

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0510

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ROGER D. PETERS and CARRIE A. PETERS,

Plaintiffs and Appellants,

v.

THE KENISON PLACE, LLC and WILLIAM J. MARTINELL, individually,

Defendants and Appellees.

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**OPENING BRIEF OF APPELLANTS  
ROGER D. PETERS AND CARRIE A. PETERS**

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On Appeal from the Montana Fifth Judicial District Court, Beaverhead County  
Case No. DV-1-2022-0014512-OC  
Honorable Luke Berger

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## I. ISSUES PRESENTED

1. Whether the District Court erred in dismissing Roger D. and Carrie A. Peters' ("Peters") claims for ditch and water use interference against The Kenison Place, LLC and William J. Martinell (collectively, "Martinell") for lack of subject matter jurisdiction.
2. Whether the District Court erred in granting summary judgment to Martinell on their counterclaim of trespass.
3. Whether the District Court erred in holding Martinell is a prevailing party and in awarding attorney's fees and costs to Martinell under M.C.A. § 70-17-112(5).
4. Whether the District Court erred in failing to certify the distribution controversy to the Montana Water Court under M.C.A. § 85-2-406(2)(b).

## II. STATEMENT OF THE CASE

On August 10, 2022, Peters filed their verified complaint, wherein Peters detailed the factual background giving rise to their claims against Martinell for interference with Peters' irrigation ditch rights and use of water. Doc. 1 at 1-15. As claims for relief, Peters sought declaratory relief pursuant to M.C.A. § 27-8-101, *et seq.*, affirming Peters' water use and primary and secondary ditch easement interests (Count I); injunctive relief enjoining Martinell from continuing to interfere with Peters' ditch rights and waste and seepage water rights (Count II); interference with

water use caused by Martinell's acts of rerouting the flow of water away from the Peters' property (Count III); interference with Peters' prescriptive ditch easement rights caused by Martinell's acts of burying the ditch, which historically conveyed water to the Peters' property, and destroying or dismantling a "control structure" situated on Martinell's lands (Count IV); and attorney's fees and costs related to Martinell's actions under M.C.A. §§ 27-8-311 through 27-8-313, and M.C.A. § 70-17-112(5) related to ditch easement interference and encroachment (Count V). *Id.*, at 16-20.

On September 21, 2022, Martinell filed a Rule 12(b)(6), M.R.Civ.P., motion to dismiss and supporting brief. Docs. 8-9. As matters outside the pleadings were included, the parties stipulated under Rule 12(d), M.R.Civ.P., the motion would be treated as one for summary judgment under Rule 56, M.R.Civ.P. Doc. 10. Peters filed their response in opposition on October 12, 2022. Doc. 11. The District Court heard oral argument on the motion on January 3, 2023. On March 7, 2023, the District Court entered its Order denying the converted motion. Doc. 17.

On April 11, 2023, Martinell filed their answer and counterclaims. Doc. 20. On April 25, 2023, Peters filed their answer to Martinell's counterclaims. Doc. 23.

Following the close of discovery, on July 19, 2024, Martinell filed a motion for summary judgment and dismissal of Peters' complaint for lack of subject matter jurisdiction under Rule 12(b)(1), M.R.Civ.P., and brief in support. Docs. 50-51. On

August 9, 2024, Peters filed their response in opposition along with supporting record evidence. Doc. 55. On August 30, 2024, Martinell filed their reply. Doc. 58. On September 4, 2024, Peters requested a hearing on the motions. Doc. 59. The District Court heard oral arguments on December 4, 2024. Doc. 63.

On December 17, 2024, the District Court entered its Order on Martinell's motions ("Order"). Appendix ("Appx.") A, Doc. 64. After reciting to the parties' arguments, the District Court held it did not have jurisdiction over Counts I-IV of the verified complaint as Peters' waste and seepage water rights do not identify a point of diversion situated on Martinell's property. *Id.*, at 17-18. Accordingly, the District Court dismissed Peters' claims under Counts I-IV of the verified complaint for ditch and water interference. *Id.*, at 18.

The District Court also granted summary judgment to Martinell on their counterclaim of trespass, holding Peters did not have a ditch easement or a water right allowing Peters to enter Martinell's property to "divert" water in the ditch which Peters asserted an easement right. *Id.*, at 19. Under the Order, the District Court enjoined Peters from entering Martinell's property. *Id.* The District Court also granted summary judgment to Martinell as the prevailing party under M.C.A. § 70-17-112(5) for purposes of attorney's fees and costs. *Id.*, at 19-20.

