IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 24-0576

LILLIAN A. OVERMAN and LARRY ROBINSON,

Defendants and Appellants,

v.

FRANK APECELLA and SHIRLYNNE APECELLA,

Plaintiffs and Appellees.

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

APPELLANT'S OPENING BRIEF

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ISSUES PRESENTED

1. Under § 70-17-112(5), MCA, did the district court err in awarding Appellees their attorney fees when Appellees failed to prevail on all claims brought pursuant to their underlying ditch interference claim?

2. Should the district court have granted Appellees a ditch easement where Appellees failed to dispute: (1) Appellants' showing of reverse adverse possession; and (2) Appellants' demonstration that the ditch easement was abandoned prior to Appellees' ownership?

STATEMENT OF THE CASE

This appeal arises from two district court orders finding: Plaintiffs Frank and Shirlynne Apecella (collectively "Apecellas" or "Appellees") had a ditch easement ("Decker Ditch") across Defendants Lillian Overman and Larry Robinson's (collectively "Overmans" or "Appellants") property; and Apecellas were entitled to their attorney fees. Although two of Apecellas' predecessors stated there was no easement in existence or Overmans prevented any use of the easement for over five years, the district court disregarded much of the testimony and found the opposite. This appeal raises important questions of reverse adverse possession, abandonment, and attorney fees under § 70-17-112(5), MCA.

In June 2002, Overmans purchased and moved onto Tract II, Certificate of Survey No. 5737-F in Ravalli County, Montana ("Overmans' property").[1] Overmans purchased the property as a repossession and the property had been vacant for at least over a year and a half, thus property was in disarray. Upon moving onto the property, Overmans discovered an irrigation ditch to the south of their dwelling that ran east and then turned to the north. At the turn, there were remnants of a ditch that ran east. However, the culvert running east had been completely crushed and there were no remnants of an open ditch past the crushed culvert. Eventually, Overmans installed a control valve/headgate at the turn so Overmans could occasionally turn water to the eastern side of their yard via a swale and water their fruit trees. From 2002 to present, none of the predecessors of Apecellas maintained or repaired any ditch on Overmans property or utilized Overmans ditches for irrigation absent explicit license from Overmans.

In January 2021, Apecellas moved from Los Angeles to Hamilton, Montana. Specifically, Apecellas moved into Lots One and Two of the Roaring Lion Estates subdivision in Ravalli County, Montana ("Apecellas' property").[2] In May 2021, Apecellas hired water rights consultant Tracey Turek to examine Apecellas' newly

[1] Legally described as the SW ¼ NW ¼ of Section 14, Township 5 North, Range 21 West, in Ravalli County, Montana.
[2] Legally described as the S ½ NW ¼ of Section 14, Township 5 North, Range 21 West in Ravalli County, Montana.

obtained water rights and to discover how Apecellas could get water to their property from Roaring Lion Creek. Within five months of their move to Montana, and shortly after retaining their consultant, Apecellas had Ms. Turek send Overmans a demand letter. Ms. Turek asserted Apecellas had a prescriptive easement across Overmans property for delivery of irrigation water and failure to observe this ditch easement would result in Apecellas suing. On June 21, 2021, Apecellas made good on the threat and sued Overmans seeking declaratory judgment and alleging: (1) interference with a ditch easement under § 70-17-112, MCA; (2) intentional interference with property rights; and (3) private nuisance.

On July 10, 11, and 14, 2023, a non-jury trial was held. Prior to that trial, both parties submitted two different proposed findings of fact and conclusions of law ("FOFCOL").[3] No pretrial order was required. In both their January 11, 2023, and June 28, 2023, pretrial, proposed FOFCOLs, Apecellas asserted claims of ditch interference, intentional interference with a property right, and private nuisance. Following the July 2023 trial, counsel suggested submitting post-trial proposed FOFCOLs after receiving the trial transcript and the district court agreed. Thus,

[3] In January 2023, after submitting Apecellas' proposed FOFCOL, Apecellas original counsel—David Markette—stated he would be withdrawing from the case due to health concerns. On April 4, 2023, David Cotner was substituted in as counsel for Apecellas. Mr. Cotner moved the Court for renewed proposed FOFCOLs. Therefore, the parties submitted their second proposed pretrial FOFCOLs on June 28, 2023.

both parties submitted their final proposed FOFCOLs on March 4, 2024. In their March 4, 2024, proposed FOFCOL, Apecellas did not assert any facts or law in support of their intentional interference with a property right or private nuisance claims.

Two weeks after receiving the parties' proposed FOFCOLs, the district issued its FOFCOL finding Apecellas demonstrated by clear and convincing evidence they had a ditch easement across Overmans' property by both implication and prescription. The district court did not include any conclusions regarding Overmans' claim of reverse adverse possession. The district court found that the scope of the ditch easement was not the entire flow of Apecellas' water right and instead part of the easement was abandoned by Apecellas' predecessors and Apecellas could only seek the flow able to go through a pipe in the rock wall on Apecellas' property. Finally, the district court ordered each party brief the issue of attorney fees under § 70-17-112, MCA.

On May 16, 2024, the district court found that—despite having not prevailed on all claims tied to Apecellas ditch interference claim—Apecellas were entitled to an award of reasonable attorney fees under § 70-17-112(5), MCA. On August 30, 2024, the district certified its FOFCOL and ruling on attorney fees as its final judgment. Overmans then timely filed this appeal.

