IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause Nos. DA 24-0656 and DA 25-0072

TROUT UNLIMTED,

Objector/Appellant/Cross-Appellee,

v.

PETRICH FAMILY LIMITED PARTNERSHIP,

Claimant/Appellee/Cross-Appellant.

TROUT UNLIMTED,

Objector/Appellant/Cross-Appellee,

v.

JIM MELIN,

Claimant/Appellee/Cross-Appellant.

On Appeal from the Montana Water Court
Cause Nos. 43B-0354-R-2021 and 43B-0148-R-2020
Hon. Stephen R. Brown, Associate Water Judge Presiding

APPELLEES/CROSS-APPELLANTS' ANSWER AND CROSS-APPEAL OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Did the Montana Water Court correctly generate implied claims?
2. Did the Montana Water Court err in granting Trout Unlimited's motions for summary judgment limiting Appellees' periods of use and diversion to May 1 to July 15?
3. Did the Montana Water Court err in finding Trout Unlimited satisfied its standing requirements?

STATEMENT OF THE CASE

This appeal involves general adjudication cases from the Montana Water Court's Preliminary Decree in Basin 43B (Yellowstone River and its tributaries until, and including, Bridger Creek). The claimants of the water rights at issue are Jim Melin ("Melin") and the Petrich Family Limited Partnership ("Petrich") (collectively "Appellees").

The Preliminary Decree was issued on May 9, 2019, and the objection deadline was December 5, 2019. Trout Unlimited ("TU") objected to Appellees' claims and was the only party to do so. There were no counterobjections or notices of intent to appear.

Senior Water Master Kathryn L. W. Lambert of the Montana Water Court consolidated Case 43B-0148-R-2020 (Melin) on July 14, 2020, and Case 43B-0354-R-2021 (Petrich) on February 8, 2021. Both cases initially proceeded on

settlement tracks that ultimately proceeded on hearing tracks.

TU filed motions for summary judgment prior to the prehearing motions deadline. TU alleged that the periods of use of Appellees' claims should be reduced to May 1 to July 15 based upon the *Petrich* decree. Both cases were reassigned to Associate Water Judge Stephen R. Brown on September 28, 2022, after the briefing for TU's motions for summary judgment was complete.

The Water Court's resulting orders on summary judgment modified the periods of use and period of diversion of Appellees' claims to May 1 to July 15. The Appellees, on cross-appeal, contest the Water Court's orders on summary judgment.

Both cases proceeded to hearing, and the hearings were conducted in the same week. The hearing for Case 43B-0148-R-2020 was on December 18, 2023, and the hearing for Case 43B-0354-R-2021 was on December 20, 2023. At the conclusion of the hearings, the parties were provided an opportunity to file proposed findings of fact and conclusions of law and one brief in response.

The Court issued its Findings of Fact, Conclusion of Law and Order in Case 43B-0354-R-2021 on October 10, 2024. *See* PR.Doc.38. In its Order, the Court 1) modified the periods of use and diversion of claims 43B 101013-00 and 43B 101014-00 to May 1 to July 15, 2) generated implied claims 43B 30160099 and 43B 30160100, and 3) dismissed the objections to claims 43B 101013-00 and 43B

101014-00. MR.Doc.38, 11-12.[1] The Court additionally found that TU had standing to raise its objections. PR.Doc.38, 8. Both TU and Petrich appeal the Court's October 10 Order. TU's Notice of Appeal was filed on November 6, 2024, and Petrich's Notice of Cross Appeal was filed on November 7, 2025.

The Court issued its Findings of Fact, Conclusions of Law and Order in Case 43B-0148-R-2020 on January 21, 2025. *See* MR.Doc.54. In its Order, the Court 1) modified the periods of use and diversion of claims 43B 194537-00, 43B 194542-00, and 43B 194543-00 to May 1 to July 15, 2) reduced the flow rate of claim 43B 194539-00 to 168.30 gpm, 3) removed the issue remarks from claims 43B 194539-00 and 43B 194543-00; 4) updated the legal land descriptions of claim 43B 194543-00, 5) generated implied claim 43B 30160105, and 6) dismissed the objections to all of Melin's claims. MR.Doc.54, 20-21. The Court additionally found that TU had standing to raise its objections. *Id*. at 15. Both TU and Melin appeal the Court's January 21 Order. TU's Notice of Appeal was filed on January 27, 2025, and Melin's Notice of Cross Appeal was filed on February 10, 2025.

Cases DA 24-0656 and 25-0072 were consolidated on February 12, 2025.

STATEMENT OF THE FACTS

The source of the water rights subject to this appeal is Mill Creek, a tributary

[1] The documents cited from the appellate records are in the following format: "[MR or PR (referencing case)].[Document or Exhibit].[Document Number or Exhibit Number/Letter], [Page]."

to the Yellowstone River. MR.Doc.54, 1; PR.Doc.38, 1. Melin's claim 43B 194543-00 appeared in the Preliminary Decree with June 3, 1963 priority date. MR.Ex.14, 15-17. Petrich's claim 43B 101013-00 appeared in the Preliminary Decree with a June 4, 1963 priority date, and claim 43B 101014-00 was decreed with a June 3, 1963 priority date. PR.Ex.6.

The periods of use and diversion for Melin's claim 43B 194543-00 appeared in the Preliminary Decree as April 1 to October 1. MR.Ex.14, 15-17. Petrich's claims were decreed with April 15 to September 15 periods of use and diversion. PR.Ex.6. The periods of use and diversion of Appellees' claims appeared in the Preliminary Decree exactly how they were claimed by the statements of claim. MR.Ex.6, 7-8; PR.Ex.1, 2-3; PR.Ex.2, 2-3.

Mill Creek has varied flows throughout the year that are heavily dependent on weather conditions. MR.Doc.54, 2; MR.Doc.48, 15-23; PR.Doc.38, 3; PR.Doc.33, 7-19. Generally, the flows in Mill Creek being to rise in May or the middle of June, will remain elevated through and peak in July, and return to baseflow no later than August. *Id*. Some witnesses recalled waters in Mill Creek rising as early as April. MR.Doc.48, 15-23; PR.Doc.33, 7-19. The length of the taper of high flows depends on snowpack and precipitation. MR.Doc.48, 15-23; PR.Doc.33, 7-19. Water supply in Mill Creek has been historically influenced by precipitation events late in the irrigation season that raise the levels in Mill Creek.

MR.Doc.48, 15-23; PR.Doc.33, 7-19.

Petrich decree

All of Appellees' claims at issue were based upon a decree from District Court of the Sixth Judicial District in Cause No. 11616, *Petrich et al. v. Allen et al.* (July 22, 1964) (hereinafter "*Petrich* decree"). MR.Doc.38, 6-7; MR.Ex.6, 7-8, 17-20; PR.Doc.38, 4; PR.Ex.1, 2-3, 7-10; PR.Ex.2, 2-3, 6-9; *see also* MR.Ex.B and PR.Ex.B. The *Petrich* decree was the second of two district court decrees on Mill Creek. MR.Doc.54, 4-6; PR.Doc.38, 3-4. The prior case regarding Mill Creek from the Sixth Judicial District was Cause No. 7833, *Allen et at. v. Wampler et al.* (June 1, 1938) (hereinafter "*Allen* decree"). *See* MR.Ex.A; PR.Ex.A. None of the Appellees' claims at issue are for claims based upon the *Allen* decree.

