personally acquainted with Defendants, spending a considerable amount of time on the Overman Property as a guest. *(Id.,* 10:1-17). Brown is a trained hydrologist and assisted with professional consulting work during the Water Court adjudication of the Overman's water right 76H 43178 00. *(Id., 18:18-23)*. Brown has personal and professional knowledge of the Ditch in Question.

Brown, acting as Ms. Overman's agent, drafted two letters to address objections by the United States Bureau of Indian Affairs regarding the water right filing for Overman's 3.55-Acre Tract II (Ex. 18). The first letter, dated June 26, 2006, describes a site inspection by Mr. Brown, providing geographic coordinates

for ditch locations, including a "Ditch-East @ Boundary." (*Id*.). These coordinates confirm that the "Ditch-East @ Boundary" lies on the Apecella Property, consistent with the Ditch in Question. (Ex. 18, at 7) (Tr. Trans. Turek, 349:7-350:20). The second letter, dated September 20, 2006, argues for claiming the entire 3.5 acres for irrigation, citing reliance on Ted Boldt's and Clifford Belew's knowledge of local irrigation practices. (Ex. 18). Despite this prior reliance, Defendants now reject their positions from the water right issue to support their current narrative.

Brown stated the Overmans used the eastern lateral ditch to irrigate their property and this same ditch was used to irrigate the Apecella Property, the Ditch in Question, during the time he was acquainted with the property professionally and personally. (*Id.,* 25:9-28:6; 30:4-31:4; 31:9-32:16; 35:1-25; 36:2-4). In 2006, the year Brown was hired by Ms. Overman as a hydrologist and was actively on the property, the ditch heading east onto the Apecella Property (the Ditch in Question) could convey upwards of 120 gallons per minute, measuring two and a half feet wide by 12 to 18 inches deep. (*Id.,* 20:22-21:1; 43:20-44:7; 39:9-21). Brown, relying on both personal and professional knowledge, conclusively established that the Ditch in Question had a significant flow in 2006, simply one example of testimony which directly refuted Defendants' claim that "Apecellas cannot dispute the nonexistence and nonuse of the ditch easement from as early as 2005 through 2020." (Brief, at 35).

d. Richard Kelm Resided on Apecella Property from 2009 and Then Subsequently Owned the Apecella Property from 2010 to 2020.

On July 29, 2010, after living on the property since 2009, Kelm purchased Lot 1, Roaring Lion Estates from Anderson. (Ex. 28-K). When Kelm purchased the property on July 29, 2010, the Decker Ditch delivered Roaring Lion Creek water from the west over the Overman Property, into a pipe through a stone wall at his west boundary, into a partially above ground and partially underground ditch system on Lot 1 and Lot 2. (Dep. Kelm, 9:5-10:10). In 2011, Kelm purchased Lot 2, Roaring Lion Estates. (Ex. 28-M).

From 2010 to early summer of 2013, during the irrigation months, Kelm testified he was able to irrigate Lot 1 and Lot 2, Roaring Lion Estates with water from Roaring Lion Creek through the Ditch in Question and the Spring Ditch. (Dep. Kelm, 63:21-64:6). About a year or two after purchasing the property, Kelm began running livestock on his property (the current Apecella property). (*Id.*, 23:5-9). He used the water to irrigate the pastures so he could feed his livestock. (*Id.*, 18:16-19:3; 55:20-24).

In 2013, Kelm contacted an attorney when the Overmans started interfering with his water because he needed this water to irrigate the pastures for his cattle and horses. (*Id.*, 18:15-24). Beginning in 2013, Robinson began restricting Kelm's water usage from the Ditch in Question. (*Id.,* 100:7-12). However, contrary to Defendants' statement in their brief, the water was never "cut off"—it was only partially

restricted during certain times. (Brief, at 19). Robinson removed the pipe through the rock wall that had been there since before Kelm owned the property. (Dep. Kelm, 31:21-4; 98:14-99:10) (Tr. Trans. Robinson, 529:17-230:10). On August 19, 2013, Kelm took a picture of where Robinson had removed the metal pipe that went through the rock wall because of the issues he was having with the Overmans, and he wanted evidence showing that they were interfering with his ditch easement. (Ex. 24, at 5-6; Dep. Kelm, 13:13-17).

To ensure he was getting his water, Kelm purchased another pipe and put it back in the wall. (Dep. Kelm, 32:1-4). Even though he continued to get water, he was not getting enough water to irrigate the Lot 2 pasture as he did in prior years. (*Id.,* 21:9-24).