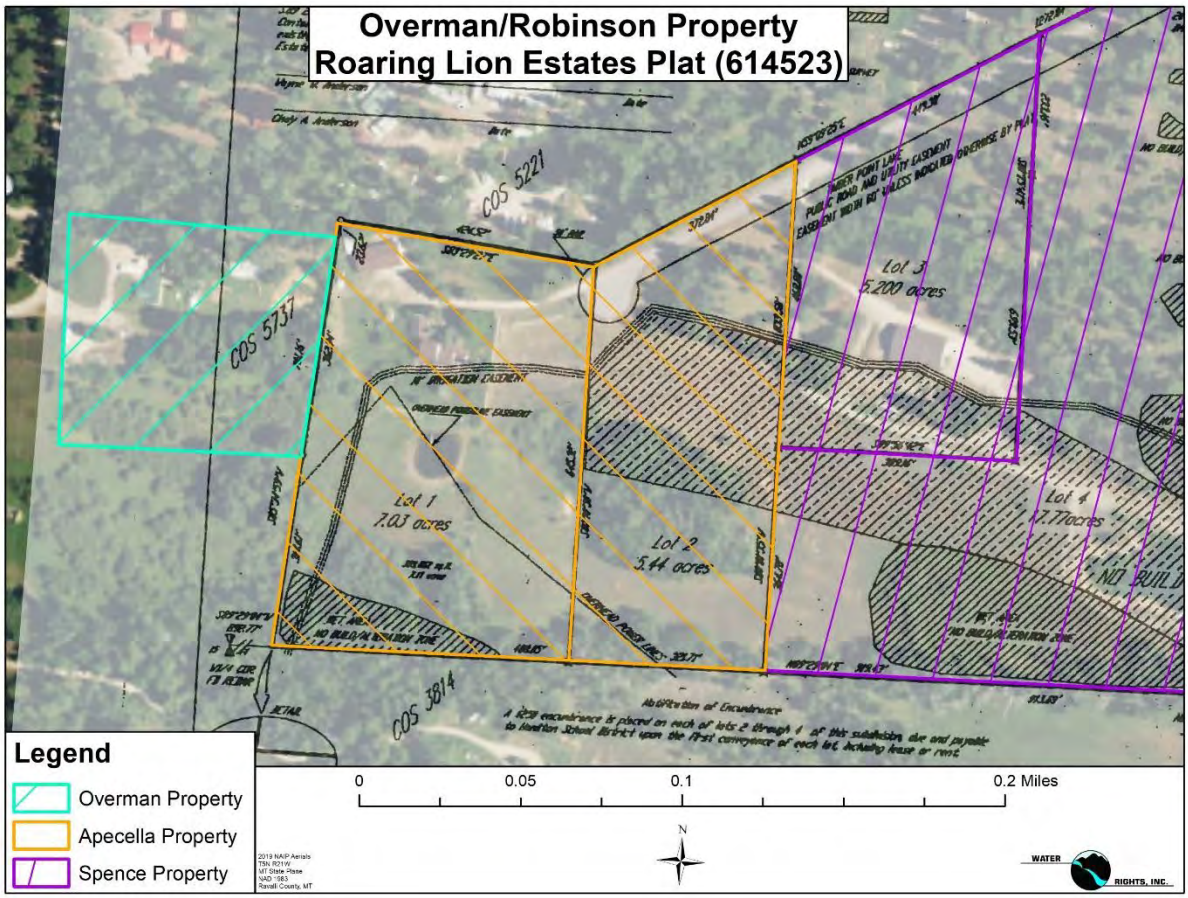
STATEMENT OF FACTS

I. Locations of the underlying properties and ditches in dispute.

The ditch at issue in this case is the dark blue ditch shown in the aerial photograph above (attached hereto as Pls.' Ex. 5-7). Apecellas assert this is a section of the Decker Ditch that delivers their water right to their property. Overmans contend since moving to the property in 2002, the ditch did not head

eastward and instead only traveled northward as seen by the pink ditch. Overmans' property is the western lot with the "split location" at its center. The "split location" is a control valve/headgate that Overmans use to send water northward to other water appropriators. Apecellas' property are the two lots directly east of Overmans' property.

The above photograph also shows a green ditch coming from the south of Apecellas' property. This ditch is sometimes referred to as the "Spring Ditch" in the pleadings and trial transcript. The property located to the direct south of Apecellas is owned by Lou Boom—another appropriator of the Decker Ditch.



The aerial photograph above is an overlay of the Roaring Lion Estates subdivision plat (created by Apecellas' predecessor, Wayne Anderson, in 2008) on top of an aerial photograph of the parties' properties. Ex. FF; see also Defs.' Exs. FFF, GGG, HHH (Anderson's subdivision documents). The aerial photograph and plat depict a single ditch on Apecellas' property that comes from the southwest corner of Lot 1 of the subdivision. No ditch coming from Overmans' property to the east is shown on the plat.

II. 1985 to 2005: Appellees' predecessors, Theodore and Patricia Boldt, did not upkeep the Decker Ditch.

Prior to 1966, Overmans' and Apecellas' respective properties were owned by Theodore Boldt Sr. and Felsie Decker Boldt as one undivided property. A 1966 contract for deed and a 1971 deed severed Overmans' property from a 36-acre parcel that would eventually become Roaring Lion Estates subdivision. *See* Pls.' Exs. 28-E, 28-G. In 1986, Felsie Decker Boldt transferred the remaining 36-acre parcel to her son, Theodore (Ted) Boldt Jr. ("Mr. Boldt") and his wife, Patricia Boldt ("Mrs. Boldt"). *See* Pls.' Ex. 28-H. Mr. and Mrs. Boldt remained on the 36-acre parcel until 2005. Trial Tr., at 152:12–153:3. Due to travel, Mr. Boldt did not spend much time on his property and his property became quite disarrayed and overgrown. *See generally* Defs.' Ex. DD; Trial Tr. at 147:6–12. Around 2004, Mr. Boldt decided he would attempt to subdivide his 36-acre parcel and began drying his property out so that it could pass a percolation test and receive septic approval. *See* Defs.' Ex. SS. (Dep. Ted Boldt 43:21–44:4, Feb. 23, 2022); Trial Tr. at 155:12–20; *see also* Trial Tr. 156:1–2 (where Ms. Boldt recognized Mr. Boldt had to move ditches to pass the percolation test).

Both Mr. and Mrs. Boldt testified that a ditch coming from Overmans' property was in existence when they owned Apecellas' property. However, when asked to draw where the ditch ran, Mr. and Mrs. Boldt had drastically different locations for the ditch at issue—and neither location matched where Apecellas, in

their Complaint and at trial, asserted the ditch was located. *Compare* Defs.' Ex. BBB, *with* Ex. CCC; *compare* Defs.' Exs. BBB, CCC, *with* Pls.' Compl. Ex. 9, Pls.' Trial Ex. 5. Mr. Boldt drew the ditch much further south and running parallel to Spring Creek Road whereas Mrs. Boldt drew the ditch running through Springhill Road below Overmans' house and when it entered Apecellas' property, it immediately went north independent from running into another ditch. *Compare* Defs.' Ex. BBB, *with* Ex. CCC. Apecellas assert the ditch easement runs east below Overmans' house and then turns south before it crosses onto Apecellas' property where it then runs into another ditch. *See* Pls.' Ex. 5-G.

When the Boldts attempted to sell their 36-acre property, a neighbor—Darrell Lee ("Lee")—examined the property in 2004. Trial Tr. at 156:20–157:14. Ms. Boldt testified that Lee was shown all irrigation ditches during his tour of the property. *Id.* Lee confirmed Ms. Boldt's testimony and asserted a ditch was running from Overmans' property into the Boldts' 36-acre parcel. *Id.* at 192:23–193:1; 194:17–21. Lee testified that when he visited the 36-acre property in 2004, laterals off the main ditch were not being used and the property only seemed to be irrigated close to the Boldts' home. *Id.* at 203:19–204:2.