The *Petrich* decree stated the following in Finding of Fact No. II:

> That the Court finds that during the months of May and June and until approximately the 15th day of July of the normal irrigating season there is flowing in Mill Creek at the headgate of the Mill Creek Flat Ditch approximately 10000 miners' inches of water in excess of the total quantity of water heretofore adjudicated and decreed by this Court in the aforesaid action.

MR.Ex.B, 3; PR.Ex.B, 3 (FOF II). The *Petrich* decree's Conclusions of Law defined the owners, priority dates, and flow rates of the decreed claims. MR.Ex.B, 10-15; PR.Ex.B, 10-15. The *Petrich* decree did not define periods of use or diversion. *Id*.

The *Petrich* decree defined and decreed thirty-five claims. MR.Ex.B, 11-12;

PR.Ex.B, 11-12. The claims decreed in the *Petrich* decree would later become the basis for forty-eight statements of claim. MR.Doc.22, Exs. B and C; PR.Doc.15, Exs. B and C. Of the forty-eight claims based upon the *Petrich* decree, forty-three of those claims appeared in the Preliminary Decree with periods of use and diversion exceeding May 1 to July 15. MR.Doc.22, Ex. C; PR.Doc.15, Ex. C.

Northside Ditch

The Appellees' claims from which implied claims were generated were all historically conveyed in the Northside Ditch. MR.Doc.54, 2-3, 5-6, 11-12; MR.Doc.48, 15-16; MR.Ex.14, 15-17; PR.Doc.38, 3-6; PR.Doc.33, 7-8; PR.Ex.6. The Northside Ditch has historically been limited as to who uses the ditch. Melin and Petrich are two users, in addition to 360 Ranch, LLC and the Art and Catherine Burns Trust. MR.Doc.48, 15-16; MR.Ex.B, 3-5; PR.Doc.33, 7-8; PR.Ex.B, 3-5.

Only *Petrich* decree claims have been historically conveyed in the Northside Ditch. Thus, all claims historically conveyed through the Northside Ditch had 1963 priority, including the claims at issue in this appeal. MR.Doc.48, 15; MR.Ex.B, 3-5; PR.Doc.33, 7; PR.Ex.B, 3-5.

The headgate of the Northside Ditch is located a short distance above the point of diversion for the "pipeline" that serves water users that historically diverted water from Mill Creek Flat and Upland Ditches. MR.Doc.48, 15-17; MR.Ex.17; PR.Doc.33, 7; PR.Ex.9. The conversion of the Mill Creek Flat and

Upland Ditches from open ditches to a pipeline resulted in diversion and conveyance savings that increased availability of water in Mill Creek. MR.Doc.54, 12; MR.Doc.48, 15-17; PR.Doc.38, 6; PR.Doc.33, 7-8.

The Northside Ditch was historically, and prior to 1973, open as early as March and diverted Appellees' water at capacity throughout the entire irrigation season, past July, and into late August and September. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. The Northside Ditch has never been limited to a May 1 to July 15 period of use and diversion. MR.Doc.54, 11-12; MR.Doc.48, 15-23; MR.Ex.6, 7-8; PR.Doc.38, 5-6; PR.Doc.33, 7-20; PR.Ex.1, 2-3; PR.Ex.2, 2-3. The *Petrich* decree's "May 1 to July 15" finding of fact was never limited when Appellees' Northside Ditch rights could be diverted. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20; MR.Doc.22, Ex. C; PR.Doc.15, Ex. C.

Water Commissioners and Junior Priority

Water commissioners have been appointed to Mill Creek from time to time but were not constant. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. The water commissioners would turn off the Northside Ditch at times due to its junior priority. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. However, if supply was sufficient and other water users were satisfied, the water commissioners would turn the Northside Ditch back on.

MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20.

None of the water commissioners administered Northside Ditch water rights as if they were limited to a May 1 to July 15 period of use and diversion. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. The water commissioners administered water rights based on priority date. *Id*. There was one instance in which Jim Patterson, a water commissioner appointed to Mill Creek, turned the Northside Ditch off on or around July 15. MR.Doc.54, 11; MR.Doc.48, 22-23; PR.Doc.38, 6; PR.Doc.33, 12. The district court judge came to inspect the issue and immediately ordered that the Northside Ditch be turned back on. MR.Doc.54, 11; MR.Doc.48, 22-23; PR.Doc.38, 6; PR.Doc.33, 12. Other than this one instance, the Northside Ditch has never been turned off on July 15. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. The Since prior to 1973, Appellees' *Petrich* decree rights have been diverted to their full extent prior to April 1 and after July 15. *Id*.

The Appellees acknowledged the junior priority of their Northside Ditch water rights. MR.Doc.48, 15-23; PR.Doc.33, 7-20. The users of the Northside Ditch have never been contacted or called for water by other users of Mill Creek. MR.Doc.48, 15-23; PR.Doc.33, 7-20. If water was available the point of diversion for the Northside Ditch, the Northside Ditch users, including Melin and Petrich, always diverted and used that water. MR.Doc.48, 15-23; PR.Doc.33, 7-20. If

supply in Mill Creek was insufficient or if other senior water users on Mill Creek requested water, the Northside Ditch would be reduced or turned off later in the irrigation season. MR.Doc.48, 15-23; PR.Doc.33, 7-20. Once water supply in Mill Creek improved or the seniors' water user ceased use, the Northside Ditch would be turned back on. MR.Doc.48, 15-23; PR.Doc.33, 7-20.

STANDARD OF REVIEW

The Water Court's factual findings are reviewed for clear error, and its conclusions of law for correctness. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2104 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644; *Twin Creeks Farm & Ranch Co. v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 21, 407 Mont. 278, 502 P.3d 1080. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the Water Court misapprehended the effect of the evidence, or the Court is left with a definite and firm conviction that a mistake was make. *Skelton Ranch*, ¶ 27. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Twin Creek*, ¶ 21 (citing *Curry v. Pondera Cty. Canal & Reservoir Co.*, 2016 MT 77, ¶ 20, 383 Mont. 93, 370 P.3d 440).

Summary judgment is appropriate only when "the pleadings, the discovery and disclosure material on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter

of law." M. R. Civ. P. 56(c); *Schutter v. State Bd. of Land Comm'rs*, 2024 MT 88, ¶ 7, 416 Mont. 305, 547 P.3d 1250. The Court reviews a grant of a motion for summary judgment by a district court de novo. *Advoc. For Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 5, 408 Mont. 39, 505 P.3d 825. Water Court grants of motions for summary judgment are reviewed under the same standard of review that applies to decisions from a district court. *Marks v. 71 Ranch, LP*, 2014 MT 250, ¶ 13, 376 Mont. 340, 334 P.3d 373.

SUMMARY OF THE ARGUMENT

The Montana Water Court properly determined that the Appellees satisfied all requirements for the generation of implied claims. However, prior to the Water Court's generation of implied claims, the Water Court erred in its interpretation of the *Petrich* decree in granting TU's motion for summary judgment. The Water Court additionally erred when it did not dismiss TU's objections failing satisfy standing requirements.

The Appellees ask this this Court to 1) uphold the Water Court's generation implied claims, 2) reverse the Water Court's orders on summary judgment limiting Appellees' periods of use and diversion to May 1 to July 15; and 3) reverse the Water Court and dismiss TU for lack of standing.