Kelm installed a buried pipe to collect the water under his side of the pipe in the rock wall which traversed to and emptied into the Spring Ditch to utilize his right to the Decker Ditch. (*Id.,* 25:5-21). Kelm did this to control the water coming from the Overman Property and keep it from flooding so the water could continue past the house to the lower (Lot 2) pasture. *(Id.).*

In the summer of 2013, Kelm hired attorney Tonya Bumbarger to assist him with protecting his easement rights to the Ditch in Question. However, he could not maintain representation because of the financial and personally physical burdens. (*Id.,* 28:1-20). Further, Kelm was not willing to confront Defendants or release the

headgate himself because Defendant Robinson's threats. (*Id.,* 28:15-29:6). Kelm could not keep up with the stress of continually stating his position with the Overmans. (*Id.).*

On September 13, 2013, Kelm took a picture of the water flowing through the Ditch in Question to the rock wall. (Ex. 24, at 7-8). Kelm took this picture because "the neighbors were playing some type of game or something. And I think they were trying to get my attention. They wanted me to do more work on their property. And I told them I didn't have much time, that I had enough to do on my own property. They got a little bit frustrated like – like I owe them or something. . . so I took it as if they were trying to send me a message that, you know, you need to come over and work on our property or, you know, you aren't going to get any more [water]." (Dep. Kelm, 16: 4-17). The picture depicts water flowing from the Overman Property to the south towards the rock wall where the pipe is. The evidence clearly establishes that water was flowing to the Apecella Property in 2013.

Even though there was not as much water flowing as he was rightfully entitled to, Kelm had Roaring Lion Creek water come through the pipe in the rock wall every summer from 2010 to 2020 and water run through the rock wall onto his property (the current Apecella Property) every year he owned the property. (*Id.,* 32:14-23). At no point during Kelm's ownership did the Overmans provide notice that they were attempting to adversely possess his water rights or that they were going to stop

him from getting his water rights delivered through the ditch to his property. (*Id.,* 28:21-25). At no point during Kelm's ownership did the Overmans put up a "no trespassing" sign or fill the ditch completely in with dirt. (*Id.,* 29:9-21).

On December 29, 2020, Kelm executed a Warranty Deed to the Apecellas for Lots 1 and 2, Roaring Lion Estates. (Ex. 28-N). Defendants' correctly assert that when Kelm sold the property in 2020, there was no water in the ditch coming from the Overman Property because it was the middle of winter—the ditch only runs spring through early fall. (Brief, at 19).

Kelm intended to sell Lots 1 and 2 to the Apecellas with the ditch easement over the Overman property to deliver the Roaring Lion Creek water right to the Apecella Property as it had been a part of that property and was "a hundred years old." (Dep. Kelm, 30:8-24).

e. Jeff Burrows Has A Clear Bias to Oppose water flow to Apecella Property.

Burrows has lived at 205 Roaring Lion Road, located north of the Apecella Property, since 2009. (Tr. Trans. Burrows*,* 457:13-458:13). Burrows' property receives water from the Decker Ditch after a portion of the ditch diverts north on the Overman Property, while the remainder flows east to the Apecella Property. (*Id*., 462:1-8). Because Burrows' water supply depends on the amount diverted north and he is only entitled to 103 GPM, he has a direct incentive to oppose water continuing

east toward the Apecella Property, which is entitled to 403.92 GPM. (Ex. 3, p. 27-28).

Burrows has not spent much time on the Apecella Property and does not know where water would go when it left the pipe in the rock wall onto the Apecellas. (Tr. Trans. Burrows, 503:3-19). "Nevertheless, he testified that during his operation of Decker Ditch and during any of his weekly walks of the Decker Ditch, Mr. Burrows never saw a ditch or water going from Overmans' property to Apecellas' property." (FOF, ¶137; Tr. Trans. Burrows, 478:20-479:11). Burrows stated that Robinson maintains the ditch on the Overman Property, and he never got much involved through the Overman Property. (Tr. Trans. Burrows, 436:3-8; 470:20-22).

Burrows confirmed water was conveyed to Kelm in 2013 but describes the ditch as a "swale" in the lawn that conveyed what he defined as "wastewater." (*Id.,* 469:4-13; 470:6-7; 501:11-22). However, this is contrary to the testimony of each of the previous fact witnesses and the 2013 photographic evidence of the ditch testified to by both Tracy Turek and Kelm.

Finally, most of Burrows' information as to how water flowed to the Apecella Property was obtained through Robinson. (*Id.,* 502:15-25; 503:1-12).

Burrow's testimony is self-serving as stopping the water allocation to the Apecella Property would directly benefit his own property by ensuring a greater share of water from the Decker Ditch.

f. Defendant Larry Robinson is an Interested Party and His Testimony is Contradicted by Other Evidence.

The district court clearly described Plaintiffs and Defendants as interested parties whose opinions are influenced by his own interests. (FOF, ¶ 166).

Robinson maintained the position through trial that there was never a ditch extending to the Apecella Property, in direct contradiction to the personal testimony of many witnesses, and stated his "private lateral" from the corner was in a state of disuse and had been for some time, and that "his" ditch, the Ditch in Question, did not extend to the Apecella Property. (Tr. Trans. Robinson, 518:4-7; 526:15-16).

In contradiction with there being no ditch extending into the Apecella Property, Robinson confirmed that he obstructed the ditch in 2013, after frustrations with Kelm, Robinson removed the pipe in the rock wall at the Overman-Apecella boundary, clearly evidencing water running at that time. (*Id.,* 528:24-530:10). Robinson removed the pipe because "I decided he violated – I told him when I permitted him to have water, I told him he could not alter the ditch, and he altered the ditch and I couldn't drive my tractor through there, my little lawn tractor, to mow on the other side. And he had done things I told him not to and he had yelled at my wife, and I was done. (*Id*.).