In 2005, Mr. and Mrs. Boldt sold their 36-acre parcel and home to Wayne Anderson ("Anderson"), a local building contractor, who hoped to subdivide the property. Trial Tr., at 710:3–711:13.

III. 2005 to 2010: Appellees' predecessor, Wayne Anderson, had no ditch easement across Appellants' property for his 5 years of ownership.

Prior to purchasing the Boldts' property, Anderson walked the entire property with Mr. Boldt and observed the property was dry and in disarray. *See* Defs.' Ex. DD-1–DD-38. During his tour of the property in 2005, Anderson took photographs of various areas of the Boldts' 36-acre parcel and recorded handwritten descriptions of each photograph on the back of each physical photograph. *See* Defs.' Ex. DD. Anderson testified that when walking the property, a large ditch was cut across the Boldts' property originating in the southwest corner, nowhere near the border with Overmans' property. *Id.* at 712:10–713:2; *see* Defs.' Ex. DD-21–26. In that ditch was a pipeline and Anderson explained the ditch was cut by Mr. Boldt who was attempting to dry his property out so he could subdivide it himself. Trial Tr. at 713:3–6; Defs.' Ex. DD-21–DD-26 (showing the pipeline).

Anderson testified that when he walked the Boldts' property with Mr. Boldt, he observed no ditches coming from Overmans' property into the Boldts' property. Trail Tr. at 717:4–8. Anderson further testified that he spoke with Mr. Boldt about the water rights that would convey with the property and that Mr. Boldt only showed him the ditch and pipeline originating in the southwest corner of the Boldts' property and there was no mention of any ditch or water coming from Overmans' property. *Id.* at 718:13–25. Mr. Boldt did not describe where the water

came from; however, Anderson asserted that his mother—Luella Boom—lives to the south of the Boldts' property and has a ditch that ties into the boggy area where the single ditch on the Boldts' property originated. *Id.* at 719:6–23; *see* Defs.' Ex. I (water right abstract for Luella Boom who lives to the south of Apecellas and has a right to water via Decker Ditch and Roaring Lion Creek).

Anderson's photographs further demonstrated no ditch ran from Overmans' property to the Boldts' property. *See* Defs.' Ex. DD. Though all his photographs demonstrate the Boldts' property was in disarray, unirrigated, and full of trash during their ownership, specific photographs show the lack of a ditch in the areas alleged by both the Boldts and Apecellas. *See id.* Photographs DD-27, DD-29, DD-32, and DD-38 show the Boldts' property looking west directly into Overmans' property. *See supra*.

Each of these photographs show no evidence of an open ditch running from Overmans' property to the Boldts' property and, instead, depict an unkept property with trash piles and junk where the ditch should allegedly exist. *Id.* Further, Photograph DD-35 depicts the chicken coop where Mrs. Boldt said the ditch from Overmans' property ran right next to yet there is no ditch running along or near the chicken coop. *Compare* Defs.' Ex. DD-35, *with* Defs.' Ex. BBB. Anderson also asserted that there was no ditch next to the chicken coop and there was no ditch that came from Overmans' property. Trial Tr., at 732:11–19.

Upon his purchase in 2005, Anderson began drying out his 36-acre parcel to pass a percolation test and subdivide the property. Lee confirmed Anderson's lack of irrigation and testified he never saw Anderson irrigate the 36-acre property. *Id*. at 203:8–15. In October 2008, Anderson was able to subdivide the 36-acre parcel into Roaring Lion Estates subdivision. *See* Pls. Ex. 19. The approved plat demonstrates the subdivision consisted of four lots and a single irrigation ditch which ran from the southwestern corner of Lot 1 and ran north before turning east and running through all 4 lots. *Id.* Eventually, Apecellas would purchase Lots 1 and 2 of the subdivision; the western most lots. *Id.*

The plat did not depict any ditch running from west to east from Overmans' property even though—under § 76-3-504(l), MCA—"the subdivider, unless otherwise provided for under separate written agreement or filed easement, [must] file and record ditch easements for unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are **consistent with historic and legal rights**." *Id., supra* (emphasis added). Anderson testified that the irrigation ditch shown on the plat and irrigation plan for the Roaring Lion Estates subdivision was the only existing ditch when he purchased the property and was in the same location as shown on the plat. *Id.*; Trial Tr. at 739:4–13. Anderson further

asserted that it was his intention to use only the single irrigation ditch shown on the subdivision plat to irrigate the subdivision and he had no intention of using any other irrigation ditches or sources not shown on the Roaring Lion Estates plat. Trial Tr., at 739:20–740:2; *see* Pls.' Ex. 19; *see also* Defs. HHH (Anderson's master irrigation plan for the subdivision which states all irrigation water for the subdivision is to be exclusively delivered by the ditch shown in the plan and plat).

In 2007, Jeff Burrows "(Burrows"), a Ravalli County commissioner who previously was an environmental engineer and chair to the Ravalli County Board of Health, moved onto property directly north of Lots 1 and 2 of Roaring Lion Estates while Anderson still owned the property. Trial Tr., at 504:4–14. Burrows' property, like Overmans' property, is served by Roaring Lion Creek via a branch of the Decker Ditch. Trial Tr., at 458:14–459:2.

In 2009, Burrows began managing the Decker Ditch from his property all the way back to the headgate on Roaring Lion Creek. *Id.* at 464:2–13. Thereupon, Burrows observed Overmans never sent water eastward to Anderson and, instead, Anderson had abandoned ditches to pass groundwater monitoring tests. *Id.* at 464:14–22. Burrows testified that the Overmans had a mechanism that would allow them to water the lower part of their lawn via a swale in Overmans' yard and anytime Overmans were going to water the lower part of their lawn and trees, they would contact Burrows to make sure it was approved. *Id.* 469:2–470:5.

By 2010, Burrows was the most active ditch manager of the Decker Ditch, and he cleaned the ditch from the headgate through the Overmans' property to his property, and apportioned water down the ditch for its users. *Id.* at 459:9–461:8. Burrows testified that since 2010, he has remained the most active ditch manager of the Decker Ditch and only delivers water to Overmans, Dr. Butch Ashcraft, Marty Lawrence, and himself. *Id*. at 461:9–22. Burrows continues to be the ditch operator to this day. *Id.*

Prior to selling any of the subdivision lots, Anderson and his sons built a rock wall along the western boundary of Lot 1—the boundary shared with Overmans—on his side of the property line. Trial Tr., at 736:19–22; 737:5–10. While building that rock wall, Anderson did not come across any ditch coming from Overmans' property to his property. *Id.* In 2010, Anderson sold Lots 1 and 2 of Roaring Lion Estates (i.e., Apecellas' property) to Richard Kelm and Anderson testified that during that sale, there was not a ditch running from Overmans' property to what would be Kelm's property. Trial Tr., at 741:1–10.