ARGUMENT

TU, Clark Fork Coalition ("CFC"), and Mill Creek Downstream Water

Users ("MCDWU") argue that the Water Court incorrectly applied *Foss* in generating Appellees' implied claims. TU additionally asserts that the Water Court is without the requisite authority to generate implied claims.

The Water Court did not expand the Appellees' use of the Northside Ditch by generating implied claims. The Water Court accounted for the Appellees' uncontested and corroborated pre-1973 use of the Northside Ditch prior to May 1 and after July 15. The Water Court, upon the substantial evidence, correctly applied applicable law by generating implied claims.

On cross-appeal, Appellees appeal Water Court orders on summary judgement. The Water Court, interpreting the *Petrich* decree, found that the periods of use and diversion of Appellees' claims were May 1 to July 15. The Water Court erred in its reading and application of the decree. The Water Court additionally erred in overlooking discrete evidence demonstrating that the *Petrich* decree was not applied as asserted by TU. The Water Court's orders on summary judgment should be reversed.

Lastly, on cross-appeal, Appellees appeal the Water Court's failure to dismiss TU as an objector for failing to satisfy standing requirements. TU adduced no evidence demonstrating that TU had satisfied statutory and common law standing requirements. The Water Court should be reversed.

I. THE MONTANA WATER COURT CORRECTLY APPLIED *FOSS* AND GENERATED IMPLIED CLAIMS.

Since its inception, the Montana Water Court has held the responsibility of defining the extent of historical use of existing water rights. Section 3-7-501(4), MCA (2023); Section 8-2-214, MCA. Inherent in that responsibility is correcting errors claimants made in filing their statements of claim. One tool for the Water Court to ensure that documented historical use was accounted for was the ability to generate implied claims.

The undisputed evidence demonstrates that Appellees' Northside Ditch claims were historically used as claimed on the statements of claim and as the claims appeared in the Preliminary Decree. MR.Doc.54, 11-12; PR.Doc.38, 9-11. TU and CFC assert that Appellees' evidence was "self-serving." *See* Appellant's Opening Brief, 42 (April 10, 2025) (hereinafter "TU Brief"); Brief of Amicus Curiae Clark Fork Coalition, 10 (April 7, 2025) (hereinafter "CFC Brief"). Yet, there is no more credible evidence than those that have lived their whole lives ranching, irrigating, and working as water commissioners. MR.Doc.54, 11; MR.Doc.33, 7-20; PR.Doc.38, 6, 10-11; PR.Doc.48, 15-23.

Foss set out the three mandatory criteria for the generation of implied claims. *See In re Lee E. Foss*, 2013 Mont. Water LEXIS 17 (hereinafter "*Foss*"). First, the implied claim must be justified by some evidence in the claim form or the information filed in support thereof. Second, evidence of actual historical use must exist. Third, the creation of the implied claim will not change historical water use

or increase the burden to other water users. *Foss*, *32.

The adverse parties argue that the Water Court incorrectly found that the *Foss* criteria were satisfied. However, the Water Court's findings were backed by substantial, uncontested, and credible evidence, and the Water Court correctly interpreted and applied the law.

A. The Water Court has Long Held the Authority to Generate Implied Claims from Statements of Claim.

The Montana Water Court has long held the authority to generate implied claims from statements of claim. TU errantly asserts that "the Water Court's custom of creating implied claims appears to have been developed primarily after 2013." TU Brief, 43. TU claims that "28 cases" since 1993 are the basis for the Water Court's jurisprudence for generation of implied claims. TU arguments ignore prior precedent.

Implied claims exist as a "practical solution to the errors commonly found in claims filed as part of the general adjudication process." *Foss*, *31. Statements of claim were required to be filed by June 30, 1983. Section 85-2-212(1), MCA; Section 85-2-221(1), MCA. When statements of claim were filed, substantial confusion resulted from water users committing their historical knowledge of their claims to paper. One common problem "was the inclusion of more than one water right in a single claim." *Foss*, *32.

The Montana Water Use Act ("Act") implemented the Montana

Constitution's directive to "provide for the administration, control, and regulation of water rights" by establishing a centralized system of records. Mont. Const. art. IX, § 3(4); *Hill v. Ellinghouse*, 2024 MT 158, ¶ 34, 417 Mont. 308, 553 P.3d 365. The Act defined "existing rights" as the rights "to the use of water that would be protected under the law as it existing prior to July 1, 1973." Section 85-2-102(3), MCA; *Hill*, ¶ 34. If water users did not file by June 30, 1983, water users risked the unclaimed water right being "conclusively presumed abandoned." Section 85-2-226, MCA; *Hill*, ¶ 34 (citing *In re Yellowstone River*, 253 Mont. 167, 171, 832 P.2d 1210, 1212 (1992)).

The process for filing statements of claim for existing water rights was not always crystal clear. *Hill*, ¶¶ 34-38 ("Use rights existed somewhere outside the express contours of the Prior Appropriation Doctrine and consciousness of water users…"). The generation of implied claims provided the Water Court an ability to ensure that all rights claimed by statements of claim were accounted for. *Foss*, *31-32.

The Water Court has long generated implied claims to account for documented historical use. *See In re Bare*, 1987 Mont. Water LEXIS 7 (January 7, 1987) (hereinafter "*Bare*"). In *Bare*, the claimant had filed a statement of claim for an irrigation claim. *Bare*, *1. On the back of the original statement of claim, the claimant handwrote a note next to the period of use element that read "And

Stockwater all year round." *Id*. The Water Court found that the "handwritten addition to the original Statement of Claim for the irrigation water indicates that the Claimant was using this water for stockwater purposes as well as irrigation use." *Id*. The Water Court, noting that the claim was not exempt from filing, directed the DNRC to generate a stockwater claim from the irrigation claim. *Bare*, *1, *3.

Another example of the Water Court's historical practice of generating implied claims derives from *Dept. of State Lands v. Pettibone*. 216 Mont. 361, 702 P. 2d 948 (1985) (hereinafter "*Pettibone*"). In *Pettibone*, the Court found that water rights that were perfected by lessees of state trust lands and used on state trust lands were property of the State of Montana. *Pettibone*, 216 Mont. at 376, 702 P.2d at 957. *Pettibone* confirmed that a party did not file statements of claim could still participate in the adjudication process and benefit from the generation of an implied claim.

After *Pettibone*, the Water Court began generating implied claims for the benefit of the state. *See e.g. In re Starr et al*., 1988 Mont. Water LEXIS 6 (June 22, 1988) (hereinafter "*Starr*"). In *Starr*, State Lands filed objections to water rights that were used on its lands. *Starr*, *1. To resolve State Lands' objection, the Water Court generated implied claims for those portions of the water rights at issue that were located on and used on property owned by State Lands. *Id*. at *6-*9.

While the precedent of *Pettibone* does not mimic the basis for Appellees' implied claims, it does affirmatively demonstrate two things. One, that implied claims have been utilized by the Water Court to fix discrepancies with how water rights were claimed. Two, the Water Court has been engaged in the practice of generating implied claims since near its inception. TU argues that the Water Court's generation of Appellees' implied claims is some deviation from historical practice. Yet *Pettibone* and *Starr* demonstrate that implied claims can be generated even where a statement of claim was not filed. Under the logic employed by TU, State Lands should have forfeited all of the water rights appurtenant to its lands. *See* Section 85-2-226, MCA; *In re Yellowstone River*, 253 Mont. at 171, 832 P.2d at 1212.