Robinson admitted the pipe currently through the rock wall was replaced by Kelm after he removed it in 2013. (*Id.,* 529:21-25; 530:1-2). This statement is consistent with Kelm's position to maintain his ditch easement and not abandon it.

In May 2021, Robinson opened the valve to allow water to flow west, after which, immediately with no modifications, water naturally flowed through the pipe in the rock wall to the Apecella Property. (*Id*., 531:11-13).

When asked if it was Robinson's "intention to finish sealing the ditch all the way to the rock wall?" Mr. Robinson testified "I might, I might not." (*Id.,* 534:22-535:7). There would be no reason to seal the ditch to the rock wall boundary between Apecella and Overman's properties if there was no ditch.

Mr. Robinson admits he filled in the Ditch in Question. (*Id.,* 536:4-12).

IV. STANDARD OF REVIEW

1. Attorneys' Fees Pursuant to §70-17-112.

This Court "review[s] for correctness a district court's decision as to whether legal authority exists to award attorney fees." *Musselshell Ranch Co. v. Seidel-Joukova*, 2012 MT 222, ¶ 10, 366 Mont. 337, 286 P3d 1212; *citing Benintendi v. Hein*, 2011 MT 298, ¶ 16, 363 Mont. 32, 265 P.3d 1239. Further, this Court will review for "abuse of discretion a district court's order granting or denying attorney fees if legal authority exists for the fees." *Benintendi,* ¶16; *citing Hughes v. Ahlgren*, 2011 MT 189, ¶ 10, 361 Mont. 319, 258 P.3d 439. "An abuse of discretion occurs when the court acts arbitrarily without conscientious judgment or exceeds the bounds of reason." *Id.*; *citing Harmon v. Fiscus Realty, Inc.,* 2011 MT 232, ¶ 7, 362 Mont. 135, 261 P.3d 1031.

2. Determination of Ditch Easement and Defendants' claims of reverse adverse possession and abandonment.

The issue presented is narrowly whether the district court failed to appropriately address Defendants' reverse adverse possession and abandonment theories. This Court applies a dual standard of review when examining a district court's finding that there is no abandonment of an easement or reverse adverse possession. *Leisz v. Avista Corp*., 2010 MT 105, ¶ 14, 340 Mont. 294, 174 P.3d 481, *Musselshell Ditch Co. v. JD Bar D, LLC*, 2025 MT 63, ¶ 8, 421 Mont. 232, 2025 Mont. LEXIS 314. Findings of fact are reviewed under the "clearly erroneous" standard, while conclusions of law are reviewed for correctness. *Id.*

A factual 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 our review of the record convinces us that a mistake has been made. *Musselshell Ditch Co.,* ¶ 8. Substantial credible evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*; citing *Cremer Rodeo Land & Livestock Co. v. McMullen*, 2023 MT 117, ¶ 35, 412 Mont. 471, 531 P.3d 566. When determining whether the district court's findings are supported by substantial credible evidence, we "'view the district court's findings of fact in the light most favorable to the prevailing party.'" *Id.;* citing *Faber v. Raty*, 2023 MT 227, ¶ 15, 414 Mont. 144, 539 P.3d 1096. A district court's conclusions of law, including

interpretation of statutes, are reviewed de novo for correctness. *Id.;* citing *State v. Damon*, 2025 MT 12, ¶ 6, 420 Mont. 225, 562 P.3d 1061.

V. SUMMARY OF ARGUMENT

The district court's decision to award attorney's fees did not amount to abuse of discretion. The district court's determinations were not arbitrary, without conscientious judgment, or beyond the bounds of reason. Rather, they were grounded in a thorough, reasoned evaluation of the facts and applicable Montana law.

The district court properly awarded attorney's fees to the Apecellas pursuant to §70-17-112(5), MCA, because they prevailed on all claims brought under that statute. As consistently held by this Court, to be a prevailing party under §70-17-112(5), MCA, a litigant must succeed on all claims asserted under the statute. The Apecellas did just that. They secured declaratory and injunctive relief establishing their ditch easement rights, and the court expressly found that the Overmans failed to prove any defense or alternative claim, including those based on abandonment, non-use, or reverse adverse possession. The district court found the Apecellas were "successful on all claims in their complaint concerning their causes of action... raised pursuant to Mont. Code Ann. §70-17-112." The award of attorney's fees under § 70-17-112(5) was both authorized by law and supported by a well-reasoned record. Contrary to Defendants' assertions, the Apecellas did not seek more water than their

easement infrastructure could deliver, and their damages claims which were not pursued at trial, were pled under distinct common law theories, not under §70-17-112. Here, only the Apecellas prevailed distinguishing these facts from *Musselshell Ranch* and *Knudsen v. Taylor,* 211 Mont. 459, 461, 685 P.2d 354, 1984 Mont. LEXIS 996, where plaintiffs failed to prevail on all claims under the statute or where both parties succeeded in part.