IV. 2010 to 2020: Appellees' predecessor, Richard Kelm, failed to maintain or enforce a ditch easement across Appellants' property and recognized Appellants' exclusive control of their ditches.

Apecellas' predecessor, Richard Kelm ("Kelm"), had his perpetuation deposition taken on July 5, 2023, and the deposition was submitted as testimony at trial. Kelm testified that he owned and lived at Lots 1 and 2 of Roaring Lion

Estates from 2010 to 2020. Dep. Richard Kelm at 7:5–8; 40:24–41:4, July 5, 2023. Burrows was familiar with Kelm and helped him on different occasions including when Kelm first moved onto his property in 2010. During the different stints Burrows assisted Kelm, Burrows never saw water coming from Overmans' property onto Kelm's property. Trial Tr. at 467:11 –469:1. Burrows testified that Kelm informed Burrows at one point that he was upset he was not getting water from Overmans' property. *Id.* at 470:12–471:7. Burrows stated that when Kelm started complaining about not having enough water, Burrows and Larry Robinson ("Overmans" or "Appellant" or "Robinson") agreed that historically, water did not flow through Overmans' property to Apecellas' property. *Id.* at 477:14–22.

Burrows testified that since taking over as the main ditch operator in 2010, he walks the Decker Ditch starting at the headgate on Roaring Lion Creek down to his property weekly to perform maintenance and clean the ditch and continues to do so to the present day. *Id*. at 486:23–487:16. Burrows further testified that in managing the headgate and flume, Burrows sets the headgate to be open to the same degree every year. *Id.* at 488:1–9. Burrows testified that—when performing his ditch duties—he walks Overmans' property a couple times a month. *Id.* at 489:13–17. While performing these duties, Burrows never saw water travel to Kelm's property from the Overmans' property and Burrows never allocated Anderson or Kelm any water. *Id.* at 474:19–25; 478:20–479:11.

Kelm testified that when he purchased the property in 2010, water was flowing in a ditch from Overmans' property through a pipe in a rock wall that divided his property from Overmans' property on its western border. Dep. Kelm at 9:5–10:11. However, Anderson stated that the metal pipe in his rock wall was not there the whole time he owned Kelm's property. Trial Tr. at 736:23–737:4. Further, Kelm testified that he installed an underground pipeline on his property to get water from Overmans' property but did not testify that there was any open ditch on his property accepting water from Overmans' property. Dep. Kelm at 25:5–11.

Robinson testified that he installed a pipe in the rock wall to temporarily send Kelm some water. Trial Tr., at 836:9–20; *see id.* at 359:9–18. Robinson asserted that when Kelm moved onto his property in 2010, Kelm did not ask for water from Overmans in that first year. *Id.* at 828:10–19. Robinson stated that Kelm approached him in Spring 2013 and asked for 400 plus gallons per minute ("GPM") of water from Overmans' ditch because his pond was running dry, and his trees were dying. *Id*. at 828:24–829:16. After calling Burrows, Robinson decided to give some of his water to Kelm, but, when Robinson started running water east, it pooled up at the rock wall and soaked into the ground, so Robinson installed a six-inch pipe underneath the rock wall. *See id.* at 830:6–831:7. Robinson contended—and Kelm confirmed—that he only allowed the water to

flow to Kelm for three to five days. *Id.* at 831:8–11. Robinson then stopped sending water to Kelm and left for work out of town. Trial Tr., at 836:9–20; *see id.* at 359:9–18 (where Turek testified that Robinson removed the pipe in the rock wall and Kelm put another pipe in).

Kelm testified that he had only two conversations with Overmans about his lack of Decker Ditch water. *Id*. at 90:4–19. On the first occasion, Kelm testified that he spoke with Lillian Overman while Robinson was away at work. *Id.* at 71:25–73:3. There, Kelm explained that he alluded to not getting water to Overman and Overman offered to give him some water. *Id*. at 72:24–73:3. When Kelm went to open the Overman headgate[4], Overman protested that he was letting too much water through and in response, Kelm closed the headgate to only allow a little bit of water flow across Overmans' property onto his property. Dep. Kelm at 72:6–72:23. Following this interaction with Overman, Kelm never tried to open the headgate again nor did Overman deliver any water to Kelm. *Id.* at 73:24–74:5. The second time Kelm spoke about his lack of water with Overmans was with Robinson, who informed Kelm that the lack of irrigation water was Kelm's problem. *Id.* at 90:4–19. Kelm never asked Robinson to open the headgate

[4] In the context of the control valve on Overmans' property, Kelm refers to the control valve as a headgate in his deposition whereas Robinson often refers to it as a control valve.

following their brief conversation nor did Kelm attempt to open it himself. *Id.* at 96:19–97:3.

Kelm testified that he did not receive water from Overmans' ditch beginning in 2013 and had to solely irrigate with spring water and a pond on his property. Dep. Kelm at 13:10–17; 83:2–7; 38:24–39:4. According to Kelm, Robinson fully controlled Overmans' ditch and any flow of water to Kelm's property with a headgate/metal valve. *Id.* at 71:14–24. Kelm also stated that Overmans used all the water before it got to his property to water their property. *Id.* at 70:1–3.

When the water issues between Kelm and Overmans came to a head in 2013, Kelm contacted an attorney—Tonya Bumbarger—in July 2013 to send a demand letter to Overmans. *Id.* at 20:13–21; *see also* Defs.' Ex. X. The letter demanded Overmans send the "entire share of Water Right No. 76H- 2506- 00 [(404 GPM)]" from their ditch into Kelm's property and Overmans had ten days to "restore the flow of water to the Kelm property[.]" Defs.' Ex. X. Robinson further testified that he did not officially respond to Kelm's demand letter and ceased sending Kelm any of Robinson's water up to when Kelm sold his property in December 2020. Trial Tr., at 841:14–842:5.

In 2014, Kelm contacted another attorney—David Markette—to get water from Overmans; however, nothing but a letter seeking more information came from that interaction. Dep. Kelm at 91:16–18; *see* Defs.' Ex. Z (where Markette

stated: "there may have been some alterations and relocations [of Kelm's ditches] over time"). Kelm never pursued further legal action to get water from Overmans and received no irrigation water from Overmans from at least late 2013 through 2020. *Id*. at 95:23–25; 82:20–22. Instead, Kelm decided to install alternative forms of irrigation including underground sprinklers and a pump in the pond on his property. *Id.* at 46:11–21; 47:4–21.