TU opines that because the Appellees did not file use rights for those portions of their statements of claim exceed the *Petrich* decree, Appellees forfeited that use. TU Brief, 23-26. TU argues the Appellees only "obtain 'decreed' water rights." TU Brief, 23.

The Appellees' predecessors in interest unquestionably claimed periods of use and diversion that exceed the *Petrich* decree's asserted May 1 to July 15 limitation. MR.Ex.6, 7-8 ("April 1 to October 1"); PR.Ex.1, 2-3 ("April 15 to Sept. 15"); PR.Ex.2, 2-3 ("April 15 to Sept. 15"). The adverse parties argue that Appellees' predecessors did not file statements of claim for that use outside the

Petrich decree. The Appellees' statements of claim plainly beg to differ. *Id*.

Foss and *Hill* articulate that the claim filing process in Montana was anything but clear. *Foss*, *31-32; *Hill*, ¶¶ 35-37. TU and the amicus parties promote an interpretation of *Foss* that if no claim was filed then no implied claim should be generated. However, this rigid interpretation holds those filing statements of claim to an impossible standard. *Foss*, *31-31. It is undisputed that Appellees' statements of claim clearly claimed periods of use and diversion that exceed the *Petrich* decree's asserted limitation. MR.Ex.6, 7-8; MR.Ex.14, 15-17; PR.Ex.1, 2-3; PR.Ex.2, 2-3; PR.Ex.6.

No lay witnesses testified that it was their understanding or experience that water rights defined by the *Petrich* decree were limited to a "May 1 to July 15" period of use and diversion. MR.Doc.54, 11; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. Appellees' witnesses confirmed that the Northside Ditch has historically, and prior to 1973, diverted water before May 1 and after July 15. *Id*. No water users from Mill Creek objected to the periods of use or diversion of Appellees' claims in either the Temporary Preliminary Decree or Preliminary Decree. *See* MR.Ex.6, 37-67, 84-86; PR.Ex.1; PR.Ex.2.

That the Appellees did not file separate use rights for those portions of their periods of use and diversion that were before May 1 and after July 15 is exact type of error that the Court's generation of implied claims corrects. *Foss*, *31-32. The

Northside Ditch water users were not aware of any need to claim separate use rights in addition to their decreed water rights as their statements of claim accurately reflected their actual historical use. MR.Doc.54, 11; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. The generation of implied claims corrected Appellees' statements of claim and accounted for their uncontested historical water use. *Hoon v. Murphy*, 2020 MT 50, ¶¶ 47-48, 399 Mont. 110, 460 P.3d 849.

Bare, *Pettibone*, and *Starr* demonstrate that the Water Court's authority to generate implied claims predates 1993. TU Brief, 7 ("The first appearances of implied right jurisprudence arose in 1993 and 1994"). TU attempts to trace the Water Court's jurisprudence to the Water Rights Claims Examination Rules, but TU confirms the connection is a "thin tendril" and the "The Claim Examination Rules apply to the DNRC … they do not apply to the Water Court." *Id*. (citing Stephen R. Brown, Michelle L. Bryan & Russ McElyea, *Montana Water Law*, (Rocky Mt. Min. L. Fdn. 2021)).

The Water Court's practice of generating implied claims derives from its inherent responsibility of defining historical use of water rights as they existed prior to July 1, 1973. Contrary to TU's and amicus parties' assertions, the Water Court has long utilized its ability to generate implied claims when the facts warrant it. This Court has affirmed that practice. *Hoon*, ¶¶ 54.

B. The Water Court Correctly Applied the Elements of *Foss* to Appellees' Water Rights.

The seminal case upon which the Water Court's decision to generate implied claims was based was *Foss*. TU and the amicus parties assert that the Appellees did not satisfy all three criteria.

The undisputed lay witness testimony established by a preponderance of the evidence that the Northside Ditch was historically open before May 1, closed well after July 15, and the supply of water was generally constant throughout the irrigation season.

TU and the amicus parties cast the lay witnesses as "self-serving" and "shared witnesses." TU Brief, 33; CFC Brief, 10. It is understandable that TU and the amicus parties would seek to discredit lay witnesses. The substantial and credible lay witness testimony corroborated the Appellees' claimed periods of use and diversion through the Northside Ditch. The Water Court, based upon the uncontested record before it, correctly applied *Foss* and generated Appellees' implied claims.

1. The Water Court Correctly Found that the First Element of *Foss* was Satisfied with Evidence of Multiple Water Rights Based on Appellees' Statements of Claim.

The Water Court correctly found that Appellees' statements of claim identify periods of use and diversion that overclaimed the *Petrich* decree. To satisfy the first *Foss* element, the Water Court was required to singularly review Appellees' statements of claim and evidence in support. *Foss*, *32. The Water

Court looked and correctly found evidence of multiple claims.

The Appellees met "the first part of the implied claims test because the statements of claim for [Appellees' claims] identify water rights with periods of use and diversion" that extended beyond May 1 to July 15. MR.Doc.54, 18; PR.Doc.38, 10. The Water Court reasoned that "by describing both decreed rights and use rights on the same statement of claim, the claims forms identify at least two claims…." *Id*.

Though the Water Court granted summary judgment that the *Petrich* decree only supported a period of use and diversion of "May 1 to July 15," the Appellees were not prohibited from claiming a longer period of use with their claims. MR.Doc.54, 18; PR.Doc.38, 10. Thus, the statements of claim were shown to have a *Petrich* decree portion of a water right and a "use" right with a different priority date and different periods of use and diversion. *Id*. A "use" right is defined as "a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree." Rule 2(a)(71), W.R.C.E.R.; *see also* Rule 2(b), W.R.Adj.R.

Foss mandates that implied claims "must be justified by some evidence in the claim form or the documents attached thereto." *Foss*, *32. This was the only element at issue in *Foss*. *Id*. at *33-34 ("The only issue for consideration is whether the claim or attachments to the claim support creation of an implied

claim…"). The water rights at issue in *Foss* were irrigation claims. *Id*. at *32.

The Faye Ditch was diverted from, crossed, and accumulated water from three different sources though only one source was claimed. *Foss*, *32-33. The Water Court attributed evidence of more than one water right to a map attached to the statement of claim depicting the ditch crossing three sources. *Id*. at *34. Additionally, evidence introduced that trial confirmed that the flow rate had been overclaimed and there was "room for the recognition of water" from the non-claimed sources. *Id*. The Water Court's findings of multiple claims were supported by substantial credible evidence from both the statement of claim and the information submitted in support. *Id.* at *36.

Skelton Ranch evokes a similar story where overclaimed notices of appropriation were found to be the basis for implied claims. *Skelton Ranch*, ¶ 23. Implied claims were generated where a flume had washed out and a larger capacity flume was installed. *Skelton Ranch*, ¶ 9 ("The 1931 flume was significantly larger than the 1912 flume"). The Water Court's "reason for creating an implied claim was that the 1931 appropriation was based on several existing claims which appeared to be overstated, creating a need to distill [the claims] into separate water right claims with a 1931 priority date." *Skelton Ranch*, ¶ 23. In this instance, overclaimed flow rates were the basis for the generation of implied claims. *Id*. The priority date was found to be the last day in the year in which the larger flume was

installed. *Id*. Other than the year, the exact date the implied claim was perfected was not identified. *Id*.