On January 16, 2025, Martinell filed their motion for award of costs and attorney's fees and supporting affidavits. Docs. 65-66. On January 30, 2025, Peters

filed their response in opposition to award of fees and costs, and supporting affidavits. Doc. 68.

On March 10, 2025, the District Court entered its Order confirming the previous Order that Martinell was a prevailing party under M.C.A. § 70-17-112(5), and set a hearing for May 20, 2025, on any award of attorney's fees and costs. Appx. B, Doc. 70 at 4.

On April 25, 2025, Peters filed their petition with the District Court for certification of the water distribution controversy to the Montana Water Court under M.C.A. § 85-2-406, and motion to stay the matter pending certification. Doc. 72. On May 9, 2025, Martinell filed their response opposing certification. Doc. 73. On May 16, 2025, Peters filed their reply. Doc. 76. The District Court never ruled on Peters' certification petition until judgment was entered on August 12, 2025. Doc. 88.

On May 20, 2025, the District Court held a hearing on the attorney's fees and costs motion. On June 3, 2025, Martinell filed a Rule 11 motion for sanctions related to Peters' petition for certification to the Montana Water Court, to which Peters responded. Docs. 78-79.

On June 18, 2025, the District Court entered its Order on attorney's fees and costs. Appx. C, Doc. 80. Under the Order, the District Court awarded Martinell \$173,592.00 in attorney's fees and costs of \$23,175.22, for a total award of \$196,767.22. *Id.*, at 16-17.

On July 17, 2025, Peters filed their notice of appeal. Doc. 82. On July 18, 2025, Martinell filed a motion for entry of judgment. Doc. 85. On July 28, 2025, Peters filed their response to the motion. Doc. 86. On August 12, 2025, the District Court entered judgment wherein the District Court held Peters’ petition for certification under M.C.A. § 85-2-406 was deemed denied as a result of the District Court’s June 18, 2025 Order, and denied Martinell’s Rule 11 motion. Appx. D, Doc. 88.

### III. STATEMENT OF FACTS

#### A. Real Property and Water Sources

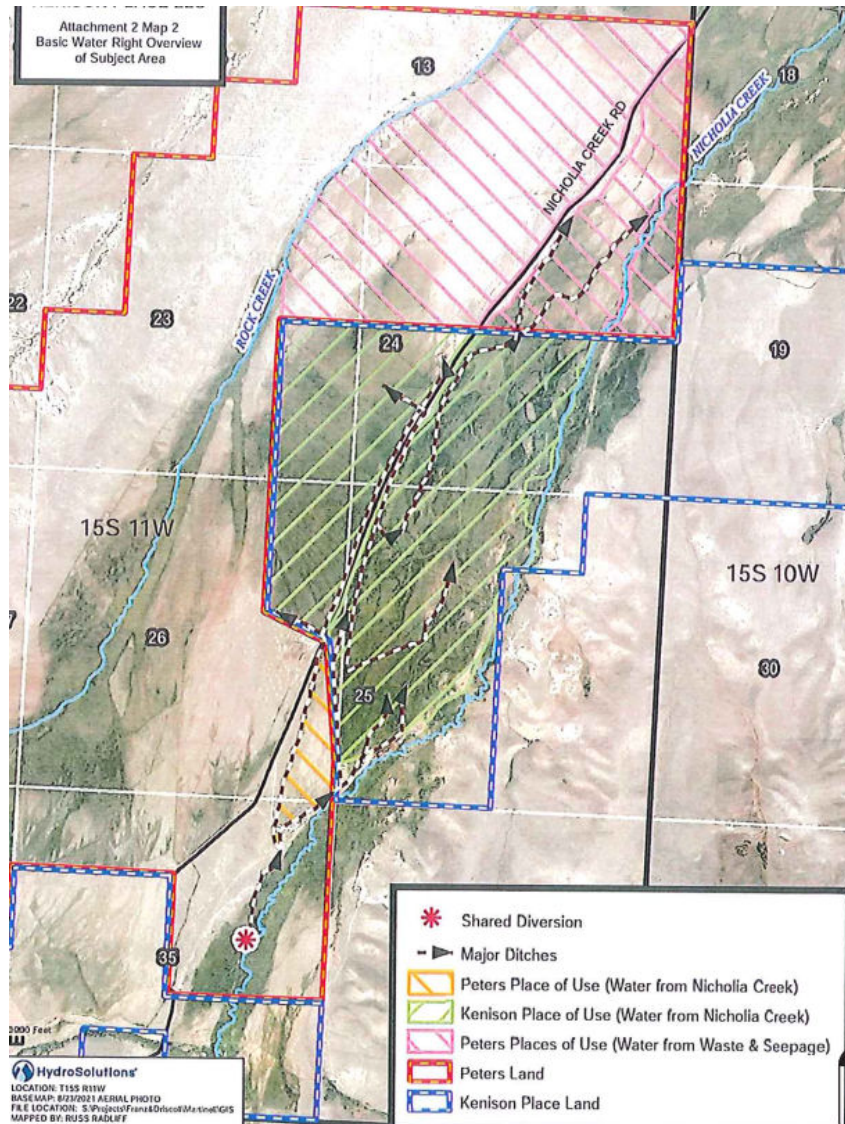
Peters and Martinell own agricultural real property adjacent to one another in southwest Beaverhead County. Doc. 1, ¶¶ 1, 8.<sup>1</sup> Peters’ property is situated along the north and west boundary of Martinell’s property. Central to this case, Peters owns water rights for “waste and seepage” water for irrigating Peters’ property north of Martinell’s property. *Id.*, ¶¶ 13-20.