Kelm later testified that—following the water dispute with Overmans in Fall 2013—he would receive a trickle of water off and on through the pipe in the rock wall on the western boundary of his property. *Id.* at 32:14–23; 66:19–23; 69:7–13; 71:3–7; 76:23–25; 78:15–21; 104:20–24. Kelm clarified that: (1) the trickle would occur year-round (outside the irrigation season and outside the period of use of Overmans' and Kelm's water rights); (2) he could not irrigate with the trickle of wastewater; and (3) the trickle of wastewater occurred even when Overmans' control valve was shut. *Id.* at 78:15–21; 104:20–24; 76:23–25; *see also* Defs.' Ex. K at 5 (where Burrows stated that he only ever saw Overmans' wastewater make its way onto Apecellas' property since operating the Decker Ditch starting in 2007).

Kelm testified that when he sold the property in 2020, there was no water in the ditch coming from Overmans' property. Kelm unequivocally stated that his water was cut off and controlled by Overmans from 2013 up to when he sold his

property at the end of 2020. Dep. Kelm 100:7–12. Kelm also testified that he informed Apecellas he was unable to irrigate with the trickle of wastewater flowing from Overmans' property. *Id*. at 104:20–24. Apecellas previously confirmed Kelm never received water following the demand letter to Overmans. Trial Tr., at 83:16–19 (citing Dep. Frank Apecella 77:11–18, Feb. 7, 2022 ("Defs.' Ex. QQ")).

V. <u>2020 to Present</u>: Appellees did not observe a ditch easement on Appellants' property upon moving onto their property.

Apecellas were not aware of how the water rights worked on his property when he purchased the property but began investigating the irrigation of his property in Spring 2021. Trial Tr. at 28:13–17; 29:8–15. Apecellas hired Turek to investigate their water rights. *Id.* at 43:11–15. Turek only walked the ditch on Overmans' property and never walked the southern lateral of the Decker Ditch on Lou Boom's property. *Id*. at 245:14–19; 421:2–422:2. Further, Turek never called Anderson or Burrows to discuss the historic use of water on Apecellas' property. *See id.* 392:22–394:11 (where Turek states she only reviewed affidavits and the depositions of Burrows and Anderson). Following Turek's investigation, Mr. Apecella spoke to Overmans regarding his water rights and that Robinson called Burrows to inform Burrows that he was going to give some water to Apecellas. *Id.* at 56:8–22; 57:21–23. Mr. Apecella then testified that Robinson opened a valve on

his ditch that allowed water to flow eastward towards Apecellas' property. *Id.* at 58:6–18.

Mr. Apecella testified that Overmans' ditch running eastward was not filled in when he walked the property with Kelm; however, Kelm testified that Overmans' ditch was filled in when he walked the property with Mr. Apecella in Spring 2021. *Compare* Trial Tr., at 90:16–19, *with* Dep. Kelm at 100:13–18. Robinson confirmed that he gave some water to Apecellas (across three to five days) in 2021 after discussing it with Burrows. Trial Tr., at 842:18–843:5. Mr. Robinson then stated he ceased sending water to Apecellas when he discovered that his ditch and been messed with and widened while he was away. *Id.* at 843:17–844:22.

Apecellas then contact Turek who sent a demand letter to Overmans on June 8, 2021, and when Overmans did not respond, Apecellas filed suit on June 21, 2021 alleging Overmans interfered with Apecellas' ditch easement and caused damage to Apecellas' property.

SUMMARY OF ARGUMENT

A party is only entitled to an award of attorney fees pursuant to § 70-17-112(5), MCA, where the party prevails "on all claims raised pursuant to this statute." *Engel v. Gampp*, 2000 MT 17, ¶ 40, 298 Mont. 116, 993 P.2d 701. Where a party provides no independent legal basis for his claims, his other claims may be

found to be embedded with the arguments brought under § 70-17-112, MCA. *See Musselshell Ranch Co. v. Seidel-Joukova*, 2012 MT 222, ¶ 21, 366 Mont. 337, 286 P.3d 1212. Thus, when a party fails on those embedded claims, he is not a prevailing party under § 70-17-112(5), MCA. *Id.* ¶ 27.

Here, Apecellas failed to prevail on their asserted intentional interference with property rights and private nuisance claims. Specifically, Apecellas asserted under their intentional inference with property rights claim Overmans' actions in interfering with the ditch easement were "willful and malicious acts" that "continue to [ ] result in injury to [Apecellas'] property and loss of crops for which they are entitled to punitive damages in an amount to be determined at trial." Pls.' Compl. ¶ 24, June 21, 2021, Dkt. 1. Regarding Apecellas' private nuisance claims, they asserted that Overmans' failure to abate the interference with their ditch easement rendered Overmans "liable to the Plaintiffs for damages[.]" *Id.* ¶ 27.

Apecellas did not succeed on the claims that Overmans' actions of ditch interference were willful and malicious and that Overmans' alleged interference and nuisance caused damage to Apecellas and their property. Therefore, Apecellas failed to prevail on all their claims tied to their claim brought under § 70-17-112, MCA, and are not entitled to attorney fees. *Musselshell Ranch,* ¶ 27.

Further, under § 70-17-111, MCA an easement is extinguished by "the performance of any act upon either tenement by the owner of the servitude or with

the owner's assent that is incompatible with its nature or exercise[.]" *Supra*. This Court has held that "[e]xtinguishment of an easement through adverse use by the owner of the servient tenement is determined by applying the principles that govern acquisition of title by adverse possession and acquisition of an easement by prescription: open, notorious, exclusive, adverse, continuous and uninterrupted use for the full statutory period." *Halverson v. Turner*, 268 Mont. 168, 174, 885 P.2d 1285, 1290 (1994) (internal citations omitted).

Here, the district court disregarded the clear record before it. From at least 2005 through 2020, multiple witnesses including Robinson, Burrows, Anderson, and Kelm confirmed that Apecellas' property did not receive water through an easement on Overmans' property and if an easement had existed, the easement was either abandoned by Apecellas' predecessors or extinguished by Overmans' reverse adverse possession of the easement. The district court and Apecellas offered little to no evidence contradicting that Anderson did not use any ditch easement from Overmans' property. The district court also failed to recognize Kelm failed to use the easement and instead recognized Overmans' explicit control of their irrigation system for longer than 5 years.

Rather than address Overmans' assertion of reverse adverse possession, the district court included some relevant caselaw in its FOFCOL and then neglected to write a conclusion of law stating how Overmans failed to meet their burden and

whether any of the elements were met. *See* Court's FOFCOL, at ¶¶ COL 21–23, March 18, 2024, Dkt. 112. The district court's failure to both analyze much of the testimony and examine whether Overmans demonstrated reverse adverse possession is clearly erroneous.