In *Twin Creeks*, this Court found that the Water Court correctly generated an implied claim where a portion of a notice of appropriation had been found to be abandoned. *Twin Creeks*, ¶¶ 33-34. Evidence introduced at the hearing established that all but 15 acres of an originally claimed 210-acre place of use had been abandoned. *Id*. at ¶¶ 8, 14. A later landowner began to "irrigate more acreage in addition to the 15-acre field." *Id*. at ¶ 33. That new use (or resumption of the old use) was found to have occurred in 1968, and the generation of an implied claim was appropriate. *Id*. at ¶ 34 ("… the Water Court was correct to establish an implied claim dating to the new appropriation begun in 1968").

These cases articulate the threshold for when there is evidence of more than one claim. In *Foss*, the Water Court identified the implied claims directly from the statement of claim and testimony in support. *Foss*, *32. In *Skelton Ranch* and *Twin Creeks*, the statements of claim were the basis for generation of implied claims as each statement of claim contained elements that were overclaimed. *Skelton Ranch*, ¶¶ 8, 23; *Twin Creeks*, ¶¶ 8-9, 34.

Here, the elements of primary concern are the periods of use and diversion. In its orders, the Water Court specifically found the following regarding the first element of *Foss*:

> Melin meets the first part of the implied claims test because the statements of claim for claims 43B 194542-00 and 43B 194543-00 identify water rights with periods of use and diversion that extend from April 1 to November 1 for claim 43B 194542-00, and April 1 to October 1 for claim 43B 194543-00. (MR.Doc.54, 18)
>
> Petrich meets the first part of the implied claims test because the statement of claim for claims 43B 101013-00 and 43B 101014 both identify water rights with periods of use and diversion that extend from April 15 to September 15. (PR.Doc.38, 10)

The Water Court discretely found that Appellees' statements of claim identified "both decreed rights and use rights with potentially different priority dates on the same statement of claim, the claims forms each identify at least two claims." MR.Doc.54, 18; PR.Doc.38, 10; *see also* MR.Ex.5, 6-7; MR.Ex.6, 7-8; PR.Ex.1, 2-3; PR.Ex.2, 2-3.

TU asserts that Appellees' statements of claim "indicate multiple rights as required by *Foss*." TU Brief, 29. TU claims that "[o]verclaiming an element is not a legitimate means to expand a decreed water right…," adding that such "use could only be lawful if claimed as a separate water right, supported with evidence, and adjudicated accordingly." TU Brief, 19-20.

MCDWU agrees that first element of *Foss* requires "an overstatement of some element." MCDWU Brief, 6-7. MCDWU additionally confirms that Melin and Petrich "overclaimed their periods of use to April 15 to September 15 (Petrich) and April 15 to October 1 (Melin)…." *Id*. at 8.

No party disputes that Appellees' statements of claim overstated the period

of use and diversion elements. TU Brief, 30-32; MCDWU, 6-10; CFC Brief, 7-10. Therefore, that Water Court's finding of more than one claim from the statements of claim was supported by substantial credible evidence. *Foss*, *36; *Hoon*, ¶ 54; MR.Doc.54, 18; PR.Doc.38, 10.

TU and CFC additionally assert that neither Appellee intended to claim more than one water right under their statements of claim. TU Brief, 32; CFC Brief, 8-9 (citing *Hoon*, ¶ 8; *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900)). Voluminous and uncontested testimony established that the Northside Ditch diverted and conveyed Mill Creek water before May 1 and after July 15. MR.Doc.54, 11 ("The witnesses who testified at the hearing generally describe diversions as not constrained by the specific May 1 to July 15 dates decreed by the District Court in the *Petrich Decree*"); PR.Doc.38, 5 ("The witnesses who testified at the hearing generally describe diversions to the Northside Ditch as not constrained by the specific May 1 to July 15 dates decreed by the District Court in the *Petrich Decree*").

Indeed, based upon the credible and substantial lay witness testimony presented at both hearings, the Appellees, by claiming period of use and diversion exceeding May 1 to July 15, demonstrated an intent to utilize the water they historically used and claimed by their statements of claim. *Hoon*, ¶ 48. In *Hoon*, this Court found that historical water use "in excess" of a notice of appropriation

"was developed as a use right." *Id*. The excess was "accounted for in a more junior claim based on the date of first use." *Hoon*, ¶ 50.

The Water Court's finding that Appellees' statements of claim described both a decreed right and a use right was supported by substantial credible evidence. MR.Doc.54, 11; PR.Doc.38, 5; *Hoon*, ¶ 54. It is undisputed that Appellees' statements of claim overclaimed periods of use and diversion over and above any limitation in the *Petrich* decree. MR.Ex.6, 7-8; PR.Ex.1, 2-3; PR.Ex.2, 2-3. The overstatement of an element on a statement of claim is the most fundamental way the first element of *Foss* is satisfied. *Foss*, *34 ("… the Water Master found the original right to be over claimed …"). Additionally, the intent of Appellees was evident from the face of the statements of claim. MR.Ex.6, 7-8; PR.Ex.1, 2-3; PR.Ex.2, 2-3.

TU and amicus parties would have this Court believe that the Appellees needed to specifically intend to claim two rights on a statement of claim for the first element of *Foss* to be satisfied. However, it is undisputed that Appellees' statements of claim overclaimed periods of use and diversion to accurately reflect historical use. MR.Doc.54, 11; PR.Doc.38, 5; *Hoon*, ¶ 54. Thus, the Water Court, based upon the substantial evidence before it, correctly found that Appellees satisfied the first element of *Foss*.

2. The Water Court Correctly Found that Appellees' Statements of Claim Had Been Historically Used as they were Claimed.

The second element of *Foss* requires that evidence of historical use must exist. *Foss*, *32. The Water Court found that Appellees provided substantial credible evidence through the testimony of their witnesses that corroborated Appellees' claimed historical use of the Northside Ditch. MR.Doc.54, 19; PR.Doc.38, 10. TU and amicus parties fail to demonstrate that the Water Court's findings of historical use were not supported by substantial credible evidence or that the Water Court incorrectly found the element was satisfied.

TU boldly alleges an "absence of concrete historical evidence." TU Brief, 33. TU further alleges that the Water Court's "findings are predicated entirely on often conflicting witness testimony…." *Id*. at 34. CFC characterizes the evidence of Appellees' historical use as "vague." CFC Brief, 10. CFC opines that "both claimants offered self-serving testimony that generally described that they diverted their decreed water rights without regard to the defined period of use that applied under the 1964 *Petrich* decree." *Id*.

MCDWU does not assert that the Water Court incorrectly found substantial credible evidence supporting Appellees' historical use of the Northside Ditch. MCDWU Brief, 5-20. This is significant as MCDWU comprises Mill Creek water users. *Id*. at 2-3. MCDWU's failure to challenge Appellees' historical use is an acknowledgment the Water Court's findings and conclusions pertaining to the second element of *Foss* are correct. *Id*.

The Appellees' claimed historical use of the Northside Ditch was corroborated by witnesses testimony: "The witnesses who testified at the hearing generally describe diversion as not constrained by the specific May 1 to July 15 dates decreed by the District Court in the *Petrich Decree*." MR.Doc.54, 11, 19; PR.Doc.38, 5-6, 10. Although Appellees did not pinpoint the exact date by which the claimed periods of use and diversion began, the testimonial evidence confirmed that the uses claimed by the statements of claim began prior to 1973. MR.Doc.54, 19-20; MR.Doc.48, 15-23; PR.Doc.38, 10; PR.Doc. 33, 7-20.