The portion of Martinell’s property relevant to this case is in Sections 23, 24, 25, and 26, upgradient of Peters’ lands in Sections 13, 23, and 24, and is solely irrigated with Martinell’s water rights from Nicholia Creek. Doc. 55, Ex. 6, 12:17-

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<sup>1</sup> Peters’ factual background includes citations to the verified complaint (Doc. 1) or to evidence in the record attached to Peters’ brief in opposition to motions (Doc. 55), Martinell’s brief in support of motions (Doc. 51), and Peters’ brief in support of its petition for certification (Doc. 72).

20, 13:2-5; *see also*, Ex. 1. Martinell’s Nicholia Creek water rights are diverted from a point on the Peters’ land in Section 35 from a “shared” diversion ditch not at issue in this case. *See*, Doc. 55, Ex. 1, copied below, a map created by Martinell’s expert witness which shows Peters’ property boundary in red, Peters’ place of use for Peters’ waste and seepage rights in pink, Martinell’s property boundary in blue and Martinell’s place of use for Martinell’s Nicholia Creek rights in green, with the “shared” diversion indicated by a red asterisk on Nicholia Creek:



Water use within the drainage area, as with most of Montana, is hydrologically interrelated. Water directly diverted from surface water creeks applied to the land will travel through and across the lands of Martinell, Peters, and other downgradient landowners as waste, seepage, and return flow water. Doc. 55, Ex. 7, ¶¶ 4, 9, and 11; Ex. 3, ¶ 9; Ex. 8, 43:3—44:1.

**B. Peters’ Water Rights as Adjudicated by the Water Court Based Upon DNRC’s Field Investigation and Stipulation with Martinell**

This matter directly concerns the irrigation of Peters’ lands in portions of Sections 13, 14, 23, and 24, T15S, R11W using waste and seepage water. The specific waste and seepage water rights held by Peters are Water Right Nos. 41A 25430-00 and 41A 25433-00. Doc. 1, ¶¶ 21-22; Doc. 55, Ex. 10, 26:1-20.

As originally claimed by Peters’ predecessors, the point of diversion for each claim was directly from Nicholia Creek on Martinell’s property in the NWSWNE of Section 25, T14S, R11W. William Martinell filed notices of intent to appear (“NOIAs”) to each claim upon issuance of the Basin 41A Preliminary Decree. Martinell’s NOIAs asserted the point of diversion for each claim was incorrect and there was no means of conveyance from Nicholia Creek. Doc. 55, Ex. 13, ¶ B. Based on Martinell’s NOIAs, the claims were consolidated by the Montana Water Court as Case No. 41A-156 for adjudication.