For these reasons, the Court should reverse the district court and conclude: (1) Apecellas are not entitled to their attorney fees; (2) Apecellas failed to establish a ditch easement over Overmans' property was not adversely possessed or abandoned; and (3) where Apecellas failed to establish a ditch easement, Overmans are entitled to their attorney fees under § 70-17-112(5), MCA.

STANDARD OF REVIEW

I. Attorney fees under § 70-17-112(5), MCA.

This Court "review[s] for correctness a district court's decision as to whether legal authority exists to award attorney fees." *Musselshell Ranch*, ¶ 10 (citing *Benintendi v. Hein*, 2011 MT 298, ¶ 16, 363 Mont. 32, 265 P.3d 1239). This Court also "review[s] for an 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).

II. Determination of whether a ditch easement exists.

This Court "review[s] for clear error a district court's findings of fact." *Roland v. Davis*, 2013 MT 148, ¶ 21, 370 Mont. 327, 302 P.3d 91 (citing *Boyne USA, Inc. v. Spanish Peaks Dev., LLC*, 2013 MT 1, ¶ 28, 368 Mont. 143, 292 P.3d 432). "Clear error exists if substantial credible evidence fails to support the findings of fact, if the district court misapprehended the evidence's effect, or if we have a definite and firm conviction that the district court made a mistake." *Id.* (citing *Boyne USA*, ¶ 28). This Court "review[s] for correctness a district court's conclusions of law." *Id.* (citing *Boyne USA*, ¶ 28).

ARGUMENT

I. Appellees are ineligible for an award of attorney fees under § 70-17-112(5), MCA.

During trial, Apecellas failed to assert that Overmans' interference with Apecellas' irrigation easement rose to the level of a private nuisance or was of an intentional nature sufficient to justify a claim for intentional interference with a property right. Apecellas recognized their failure to prosecute these two claims and completely excluded any basis for the claims from their post-trial FOFCOL filed March 4, 2024. Therefore, because Apecellas failed to prevail on all claims associated with their claim brought under § 70-17-112, MCA, Apecellas are not entitled to an award of attorney fees under § 70-17-112(5), MCA.

A. Because Appellees failed to prevail on all claims brought pursuant to their underlying ditch interference claim, Appellees are ineligible for attorney fees under § 70-17-112(5), MCA.

In *Engel* the Court held that "[i]n order to be deemed a 'prevailing party' for the purposes of § 70-17-112(5), MCA, […] a party must successfully prevail on *all* claims raised pursuant to [§ 70-17-112, MCA]." *Supra*, 2000 MT 17, ¶ 40, 298 Mont. 116, 993 P.2d 701 (emphasis in original). Here, Apecellas "provided no independent legal basis for th[eir] [two alternate] claim[s]; [rather,] th[eir] allegation[s] w[ere] embedded within [Apecellas'] arguments under § 70-17-112, MCA, without distinction from the remaining [ ] arguments." *Musselshell Ranch*, ¶ 21. "There is no support, therefore [ ] for a conclusion that [their two claims] w[ere] posited under [ ] separate and distinct legal theor[ies]." *Id*.

On June 21, 2021, Apacellas filed their Complaint alleging various claims under the exact same facts and legal issue of whether Apecellas had a ditch easement across Overmans' property for irrigation. Pls.' Compl. ¶¶ 17–21. Tied to that legal issue were two complimentary claims seeking the district court declare Overmans' alleged interference with the ditch also amounted to a private nuisance and an intentional interference with a property right. *Id.* ¶¶ 22–27. These complimentary claims included claims for damages for the destruction of Apecellas' real property and for crop loss. These two claims existed in Apecellas'

case-in-chief all the way to the pretrial conference and second FOFCOL filed on the eve of trial. *See* Pls.' 2nd FOFCOL at 26, ¶ 29.

Apecellas did not attempt to prosecute their private nuisance or intentional interference with property right claims. Not only did Apecellas fail to assert legal issues pertaining to their private nuisance and intentional interference with a property right claim during trial and after in their post-trial FOFCOL, Apecellas never asserted in trial that Overmans acted willfully and maliciously in interfering with Apecellas' easement as alleged in the Complaint. It is now impossible for Apecellas to argue that Overmans' alleged interference with their irrigation easement was intentional as opposed to negligent or rose to the level of a private nuisance that caused damage to their property. Therefore, because Apecellas "did not prevail on *all* claims […] [they are] not entitled to fees and costs under § 70-17-112(5), MCA." *Id*. ¶ 27 (emphasis in original).

B. Where Appellees failed to obtain an easement of the scope sought, Appellees cannot be deemed to have prevailed on all claims under § 70-17-112, MCA.

Apecellas sought an easement across Overmans' property to convey the totality of Water Right No. 76H 2506-00 (i.e., 403.92 GPM)). Overmans contended that if the ditch easement used to convey 403.92 GPM across their property had existed, it was abandoned or extinguished by reverse adverse possession. The district court determined that the pipe in the rock wall located

solely on Apecellas' property—outside the alleged easement—limited the easement sought by Apecellas. Specifically, the district court held that "due to the limited flow allowed by the pipe, which has been in place for more than 5 years, the burden on the Overman Property imposed by the Apecella easement is limited to allowing the maintenance of the Ditch in Question sufficient to convey only the volume of water that can flow through the pipe." Court's FOFCOL ¶ 52. Defendants' expert, Lee Yelin ("Yelin"), was the only individual who supplied any measurements of the pipe in the rock wall's flow and found it could only convey 29-32 GPM—a fraction of what Apecellas sought to convey through the ditch. *See* Defs.' Exs. O; EE.

The district court, in its order, later elaborated that "Plaintiffs' right to use the Ditch in Question to convey more water than can be conveyed through the pipe was abandoned." *Id.* ¶ 169. In declaring the majority of Apecellas' easement abandoned, the district court determined that one of Overmans' defenses was correct. Therefore, Apecellas are not the prevailing party under § 70-17-112(5), MCA.

Similarly, in *Knudsen v. Taylor*, the court found that where "each [party] sustained damages by reason of the other party's failure to grasp fully their respective rights and responsibilities concerning the ditch" created "a victory and a loss for both sides." *Supra*, 211 Mont. 459, 463, 685 P.2d 354, 357 (1984).

Therefore, the court determined "that the District Court was correct in finding in effect there was no prevailing party in the cause in the contemplation of Section 70-17-112(5), MCA, and properly denied attorney fees." *Id*. 464, 685 P.2d 357.