TU and CFC assert that the Appellees' evidence was insufficient corroborate their claimed historical use of the Northside Ditch. TU Brief, 34; CFC Brief, 11. However, nearly every witness called by Appellees confirmed that the Northside Ditch was historically open prior to May 1 and after July 15. MR.Doc.54, 11-12, 18-20; MR.Doc.48, 15-23; PR.Doc.38, 5-6, 9-11; PR.Doc.33, 7-20. The Water Court specifically noted the testimony of Gerald Petrich, who possessed "first-hand" knowledge of this historical use of the Northside Ditch prior to 1973. PR.Doc.38, 10 ("He credibly testified that once the Northside Ditch was complete, it was opened beyond the periods covered by the *Petrich Decree*"). Gerald Petrich testified in both of Appellees' hearings.

The unrebutted testimonial evidence demonstrated that the Northside Ditch was "not constrained by the specific May 1 to July 15" finding in the *Petrich*

decree. MR.Doc.54, 11; PR.Doc.38, 5-6. Not one lay witness, including prior water commissioners, recalled water rights on Mill Creek being enforced by periods of use or diversion. MR.Doc.54, 11-12, 18-20; MR.Doc.48, 15-23; PR.Doc.38, 5-6, 9-11. Other than the *Petrich* decree, TU adduces no evidence that the Northside Ditch was limited to May 1 to July 15 periods of use and diversion or that the Appellees did not historically use their claims as they appeared on the statements of claim. TU Brief, 32-35.

The task for Appellees under the second element of *Foss* was to corroborate the historical use of their claimed periods of use and diversion with evidence. *Foss*, *32. Appellees' witnesses credibly and substantially demonstrated that Appellees historically utilized the Northside Ditch outside any parameters of the *Petrich* decree and as claimed by their statements of claim. Thus, the Water Court correctly found that Appellees satisfied the second element of *Foss*.

3. The Water Court Correctly Found that the Generation of Implied Claims Would Not Increase the Burden on Other Water Users.

The third element of *Foss* requires that "the creation of an implied claim should not result in a change to historic water use or increase the historic burden to other water users." *Foss*, *32. The Water Court's generation of implied claims significantly reduces the priority of a portion of Appellees' claims. Claims of increased burden on Mill Creek are unfounded given the historical context, evidence, and notice of Appellees' historical use of the Northside Ditch.

TU asserts that the Water Court failed to consider the impacts to junior water users who are entitled to their source of water in the same manner by which they appropriated their right. TU Brief, 36. MCDWU asserts a lack of notice and that Water Court's generation of implied claims creates a "heavy administrative and practical burden" on Mill Creek water users. MCDWU Brief, 13-21. CFC argues that generation of implied claims is burdensome because each statement of claim "is based on a *single* historical appropriation…." CFC Brief, 13 (emphasis in original).

No party can contest that the Appellees' statements of claim overclaimed periods of use and diversion exceeding the *Petrich* decree. MR.Ex.6, 7-8; MR.Ex.14, 15-16; PR: Ex. 1, 2-3; Ex. 2, 2-3; PR.Ex.6. Furthermore, it cannot be contested that the periods of use and diversion of Appellees' claims appeared in the Preliminary Decree in the exact way they were claimed. *Id*. This fact is pivotal.

The Water Court correctly applied *Foss* by requiring Appellees to prove that implied claims would not increase the historical burden on Mill Creek. MR.Doc.54, 19; PR.Doc.38, 11. The Water Court recognized that Appellees' satisfied this requirement "because of the testimony about how water was historically used and administered on Mill Creek." *Id*. The Water Court additionally found that recognizing priority dates of June 30, 1973, for implied claims was appropriate and consistent with the penalty provisions of prior

adjudication statutes. *Id*. (citing Section 89-837, RCM, (1947)). It was also consistent with Appellees' corroborated historical use. *Id*.

The records are replete with evidence, before and after 1973, that established by a preponderance of the evidence that Appellees utilized the Northside Ditch during the claimed periods of use and diversion. MR.Doc.54, 11-12; MR.Doc.48, 15-23; PR.Doc.38, 5-6; PR.Doc.33, 7-20. The uncontested evidence confirmed that the Northside Ditch was historically and consistently open prior to May 1 and after July 15. *Id*.

All water users on Mill Creek had notice of the Appellees' claimed historical use, including the periods of use and diversion, by way of the Preliminary Decree. MR.Doc.54, 7-8; PR.Doc.34, 5; *In re Erb*, 2016 Mont. Water LEXIS 2, *3-7 (April 11, 2016); *In re Windbreak Ranch LLC*, 2022 Mont. Water LEXIS 536, *5-9 (June 17, 2022); Section 85-2-214, MCA. MCDWU assert that they had no responsibility to review the Preliminary Decree to determine if they needed to file objections. MCDWU Brief, 10-12. However, MCDWU's failure to object cannot be construed as MCDWU not having notice of Appellees' claimed historical use. *In re Erb*, *3-7; *In re Windbreak Ranch*, *5-9.

It is instructive to look at the Water Court's generation of implied claims from a do-nothing approach. TU was the only party to have objected to Appellees' water rights. MR.Doc.54, 9; PR.Doc.38, 5. If TU had not objected, the periods of

use and diversion of Appellees' water rights would have remained as they appeared in the Preliminary Decree. *See* Section 85-2-233, MCA; Section 85-2-248, MCA. The Appellees' periods of use and diversion would have then been incorporated into the final decree. Section 85-2-234(1), MCA. TU and amicus parties cry foul, but the generation of implied claims made portions of Appellees' rights *more junior*. MR.Doc.54, 19 (COL 27); PR.Doc.38, 11 (COL 19). TU and the adverse parties fail to recognize that Mill Creek water users are in a better position that they would have been had TU not objected.

More disturbing is the undisputed fact that there are claims based upon the *Petrich* decree with period of use and diversion that TU did not object to. MR.Ex.15, 23-25 (RFA 7); PR.Ex.7, 16 (RFA 7). The do-nothing approach is reality as there are *Petrich* decree claims on Mill Creek whose periods of use and diversion will forever exceed the *Petrich* decree's asserted limitations. *Id*.; *see also* Section 85-2-234(1), MCA.

TU and CFC argue that junior users are entitled to "have the water flows in the same manner as when [they] located," and senior water users may not adversely affect their rights. TU Brief, 36; CFC, 14; *see also Hohenlohe v. State*, 2010 MT 203, ¶ 43, 357 Mont. 438, 240 P.3d 628. TU and CFC attempt to make this point irrespective of the uncontested evidence establishing that Appellees historically diverted their *Petrich* decree claims in accordance their statements of

claim. MR.Doc.54, 19; MR.Doc.48, 15-23; PR.Doc.38, 11; PR.Doc.33, 7-20. Junior users were aware of the Northside Ditch, its historical use, and how Appellees' claims appeared in the Preliminary Decree. MR.Doc.54 6-9; MR.Ex.14, 15-17; PR.Doc.38, 5; PR.Ex.6. Not one objected. *Id*. Furthermore, MCDWU, the only party representing interests of Mill Creek water right holders, does not contest the Water Court's findings on the historical use element of *Foss*. MCDWU Brief, 13-20.