The second issue presented is whether the district court properly rejected Defendants' claims that the Apecellas' prescriptive easement was extinguished by abandonment or reverse adverse possession. This Court applies a dual standard of review: findings of fact are reviewed for clear error, and conclusions of law are reviewed de novo for correctness. The district court correctly concluded that a prescriptive ditch easement exists across the Overman Property and has been continuously maintained from at least 1966 to 2020. Defendants do not dispute the existence of the easement but argue the court failed to properly address abandonment and reverse adverse possession defenses for the period 2005–2020 amounting to clear error. This argument is meritless.

The district court found that the elements of a prescriptive easement were met throughout the relevant period and explicitly rejected Defendants' claims of extinguishment through reverse adverse possession and abandonment. After reviewing the testimony of all relevant witnesses—none of whom were overlooked,

as Defendants assert—the court determined that Defendants failed to meet their burden of proof by clear and convincing evidence. The factual findings are well-supported by substantial, credible evidence, as reflected in over 35 pages of detailed findings. Furthermore, the legal conclusions reached by the court are correct. Defendants' claims of abandonment and reverse adverse possession are inconsistent with the court's thorough findings of continuous, adverse, and visible use by the Apecellas and their predecessors. When the facts are substantiated and the legal conclusions align with established Montana law, the district court's findings and conclusions should be upheld. In this case, the district court's findings were not clearly erroneous, and its' legal conclusions were correct.

Accordingly, this Court should affirm both the award of attorney's fees and the district court's determination of a prescriptive ditch easement.

1. **The district court properly awarded attorney fees to the Apecellas under §70-17-112(5), MCA because they prevailed on all claims brought pursuant to the statute.**

Montana Code Annotated §70-17-112(5) provides that the prevailing party in an action enforcing ditch easement rights "is entitled to costs and reasonable attorney fees." (Emphasis added). This Court has held that "to be deemed a 'prevailing party' for purposes of §70-17-112(5), MCA . . . a party must successfully prevail on *all* claims raised pursuant **to this statute.**" *Engel v. Gampp,* 2000 MT 17, ¶ 40, 298 Mont. 116, 993 P.2d 701 (emphasis added). "Accordingly, because [the

plaintiff] successfully prevailed on all claims raised pursuant to §70-17-112, MCA, he is entitled to his attorney's fees and costs pursuant to §70-17-112(5), MCA." *Espy v. Quinlan*, 2000 MT 193, ¶ 28, 300 Mont. 441, 4 P.3d 1212 (emphasis added). The prevailing party is the party which prevails on the "issues pertaining to MCA §70-17-112." *Musselshell Ranch*, ¶ 25.

This Court further clarified that when a party "successfully enforced both §70-17-112(1) and (2), MCA . . . he was 'entitled, as the prevailing party, to costs and reasonable attorney fees'" not whether the party succeeded on unrelated claims. *Sharon v. Hayden*, 246 Mont. 186, 190, 803 P.2d 1083, 1990 Mont. LEXIS 411. Thus, under well-established under Montana law, the necessary elements to determine whether a party is the prevailing party and entitled to recover their attorney's fees under § 72-17-112(5) are 1) does the individual have a secondary easement to enter, inspect, repair, and maintain a canal or ditch and 2) was the easement encroached upon or otherwise impaired. The Apecellas have clearly prevailed on all elements of MCA §70-17-112.

Here, the district court correctly determined that the Apecellas prevailed on all statutory claims brought under §70-17-112. (Order on Fees, at 3). The Apecellas proved both the existence of a ditch easement and Defendants' interference with their secondary easement rights to maintain, repair, and operate their ditch. (COL, ¶¶ 16, 23-24). As a result, they were awarded declaratory and injunctive relief, the

precise remedies they sought in their Complaint pursuant to §70-17-112. (Complaint, at 8, Doc. 1).

Moreover, Defendants' attempt to argue that the Apecellas "were incorrect as to the scope and use of their easement" and therefore did not "fully grasp the easement rights in contention." (Brief, at 35). This mischaracterizes both the record and the Apecellas' claims. The Apecellas never demanded that the entirety of their water right be delivered through the existing infrastructure. Rather, they simply sought proper access to, and conveyance of, their Roaring Lion Creek water through the Ditch in Question and the pipe in the rock wall—a claim on which they ultimately prevailed.

a. **The Apecellas prevailed on all claims brought under §70-17-112, MCA, justifying an award of attorney fees under §70-17-112(5).**

The district court's conclusion that the Apecellas prevailed on all claims brought under Mont. Code Ann. §70-17-112 was supported by the record and well within its discretion. This finding, based on the district court's thorough evaluation of the evidence and Montana law, cannot constitute an abuse of discretion. The district court expressly concluded that the Apecellas prevailed on all claims brought under Mont. Code Ann. §70-17-112—claims that were the focus of the trial. Nowhere in the district court's FOFCOL is there any suggestion that the Apecellas failed on any of their claims.