Just as in *Knudsen*, the district court determined that neither Apecellas or Overmans fully grasped the easement rights in contention and then found both that Overmans were correct that some aspect of Apecellas' easement was abandoned and Apecellas were incorrect as to the scope and use of their easement. Therefore, under § 70-17-112(5), MCA, neither party is the true prevailing party and are entitled to attorney fees where Apecellas have a ditch easement.[5]

II. Appellees failed to establish a ditch easement across Appellants' property.

A. Any ditch easement held by Appellees or their predecessors was extinguished by reverse adverse possession.

Though the district court's conclusions of law make mention of the elements of reverse adverse possession, the district court fails to apply any facts to the elements and fails to discuss whether Overmans made showing or not of any of the

[5] Where this Court overturns the district court's finding that Apecellas have an easement across Overmans' property, Overmans are entitled to an award of their reasonable attorney fees under § 70-17-112(5), MCA. In *Boylan v. Van Dyke*, this Court determined that where a plaintiff fails on all claims brought pursuant to § 70-17-112, MCA, the defendant is entitled to attorney fees under § 70-17-112(5), MCA. *Supra*, 247 Mont. 259, 267, 806 P.2d 1024, 1029 (1991). Therefore, where Apecellas' ditch easement is reversed by this Court, Overmans are entitled to their reasonable attorney fees as the prevailing party.

elements. *See* Court's FOFCOL ¶¶ 21–22. Though Apecellas could not refute the testimony of Kelm, Anderson, and Burrows—specifically regarding the nonuse of the easement from 2005 to 2020—the district court still failed to even consider reverse adverse possession. The district court's FOFCOL provides no conclusions of law regarding reverse adverse possession thus, this Court has no conclusions to review for correctness. Further, 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. The district court committed clear error in its findings of fact and failed to provide adequate conclusions of law for review. Therefore, the district court committed clear error and should be reversed.

The district court's failure to recognize that any possible ditch easement across Overmans' property was extinguished by reverse adverse possession is clearly erroneous because it misapprehended the effect of evidence presented at trial. This Court has held that "[e]xtinguishment of an easement through adverse use by the owner of the servient tenement is determined by applying the principles that govern acquisition of title by adverse possession and acquisition of an easement by prescription: open, notorious, exclusive, adverse, continuous and uninterrupted use for the full statutory period." *Halverson*, 268 Mont. at 174, 885 P.2d at 1290 (internal citations omitted). The statutory period is five years. *See* §

70-19-413, MCA. This Court has "consistently followed the rule that open, notorious, continuous, uninterrupted and exclusive use raises a presumption that the use was also adverse." *Ray v. Nansel*, 2002 MT 191, ¶ 23, 311 Mont. 135, 53 P.3d 870 (citing *Albert v. Hastetter*, 2002 MT 123, ¶ 20, 310 Mont. 82, 48 P.3d 749).

Each of these elements must be proven by clear and convincing evidence. *Brimstone Mining, Inc. v. Glaus*, 2003 MT 236, ¶ 37, 317 Mont. 236, 77 P.3d 175 (internal citation omitted). "The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt." *Wareing v. Schreckendgust*, 280 Mont. 196, 206, 930 P.2d 37, 43 (1996) (internal quotations omitted).

Overmans' use of the ditch on their property was open and notorious. Anderson and Kelm knew or should have known of Overmans' obvious use and control of their ditch. "Open and notorious use can be established by showing that the condition of use was so obvious that the owner was not deceived and should have known of the claimant's use." *Hastetter*, ¶ 21 (internal citations omitted). Here, Overmans openly irrigated their property with the ditch at issue during the irrigation season to where Anderson should have been on notice of Overmans' use. *See* Trial Tr., at 736:19–22; 737:5–10 (where Anderson discusses building the rock

wall at the boundary with Overmans' property well within view of Overmans' irrigation system and never saw a ditch heading to his property).

Apecellas did not dispute Overmans' control and use of their ditch was patently obvious but instead asserted Overmans never told Kelm they sought to adversely possess his ditch easement. *See* Court's FOFCOL ¶ 102. Though this is not the standard, Kelm had actual knowledge of Overmans' use and control of the ditch. Kelm sought legal help to cease Overmans' open and notorious use but eventually gave up and allowed Overmans to exclusively control the ditch and cut off all irrigation to Kelm. *See* Dep. Kelm at 26:15–22, 44:23–25, 72:14–74:5, 76:12–18, 77:11–13, 87:22–23, 90:2–19 (where Kelm admits: (1) talking to Overmans about his water being cutoff; (2) Overmans controlled the water with a headgate; (3) never entering the easement to turn the headgate on; and (4) Overmans continued to prevent Kelm from irrigating after Kelm sent them a demand letter).

Overmans' use of their ditch was exclusive. "Exclusive use does not mean that no one else may use the claimed roadway except the easement claimant. Instead, the element requires only that the claimant's right of use does not depend on the like right in others." *Hastetter*, ¶ 24 (internal citations omitted). Overmans demonstrated exclusive use and control of their ditch. Where Kelm was given permission to take a little water, Overman instructed him to take less than he

initially attempted to take. Dep. Kelm at 72:6–72:23. Further, Overmans enforced their claim of right to the ditch by preventing Kelm from entering the ditch and diverting water to his property or interfering with Overmans' use of the ditch for almost 10 years. Dep. Kelm at 87:22–23, 90:2–19. Kelm admitted that Overmans took all of the irrigation water and controlled the ditch via headgate/control valve on Overmans' property. Dep. Kelm at 104:20–24, 26:15–22, 87:22–23, 90:2–19.

Overmans' use of the ditch was continuous and uninterrupted. "Continuous use [such as will establish right-of-way by prescription] does not mean constant use. Rather, if the claimant used the right-of-way whenever he desired, without interference by the owner of the servient estate, the use was continuous and uninterrupted." *Cook v. Hartman*, 2003 MT 251, ¶ 29, 317 Mont. 343, 77 P.3d 231 (internal quotations omitted). Continuous and uninterrupted use must occur for the five-year statutory period. *See* § 70-19-404, MCA. Neither Anderson or Kelm prevented Overmans from their exclusive use of the ditch on their property. Instead, Anderson did not irrigate with the ditch whatsoever, and Kelm never attempted to open the headgate/control valve on Overmans' property without permission from Overmans. *See also Morrison v. Higbee*, 204 Mont. 515, 521, 668 P.2d 1025, 1028 (1983) (where the Court found that a party's "subsequent actions of asking permission to use [a] ditch and of signing [a] license agreement [were]

incompatible with the nature of a prescriptive easement[;]" thus, the easement was extinguished under § 70-17-111(2)(c), MCA.