The Water Court's findings that no junior user would be burdened by the generation of Appellees' implied claims were supported by substantial credible evidence. The generation of implied claims reduced the priority of portion of Appellees' claims, and the uncontested evidence of historical use demonstrated that the implied claims pertained to Appellees' well-known historical uses of Mill Creek. As such, the Water Court correctly found that no Mill Creek water users would be burdened by the generation of implied claims.

II. THE MONTANA WATER COURT ERRED WHEN IT GRANTED TROUT UNLIMITED'S MOTIONS FOR SUMMARY JUDGMENT.

The Appellees filed a cross-appeal addressing the Water Court's order on summary judgment where the Water Court found that the *Petrich* decree established periods of use and diversion for Appellees' claims. First, the Court misinterprets the *Petrich* decree as "unambiguously" defining periods of use and diversion. Second, the Water Court overlooked key evidence as to how the *Petrich*

decree water users claimed their rights.

A. The Water Court Errantly Misconstrued the Unambiguous Language of the *Petrich* Decree.

In orders on TU's motions for summary judgment, the Water Court found the language of the *Petrich* decree to be "unambiguous" as to periods of use and diversion. The Water Court erred in making this finding by misinterpreting the plain wording of the *Petrich* decree.

The Water Court's orders on summary judgment contained the following findings as to the language of the *Petrich* decree: "The unambiguous language and context of the *Petrich Decree* provided for a period of use of May 1 to July 15." MR.Doc.25, 10; PR.Doc.18, 9. The relevant finding of fact stated the following:

> That the Court finds during the months of May and June and until approximately the 15th day of July of the normal irrigation season there is flowing in Mill Creek at the headgate of the Mill Creek Flat Dicth approximately 10000 miners' inches of water in excess of the total quantity of water heretofore adjudicated and decree by this Court in the aforesaid action.

MR.Doc.25, 3; PR.Doc.18, 3; MR.Ex.B, 3; PR.Ex.B, 3. The "unambiguous" reading of this finding means that in a normal irrigation season water is "approximately" available until July 15. This statement is not a hard mandate that the decree water rights be specifically limited to "May 1 to July 15." The Water Court did not find, nor did TU assert, that this finding was ambiguous, so for the Water Court to look at any other evidence than the decree itself was in error.

MR.Doc.25, 8; PR.Doc.18, 7; *see Granite Cnty. Bd. of Comm'rs v. McDonald*, 2016 MT 281, ¶ 19, 385 Mont. 262, 383 P.3d 740.

The Water Court's interpretation of the *Petrich* decree errantly imposes a limit when the Appellees' decree rights could be diverted. The express language of the *Petrich* decree does not define the period of use or diversion elements for the claims in the decree—it set out when the waters of Mill Creek were "approximately" available. MR.Ex.B, 3; PR.Ex.B, 3. The use of the word "approximate" indicates that availability was not precise, that water supply may cease before or after July 15. Lay witness testimony confirmed that high flows in Mill Creek start prior to May 1 and often last into August. MR.Doc.48, 15-23; PR.Doc.33, 7-20.

The *Petrich* decree provided a comprehensive list of the water rights and "their respective quantities" in its Conclusions of Law. MR.Ex.B, 11-12; PR.Ex.B, 11-12. The decree defined owners, priority dates, source, flow rate, and means of conveyance for each right defined by the decree. *Id*. The Conclusions of Law do not ascertain period of use and diversion limitations on Appellees' claims or any other right defined by the decree. *Id*.

The Water Court asserted that the "the District Court recognized no rights outside the period expressly stated in the findings of fact" and that "any use outside of those facts in not part of the right the District Court decreed." MR.Doc.25, 9;

PR.Doc.18, 8-9. However, the *Petrich* decree does not contain any provision that discretely, or unambiguously, *limits* the period of use and diversion to "May 1 to July 15." MR.Ex.B; PR.Ex.B. To say that the *Petrich* decree "unambiguously" defined the elements of period of use and diversion to be "May 1 to July 15" is errant as district court specifically noted that the finding was "approximate." *Id.* at 10-15. The Water Court's interpretation is in error and should be reversed.

B. The Water Court Ignored Evidence Demonstrating that the *Petrich* Decree Did Not Limit Periods of Use and Diversion.

The Water Court additionally, and errantly, found that the evidence provided by the Appellees did not establish a genuine issue of material fact. The Appellees' evidence clearly demonstrated that the *Petrich* decree contained no limitation on the time of year the decree claims could be diverted.

The Appellees produced the Preliminary Decree abstracts of every *Petrich* decree claim in the Preliminary Decree to demonstrate a genuine issue of material fact. MR.Doc.25, Ex C.; PR.Doc.18, Ex. C. The *Petrich* decree defined thirty-five claims. MR.Ex.B, 10-15; PR.Ex.B, 10-15. The Preliminary Decree contained forty-eight claims with "decree" types of historical right that were based upon the *Petrich* decree. *Id*.; see *also* MR.Doc.25, Exs. B and C.; PR.Doc.18, Exs. B and C.

The periods of use and diversion of the *Petrich* decree claims are instructive to assess the limitations of *Petrich* decree. MR.Doc.25, Ex. C; PR.Doc.18, Ex. C. Of the forty-eight *Petrich* decree claims in the Preliminary Decree, forty-three

claims were decreed with a period of use and diversion greater than "May 1 to July 15." *Id*. Most *Petrich* decree users did not file statements of claim reflecting any *Petrich* decree limitation. *Id*. The *Petrich* decree users instead claimed statements of claim that were in concert with their historical use. MR.Doc.25, Ex. C; PR.Doc.18, Ex. C; *see also* Section 85-2-227, MCA ("…a claim of an existing right filed in accordance with 85-2-221 … constitutes prima facie proof of its content until the issuance of the final decree"). TU has admitted that it did not object to all claims in exceedance of the *Petrich* decree. MR.Ex.15, 23-25 (RFA 7); PR.Ex.7, 16 (RFA 7).

Looking past the Appellees' evidence, the Court asserted that the interpretation of a prior district court decree is a question of law, not fact. MR.Doc.25, 10; PR.Doc.18, 9 (citing *In re Quigley*, 2017 MT 278, ¶ 15, 389 Mont. 283, 405 P.3d 627). *In re Quigley* addressed a dispute over of the amount of water the parties were entitled based upon an underlying decree. *In re Quigley*, ¶¶ 3-7. This Court found that the decree at issue was not specific as to where the water an issue could be used and the pleadings did not control. *Id*. at ¶¶ 19-20. *In re Quigley* is analogous to the instant case in that where is a decree is not specific to an asserted element it cannot be interpreted as defining that same element. *Id*. In *In re Quigley*, the issue was place of use; here, it is periods of use and diversion.

This Court reviews the Water Court's interpretation of a prior decree as an issue of law to determine if it is correct. *In re Quigley*, ¶ 9; *see also Granite Cnty.*, ¶ 19. In *Granite Cnty*., the Court stated "[j]udgments are to have a reasonable intendment; where a judgment is susceptible of two interpretations the one will be adopted which renders it the more reasonably effected and conclusive and which makes the judgment harmonize with the facts and law of the case." *Granite Cnty*., ¶ 19 (citing *Gans & Klein v. Sanford*, 91 Mont. 512, 522, 8 P.2d. 808, 811 (1932)). In the instant case, Appellees' provided discrete and substantial evidence that demonstrated the *Petrich* decree did not limit periods of use and diversion. MR.Doc.25, Ex. C; PR.Doc.18, Ex. C. The *Petrich* decree water users' statements of claim and Preliminary Decree abstracts confirm that the asserted *Petrich* decree periods of use and diversion were nothing but "approximate." MR.Ex.B, 10-15; PR.Ex.B, 10-15.