The district court held that "Apecellas have been successful on all claims in their complaint concerning their causes of action (their First, Second, and Fourth Cause of Action) raised pursuant to Mont. Code Ann. §70-17-112. The Court found the Overmans did not prove their claims by clear and convincing evidence." (Order on Fees, at 3).

Despite this, Defendants argue that the Apecellas are not entitled to attorney fees because they somehow failed to prevail on all claims brought under §70-17-112, MCA. (Brief, at 25). This argument is flawed. The Apecellas clearly succeeded on all such claims. Under their First Cause of Action (Interference with Canal and Ditch Easement under §70-17-112, MCA) and Fourth Cause of Action (Declaratory Judgment regarding ditch easement rights under §70-17-112, MCA), the Apecellas sought a determination of their easement rights and an acknowledgment that Defendants interfered with those rights—relief which was granted in full. (Doc. 1).

Defendants also claim the Apecellas provided no separate legal basis for their causes of action for Intentional Interference with Property Rights and Nuisance. (Brief, at 26). This is also incorrect. The Apecellas separated their common law damages claims from their statutory claims, distinguishing this case from the Complaint allegations brought in *Musselshell Ranch,* where the failed allegations were "embedded within the Ranch's arguments §70-17-112, MCA" therefore there is "no support. . . that this argument was posited under a separate and distinct legal

theory." *Musselshell Ranch,* ¶ 21. These claims were clearly pled as distinct from the statutory claims under §70-17-112. These two claims were based on independent legal theories and sought separate relief, as opposed to the declaratory and injunctive relief sought under §70-17-112, MCA. Apecellas' claim for intentional interference of property rights is a claim against the Defendants for their malicious acts and conduct causing injury to property. (Doc. 1 at 5). Apecellas' claim for nuisance is brought under MCA §27-30-302. (*Id.,* at 6).

In sum, the district court correctly found the Apecellas prevailed on all § 70-17-112 claims. Their damages claims were separately pled and adjudicated, not imbedded into their statutory claims as in *Musselshell Ranch*. Because the Apecellas wholly prevailed under §70-17-112, MCA, the district court properly awarded attorney fees under §70-17-112(5), MCA. Its decision was based on substantial evidence and reasoned judgment following extensive briefing, and no abuse of discretion occurred.

b. Apecellas received their requested relief under MCA §70-17-112, as stated in their Complaint.

Defendants incorrectly assert that "Apecellas sought an easement across Overman's property to convey the totality of Water Right No. 76H 2506-00." (Brief, at 27). Contrarily, the Apecellas' position has been consistent: The 404 GPM allocation under their water right should be measured at the headgate on Roaring Lion Creek—not at the point of delivery to the Apecella Property. (Tr. Trans. Turek,

435:6–12). It is well understood that ditch loss naturally occurs between the headgate and the point of conveyance. (*Id.*). At no point did the Apecellas demand delivery of the full 404 GPM through the pipe at the rock wall or seek a flow rate exceeding the pipe's capacity. While the Apecellas sought to exercise their water rights, they never requested to divert more water than the existing pipe through the rock wall could physically convey. (Doc. 1, at 8). They did not seek to remove the pipe or expand the ditch beyond its existing capacity. Instead, the Apecellas prevailed by securing their right to receive the full volume of water the existing pipe could historically deliver—no more, no less. Their claim was not about expanding infrastructure or demanding excess flow but about preserving their long-established easement and protecting their right to continued historical use.

Defendants incorrectly argue that the Apecellas were not the prevailing party, claiming they sought more water than the pipe could convey. Even accepting Defendants' flawed argument, this still fails. Defendants rely on *Knudsen,* but that case is readily distinguishable. In *Knudsen*, both parties asserted competing claims against each other and the jury found in favor of both. Here, Defendants did not have any counterclaims against Apecellas, nor did they prevail on any issue. (COL, ¶ 19).

Apecellas prevailed on all claims under §70-17-112, MCA, and did not seek more water than could be conveyed through the pipe. Apecellas successfully enforced both §70-17-112(1) and (2), MCA, and are entitled to attorney fees.

Sharon, at 190. The district court acted within its discretion in awarding attorney fees, basing its decision on a careful analysis of the facts and law. The court's ruling was not arbitrary, and the award should be affirmed.

2. Apecellas established a prescriptive ditch easement from at least 1966 to present, and Defendants did not prove there was an extinguishment or abandonment of such ditch easement.

As a preliminary matter, it is important to clarify that Defendants are not challenging the district court's determination that a prescriptive or implied easement was established. Rather, they assert that the district court's FOFCOL "fails to apply any facts to the elements and fails to discuss whether Overmans made a showing or not of any of the elements" of reverse adverse possession and abandonment—"specifically regarding the nonuse of the easement from 2005 to 2020." (Brief, at 36, 42).