Lastly, although adverse use may be presumed, Overmans' use of the ditch was adverse to the interests of Anderson and Kelm. "To be adverse, the use of a claimed right must be hostile and not permissive." *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991) (internal citation omitted). Overmans did not seek the permission of Anderson or Kelm to use the ditch on their property. Instead, Overmans actively controlled the ditch and associated control valve contrary to the interests of Kelm and prevented Kelm from using the ditch for well over 5 years. *See* Dep. Kelm at 26:15–22, 44:23–25, 72:14–74:5, 76:12–18, 77:11–13, 87:22–23, 90:2–19.

Further, though Kelm asserted that he always received a trickle of water (even when Overmans were not irrigating and outside the period of use for Overmans' and his water rights), Kelm did not overcome Overmans' reverse adverse possession. In *Letica Land Co., Ltd. Liab. Co. v. Anaconda-Deer Lodge Cnty.*, this Court concluded that the public's occasional cutting of fences and use of the upper branches of the disputed road was "not sufficient to conclude that reverse adverse possession did not extinguish the claimed prescriptive easement." *Supra,* 2015 MT 323, ¶ 45, 381 Mont. 389, 362 P.3d 614 (citing *Dome Mt. Ranch v. Park Cnty.*, 2001 MT 289, ¶¶ 24–25, 307 Mont. 420, 37 P.3d 710).

Here, Kelm's occasional trickle of water is not sufficient to overcome Overmans' reverse adverse possession. *Id.* Similarly, Mr. Kelm's: (1) acquiescence to permissive use of Overmans' ditch; (2) inability to irrigate with the alleged irrigation easement; and (3) failure to enforce his easement rights for over 5 years; represent acts incompatible with the nature of the ditch easement and therefore extinguish the easement under § 70-17-111(2)(c), MCA. *See e.g. Dome Mt. Ranch*, ¶ 25 (where this Court found acquiescence to locked gates extinguished the public's easement); *Pub. Lands Access Ass'n v. Boone & Crockett Club Found.*, 259 Mont. 279, 291, 856 P.2d 525, 532 (1993) (where the public's acquiescence to a walk in program paved way for reverse adverse possession); *Morrison*, 204 Mont. at 521, 668 P.2d at 1028 (where a party's acquiescence to permissive use of a ditch extinguished the underlying easement).

The district court committed clear error where it misapprehended the effect of the evidence and neglected to even discuss Defendants' claim of reverse adverse possession. Further, the district court neglected to apply the undisputed testimony of Anderson, Burrows, and Kelm—especially regarding the years 2005 through 2020. Because Apecellas cannot dispute the nonexistence and nonuse of the ditch easement from as early as 2005 through 2020, this Court should reverse the district court and determine Overmans extinguished any ditch easement on their property by reverse adverse possession.

B. Any ditch easement held by Appellees or their predecessors was abandoned.

The Boldts' attempt at drying out his property; Anderson's intent to use the single ditch on the subdivision plat for irrigation; and Kelm's acquiescence to Overmans' control of their ditch and alternative irrigation strategies all represent voluntary acts demonstrating intent to abandon use of a ditch on Overmans' property. *See* Dep. Kelm at 46:11–21; 47:4–21. The district court's failure to consider abandonment of the ditch easement is clearly erroneous and should be reversed by this Court.

By the time Anderson moved onto the property that would eventually become the Apecellas, there was no evidence of a ditch coming from Overmans' property to Apecellas' property. Instead, Anderson and Burrows confirmed that the alleged ditch was gone by at least 2007 if not 2005. The actions of Kelm further bolstered the nonexistence of an open ditch as he had to install an underground pipeline so the temporary water from Overmans would not fan out across the property. Because of the non-existence of the ditch in 2005 and the Boldts' attempts to dry out the property for subdivision, the ditch easement was abandoned.

"In order for there to be abandonment there must be an intent to abandon. An intent to abandon has not been found from mere nonuse. Abandonment means a voluntary act involving a concurrence of act and intent. The act is the

relinquishment of possession and the intent is a manifestation not to resume beneficial use of it. Neither of the elements alone is sufficient." *Rieman v. Anderson*, 282 Mont. 139, 145, 935 P.2d 1122, 1126 (1997) (internal quotations omitted). "The party claiming abandonment must prove that the 'acts claimed to constitute the abandonment [are] of a character so decisive and conclusive as to indicate a clear intent to abandon the easement.'" *Rieman*, 282 Mont. at 145-46, 935 P.2d at 1126 (quoting *City of Billings v. O.E. Lee Co.*, 168 Mont. 264, 268, 542 P.2d 97, 99 (1975)).

Like in *Rieman*, Mr. Boldt intended to subdivide his property thus he attempted to dry his property out. *See supra* 282 Mont. at 146, 935 P.2d at 1126 (where an easements owner drying out his property and subdividing was proof of intent to abandon a ditch easement). Further, by the time Mr. Boldt sold his property to Anderson, Mr. Boldt was not irrigating his property, which ran contrary to Mr. Boldt's alleged, historical use of the ditch easement. *See* Defs.' Ex. DD. Anderson then continued not to irrigate the property to subdivide it. Following subdivision, it was Anderson's intent to use only the ditch shown on the final plat of Roaring Lion Estates. *See* Pls.' Ex. 19. Whether Anderson can exhibit the necessary intent to abandon a ditch he never knew about is a novel question for this Court. However, given Anderson saw no proof of the ditch easement when purchasing the property, never attempted to use it, and identified all irrigation

water as sourced from south of the property, it is clear that the ditch was abandoned as early as 2005; filled in prior to Anderson's ownership; and not used for any purpose throughout his ownership.

Then Kelm took over the property and acquiesced to Overmans' control and exclusive use of the ditch thus demonstrating "relinquishment of possession" and thus abandonment of the ditch easement. *Rieman*, 282 Mont. at 145, 935 P.2d at 1126. Kelm demonstrated the requisite intent by his "manifestation not to resume beneficial use of" the ditch. *Id.* Specifically, Kelm: (1) intended to not pursue challenging Overmans' use of the ditch; (2) acquiesced to requesting Overmans' permission to use the ditch; and (3) invested in separate irrigation equipment to water his property from other sources. Dep. Kelm at 82:13–17, 72:6–72:23, 73:24–74:5, 46:11–21.

The acts of the Boldts, Anderson, and Kelm, all demonstrate a clear intent to abandon any ditch easement on Overmans' property. Therefore, this Court must reverse the district court for its failure to apply the full effect of the substantial evidence.

CONCLUSION

For these reasons, this Court should reverse the district court and conclude that Apecellas are not entitled to attorney fees under § 70-17-112(5), MCA, and

Apecellas did not properly establish a ditch easement as any easement was lost to reverse adverse possession or abandonment.

DATED this 27th day of January, 2025.

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CERTIFICATE OF COMPLIANCE:

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 8,777 including footnotes.

/s/ Rick C. Tappan

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