The evidence provided by the Appellees clearly demonstrated a genuine issue of material fact that *Petrich* decree did not limit water users to periods of use and diversion for "May 1 to July 15." The Water Court was incorrect to ignore Appellees' evidence and rely on its interpretation of the *Petrich* decree. As such, the Water Court's orders on summary judgment must be reversed.

III. THE MONTANA WATER COURT ERRED WHEN IT FAILED TO DISMISS TROUT UNLIMITED FOR LACK OF STANDING.

The Water Court erred when it found TU had standing to pursue its

objections to Appellees' water rights. There are two discrete errors. First, the Water Court incorrectly found that Appellees were not permitted to raise standing. Second, the Water Court incorrectly interpreted and misapplied the relevant caselaw.

A. The Water Court Incorrectly Found that the Appellees had No Basis to Raise Standing Issues in their Proposed Findings.

The Water Court errantly found that that the Appellants had no right to raise standing in proposed finding and conclusions because it was not asserted in the prehearing order. MR.Doc.54, 15; PR.Doc.38, 8 (citing *Ganoung v. Stile*, 2017 MT 176, ¶ 28, 388 Mont. 152, 398 P.3d 282). The Water Court's conclusions conflict directly with this Court's precedent on when standing can be raised.

This Court recently confirmed when standing can be raised. *See Mont. Trout Unlimited v. Mont. Dep't of Nat. Res.*, 2025 MT 1, ¶¶ 15-19, 420 Mont. 85, 561 P.3d 995 (hereinafter "*Mont. TU*"*)*. A challenge to standing may be raised for the first time on appeal in general litigation. *Mont. TU*, ¶ 18 (citing *Baxter Homeonwers Ass'n v. Angel*, 2013 MT 83, ¶ 14, 369 Mont. 398, 298 P.3d 1145). Objections to standing cannot be waived. *Rieman v. Anderson*, 282 Mont. 139, 144, 935 P.2d 1122, 1125 (1997).

The question of standing resolves "whether the complaining party is the proper party to seek adjudication of the contested issue." *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 27, 361 Mont. 77, 255 P.3d 179. The test

for standing is that "the complaining party must clearly allege past, present or threatened injury to a property or civil right, and the alleged injury must be distinguishable from injury to the public generally, but it need not be exclusive to the complaining party." *Mont. TU*, ¶ 17; *Beaverhead*, ¶ 27.

The Water Court found that the issue of standing was not preserved by the Appellants because its contentions were not set forth in the Prehearing Order. MR. Doc.54, 15; PR.Doc.38, 8 (citing *Ganoung*, ¶ 28) ("[f]ailure to raise an issue in the pretrial order may result in waiver."). The Water Court misconstrues the law on standing.

This Court, in a case where TU was a litigant, has confirmed that standing can be raised as late an appeal before this Court. *Mont. TU*, ¶ 18. Here, it was not the Appellees' burden to ask for that information—it was TU's burden to demonstrate it satisfied standing requirements. *Beaverhead*, ¶ 27.

This Court has confirmed that standing can be raised for time on appeal. Therefore, the Water Court errantly found that the Appellants' standing arguments were waived. The Water Court should be reversed.

B. The Water Court Incorrectly Found that Trout Unlimited Satisfied its Standing Requirements.

The Water Court erred when it found that TU had "good cause" to object to Appellees' claims. MR.Doc.54, 15; PR.Doc.38, 8. The Water Court mispplies *Beaverhead* asserting that "participation as an objector turns on whether an

objector has 'good cause' to object to a claim." *Id*. (citing *Beaverhead*, ¶ 34).

In *Beaverhead*, this Court enumerated the standing requirements for TU in a case before the Montana Water Court. *Beaverhead*, ¶ 27; *supra* pgs. 38-39. TU "must allege past, present or threatened injury to a property or civil right, and that the alleged injury must be distinguishable from the injury to the public generally…." *Beaverhead*, ¶ 27; *Mont. TU*, ¶ 17. The Water Court sidestepped this test and singularly promoted the "good cause" requirement. MR.Doc.54, 15; PR.Doc.38, 8.

The Water Court found that TU's standing only hinged on whether it has "good cause" to object. MR.Doc.54, 15; PR.Doc.38, 8. The Water Court failed to assess the common law elements of TU standing. *Id*.; *Beaverhead*, ¶ 33. TU produced no evidence that it had and an interest that was impacted by the Appellants' water use. MR.Doc.48, 24, 26-28, 32; PR.Doc.33, 20, 22-24, 28. TU additionally presented no evidence of a past, present or threatened injury to a property or civil right and that any such injury was distinguishable from the public generally. *Id*. It is undisputed that TU possesses no statements of claim from Mill Creek, did not appear in the Preliminary Decree as a claimant to any claim, and makes no claims to water rights in either the *Allen* or *Petrich* decrees. MR.Ex.15, 22-23; PR.Ex.7, 14-15. Simply stated, TU did not demonstrate that its interests would be impacted by the adjudication of Appellees' Mill Creek claims.

In *Beaverhead*, TU established that it had common law standing by demonstrating personal and recreational interests in the Big Hole River, that those interests were distinct from the public at large, and that those interests could be adversely affected. *Beaverhead*, ¶ 33. This Court found that TU met "all common law and statutory requirements for standing...." *Id*. The application of *Beaverhead* was discretely limited and did not confer TU carte blanche standing without satisfying statutory and common law requirements. *Beaverhead*, ¶¶ 33-34. TU's satisfaction of common law requirements was a fundamental component of this Court finding that TU has satisfied statutory requirements under § 85-2-233, MCA. *Beaverhead*, ¶ 33. In the instant case, the Water Court simply found that all TU needed was "good cause." MR.Doc.54, 15; PR.Doc.38, 8.

The Water Court conclusions of law as to TU's standing are not supported by substantial credible evidence. MR.Doc.54, 2-13; PR.Doc.38, 2-6. Therefore, the Water Court is in error two ways. First, it states no facts that demonstrate that TU satisfied either statutory or common law requirements for standing to object to the Appellants' water right. Second, it fails to fully apply *Beaverhead* to determine whether TU had satisfied statutory and common law standing requirements. Accordingly, the Water Court's decision on standing should be reversed, and TU should be dismissed as an objector to Appellees' claims.

CONCLUSION

The Appellees respectfully request this Court to 1) affirm the Water Court's generation of implied claims for Appellees' claimed, corroborated, and uncontested historical diversion of Mill Creek through the Northside Ditch; 2) in the alternative, and on cross-appeal, reverse the Court's orders for summary judgment and affirm the Appellees' periods of use and diversion as they appeared in the Preliminary Decree; and 3) reverse the Water Court's decision that TU satisfied standing requirements under *Beaverhead* and dismiss TU as an objector to Appellees' claims.

DATED this 11th day of July, 2025.

SUDDUTH LAW, PLLC

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that APPELLEES' ANSWER AND CROSS APPEAL OPENING BRIEF is printed with proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word, is 9912 words, excluding this Certificate of Compliance, the Table of Contents, and the Table of Authorities.

DATED this 11th day of July, 2025.

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CERTIFICATE OF SERVICE

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