Defendants argue "the district court disregarded the clear record before it. From at least 2005 through 2020, multiple witnesses—including [Defendant] Robinson, [interested party] Burrows, Anderson, and Kelm—confirmed that Apecellas' property did not receive water through an easement, and if an easement existed, it was either abandoned by Apecellas' predecessors or extinguished by Overman's reverse adverse possession." (Brief, at 23). However, the district court carefully considered all testimony from both parties' witnesses, including Burrows, Anderson, and Kelm, and found that Apecellas proved a prescriptive easement

through continuous, uninterrupted use from at least 1966 to 2020. The district court noted that the Ditch in Question was evident when Defendants acquired the property and easement was transferred with each successive ownership from 1966 to 2020.

Here, the appeal must not be used to relitigate the case but must demonstrate that the district court's findings are clearly erroneous and its conclusions of law incorrect. Defendants are simply attempting to relitigate their case before this Court, even though the district court already heard and rejected these same arguments presented in Defendants' Opening Brief. The district court's findings confirm that the prescriptive easement was maintained continuously through each ownership, including from 2005 to 2020. Therefore, because Apecellas proved their prescriptive easement, Defendants did not meet their burden of proving the elements necessary for abandonment or reverse adverse possession. The doctrines of abandonment and reverse adverse possession are incompatible with ongoing, uninterrupted prescriptive use, and the prescriptive easement's establishment precludes their application.

The district court did not commit clear error or misapprehend evidence. The evidence relied upon by the district court reasonably demonstrated the continuity and validity of the prescriptive easement.

a. The district court thoroughly considered and rejected Defendants' reverse adverse possession claim based on substantial evidence, without clear error and with correct legal conclusions.

Contrary to Defendants' claim that the district court failed to consider reverse adverse possession thus committing "clear error in its findings of fact and failed to provide adequate conclusions of law for review", the court directly addressed and rejected this theory. (Brief, at 36; COL, ¶¶ 17–22). Specifically, the district court provided the adequate application of the law for reverse adverse possession:

> Alternatively, Overman claims the ditch was adversely possessed. The level of proof for extinguishment of an easement by reverse adverse possession is the same as the burden for establishing a prescriptive easement. *Halverson v. Turner* (1994), 268 Mont. 168, 174, 885 P.2d 1285, 1290. However, the burden shifts to the opposite party. Therefore, Defendants had the burden of proving by clear and convincing evidence that his claim to extinguish the easement was open, notorious, exclusive, adverse, continuous and uninterrupted. *Brimstone Mining, Inc., v. Glaus*, 2003 MT 236, ¶ 37, 317 Mont. 236, 77 P.3d 175, 184.

(COL, ¶ 21).

After thoroughly addressing all of the Defendants' claims—including the assertion of reverse adverse possession—the district court ultimately concluded that "Defendants failed to prove their claims by clear and convincing evidence." (COL, ¶¶ 18–19). The district court specifically rejected the reverse adverse possession claim, finding instead that the elements of a prescriptive easement (the same

elements Defendants had to prove for reverse adverse possession) had been continuously satisfied from 1966 to 2020.

Defendants then incorrectly state that "the district court provides little to no discussion of the testimony of Anderson, Burrows, or Kelm and thus did not rely on the substantial evidence for the years 2005 through 2020." (Brief, at 30). However, the district court dedicated over 27 separate Findings of Fact specifically to the testimony of Anderson, Burrows, and Kelm. (FOF ¶¶ 83-104, 133-138). Then summarizing these findings clearly stating "[n]o clear and convincing evidence was presented to prove that Roaring Lion Creek water was not conveyed to the Apecella Property via the Ditch in Question for five or more years." (FOF, ¶ 168). These findings, as well as the testimony of the Ted, Patti, Kelm, and Mr. Brown directly support the district court's conclusion that a prescriptive ditch easement had been established and continuously transferred—from Ted Sr. to Ted and Patti in 1985, to Anderson in 2005, to Kelm in 2010, and ultimately to the Apecellas in 2020. (COL ¶ 16). Thus, it was concluded that no reverse adverse possession nor abandonment occurred. (COL ¶¶ 18-19).

Defendants notably omit any reference to the testimony of Brown, which the district court explicitly relied upon. In its findings, the court noted that in 2006—when Mr. Brown was retained by Ms. Overman as a hydrologist and conducted on-site evaluations—the ditch extending east onto the Apecella Property could convey

up to 120 gallons per minute and measured approximately two and a half feet wide and 12 to 18 inches deep. (FOF, ¶ 79).

Moreover, Defendants' assertion that "Kelm confirmed that Apecellas' property did not receive water through an easement" is false. Mr. Kelm testified that from 2010 to 2020, water from Roaring Lion Creek flowed through the pipe in the rock wall and onto what is now the Apecella property every summer. (Dep. Kelm, 32:14–23).

Defendants' claim that the district court failed to consider the evidence, or "misapprehended the effect of the evidence" is misplaced. The district court's findings—based on a thorough evaluation of the testimony and evidence presented by all relevant witnesses on both sides—support its conclusion that a valid prescriptive easement exists and was neither abandoned nor extinguished by reverse adverse possession. The district court's findings do not reflect clear error, and the legal conclusions are correct.

b. The district court thoroughly considered and rejected Defendants' abandonment claim based on substantial evidence, without clear error and with correct legal conclusions.

Defendants again claim that the district court's failure to consider abandonment of the ditch easement is "clearly erroneous and should be reversed" (Brief, at 36). However, this issue was fully litigated and rejected by the district court after reviewing all the evidence, including testimony from Defendants' witnesses.

The district court applied the correct legal standard for abandonment and concluded that Defendants failed to prove abandonment by clear and convincing evidence, reaffirming the continuous existence of a prescriptive easement. (COL, ¶¶ 16-17, 19-20).

A prescriptive easement requires continuous, uninterrupted use of the property, while abandonment necessitates a definitive cessation of that use and intent to permanently relinquish the easement. (COL, ¶¶13, 17). These two concepts are mutually exclusive—once abandonment is established, the continuous use necessary for a prescriptive easement is negated. Therefore, abandonment and a prescriptive easement cannot coexist.

The court found that the elements for a prescriptive easement were met, rejecting the claim of abandonment and affirming that the ditch was continuously used from Ted Sr.'s ownership through to 2020. Defendants' assertion that "by the time Anderson moved onto the property, there was no evidence of a ditch" (Brief, at 42) overlooks crucial testimony from Ted and Patti Boldt, Brown, and Kelm, all showing otherwise. The district court carefully considered this evidence and concluded that the easement had been continuously exercised, rejecting Defendants' abandonment theory.

Once again, after carefully considering all of the Defendants' arguments—including the claim of abandonment—the district court concluded that "Defendants

failed to prove their claims by clear and convincing evidence." (COL, ¶¶ 18–19). In particular, the court rejected the abandonment theory, determining that the elements of a prescriptive easement had been continuously met from the time of Ted Sr.'s ownership through to the present.

For the sake of addressing some of Defendants' relitigated arguments, which were all presented at trial and the district court concluded they failed to establish abandonment, Apecellas provide the following:

Defendants' argument that the Boldts attempted to "dry out" their property, implying the absence of a ditch easement, is both illogical and inconsistent with the record. Ted and Patti testified that when they sold the property to Anderson, the Ditch in Question was intact and had conveyed Roaring Lion Creek water every summer during their ownership. (Tr. Trans. Patti, 150:23-153:3). They also informed Anderson of the ditch's existence and the source of the water. (*Id.*) There is nothing in the record that Ted and Patti abandoned or intended to abandon his ditch easement because he was "drying out the property" for percolation testing, rather the Ditch in Question conveyed water during their ownership.

Furthermore, Defendants' claim that the ditch was "filled in prior to Anderson's ownership" (Brief, at 37) is refuted by testimony from Brown and the Boldts, both confirming that the ditch was still actively conveying water as late as 2006. Brown testified that in 2006—during Anderson's ownership—the ditch was

still actively conveying water. (Dep. Brown, 16:1-21). Further, the Boldts testified that upon selling to Anderson in 2005, the Ditch in Question conveyed Roaring Lion Creek water. (Tr. Trans. Patti, 150:23-153:3).

With respect to Kelm, the record demonstrates that he made genuine, good-faith efforts to access and use the ditch water—manually opening valves, replacing pipes that had been removed, and persistently attempting to utilize the water from the ditch, originating from Roaring Lion Creek, which he did receive every year of his ownership from 2010 to 2020. (*Dep. Kelm, 32:14-23*). Moreover, his occasional use of pond water for irrigation does not equate to an abandonment of his rights to water from Roaring Lion Creek.

Defendants make speculative and unsupported leaps in reasoning in an effort to reassert arguments that were fully litigated and rejected by the district court.

All Defendants' arguments in their Brief have already been fully litigated and rejected by the district court. The district court's FOFCOL clearly establish that Defendants failed to meet their burden of proving abandonment. The district court thoroughly evaluated the substantial evidence presented—reflected in over 36 pages of detailed findings—and did not misapprehend the evidence or "fail to apply the full effect" of that evidence. (Brief, at 38). Rather, after considering and analyzing the testimony from both parties' witnesses, it concluded a prescriptive easement remained intact and continuously exercised from 2005 through 2020. The district

court's findings do not reflect clear error, and the legal conclusions are correct. The district court's conclusions should be upheld.

VI. CONCLUSION

For these reasons, this Court should affirm the district court's decision and conclude that the Apecellas properly established a valid prescriptive and implied ditch easement from 1966 to 2020 and are further entitled to attorney fees under §70-17-112(5), MCA as they successfully prevailed on both §70-17-112(1) and (2), MCA.

DATED this 30th day of April 2025.

COTNER RYAN BLACKFORD, PLLC

By: */s/ Taylor N. Eisenzimer*
David B. Cotner
Taylor N. Eisenzimer

CERTIFICATE OF COMPLIANCE

Under Mont. R. App. P. 11, I certify that this Response Brief is proportionally spaced in 14-point Times New Roman font, double-spaced, and contains 9,942 words, excluding the table of contents, certificate of service and this compliance certificate.

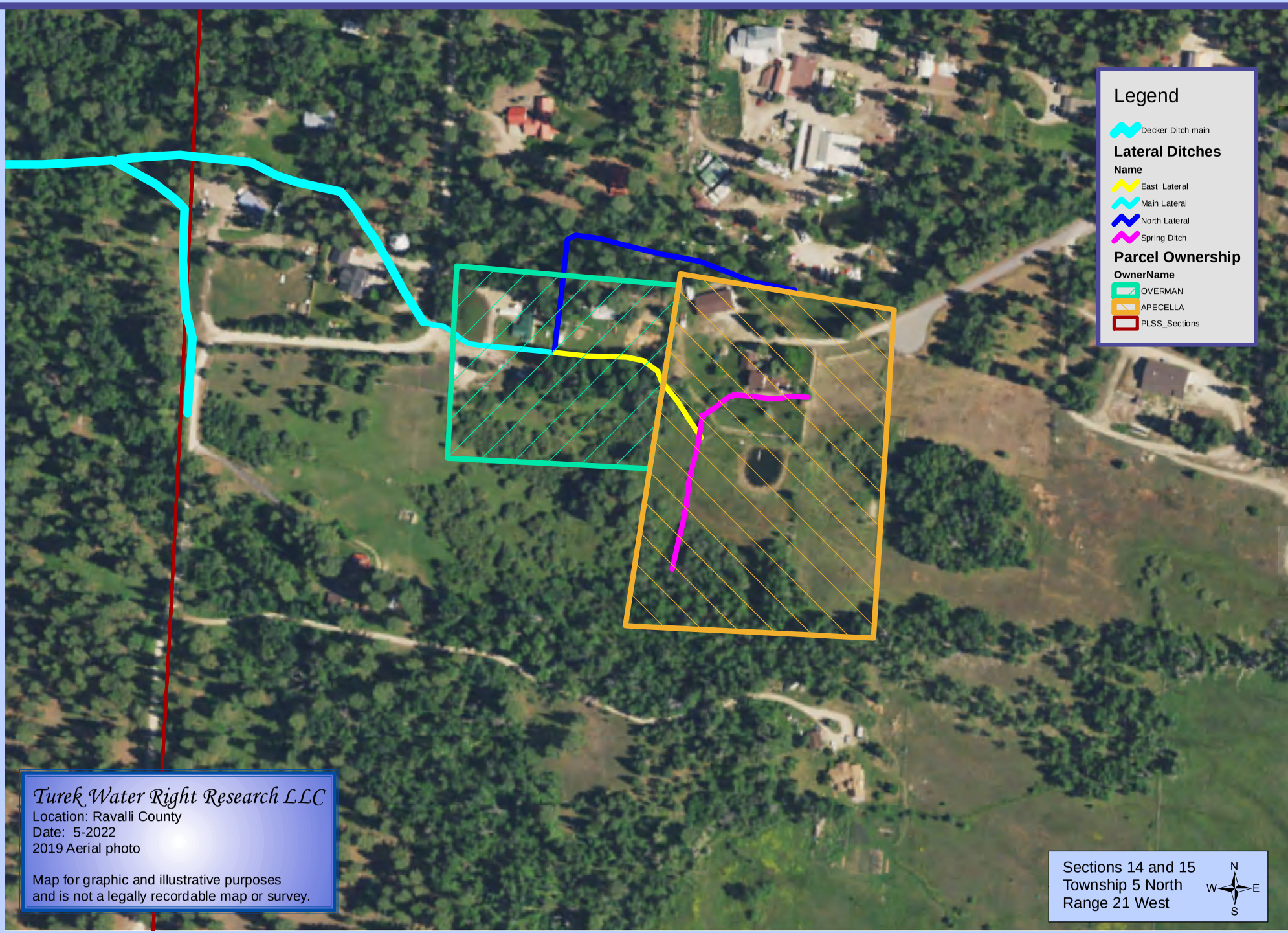
By: */s/ Taylor N. Eisenzimer*
Taylor N. Eisenzimer

APPENDIX

1. Aerial Photo

APPENDIX 1

GENERAL OVERVIEW MAP



CERTIFICATE OF SERVICE

I, Taylor Nicole Eisenzimer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-30-2025:

David Brian Cotner (Attorney)
321 W. Broadway
Suite 500
Missoula MT 59802
Representing: Frank Apecella, Shirlynne Apecella
Service Method: eService

Richard Charles Tappan (Attorney)
7 W 6th Ave
Suite 516
Helena MT 59601
Representing: Lillian A. Overman, Larry Robinson
Service Method: eService

Dale Schowengerdt (Attorney)
7 West 6th Avenue, Suite 518
Helena MT 59601
Representing: Lillian A. Overman, Larry Robinson
Service Method: eService

Connlan William Whyte (Attorney)
7 West 6th Avenue, Suite 516
Helena MT 59601
Representing: Lillian A. Overman, Larry Robinson
Service Method: Conventional

Electronically Signed By: Taylor Nicole Eisenzimer
Dated: 04-30-2025