As part of Case No. 41A-156, a field investigation was conducted on August 7, 2015, by Department of Natural Resources and Conservation (“DNRC”) Water

Resources Specialist, Myles VanHemelryck. Doc. 55, Ex. 11, ¶ 4. Mr. VanHemelryck determined the actual source of water historically used for Peters' downgradient irrigation was "waste and seepage" from irrigation of the Martinell property. *Id.* He recommended the source of Water Right Nos. 41A 25430-00 and 41A 25433-00 be modified to "waste and seepage." *Id.* He further recommended the point of diversion be amended to identify where he understood Peters took control of the waste and seepage water where it *enters* the Peters' property. *Id.*, ¶ 8. Mr. VanHemelryck's investigation and reports to the Water Court did not consider how the waste and seepage water was delivered to the Peters' property across Martinell's land. *Id.*, ¶ 8.

After the DNRC field investigation, Peters agreed "waste and seepage" was a proper description of the source of Peters' rights. Doc. 55, Ex. 10, 51:1-9. Roger Peters attested that these rights "were no longer diverted from Nicholia Creek itself, but rather water from upgradient irrigation of the Martinell property, and to a certain extent, the Peters' property upgradient of Martinell" which "provided waste water in sufficient quantities to conduct irrigation." Doc. 55, Ex. 2, ¶ 7. He further explained the practice "resulted in a very efficient use of water ... since the water gathered in a very swampy area on Martinell's land" and "[t]here has never been a shortage of waters gathering on the Martinell property" such that Peters has "always been able to irrigate [his] places of use." *Id.*

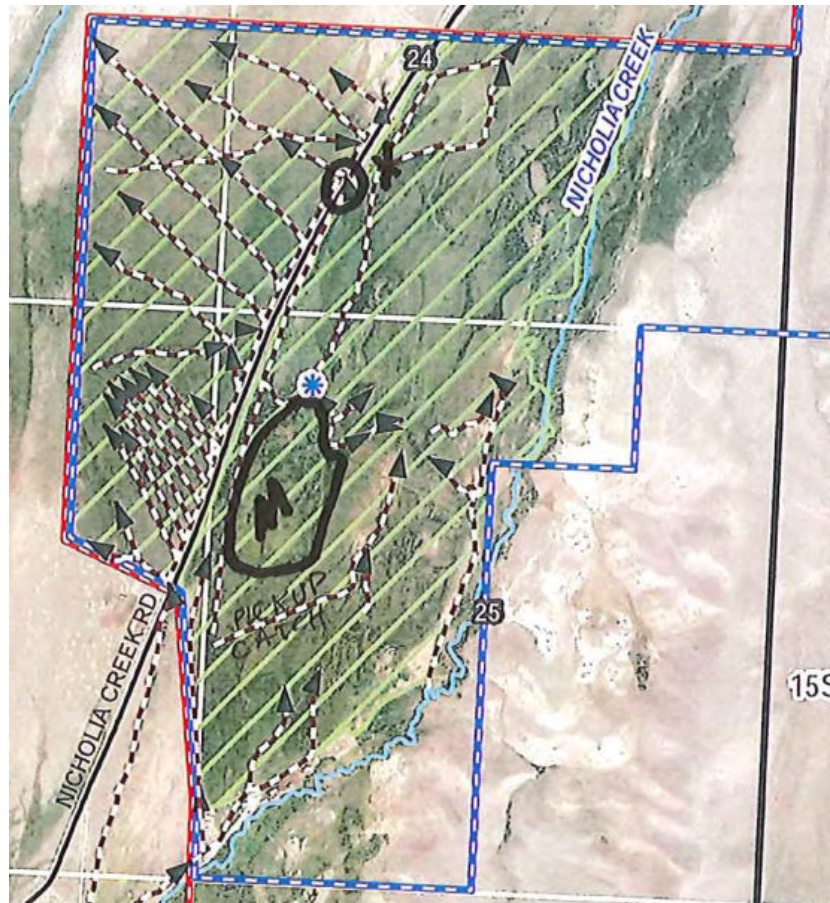
In February 2016, Peters filed motions with the Water Court to amend 41A 25430-00 and 41A 25433-00 to adopt DNRC's recommendations. Doc. 55, Ex. 12. As the record confirms, describing the "point of diversion" along Peters' property line is consistent with guidance under the DNRC Water Right Claims' Examination Manual for waste and seepage water. Doc. 55, Ex. 29 at 309 (explaining the point of diversion for waste and seepage rights will be where the water leaves the drain ditch to the place of use if the exact boundaries of the collection area are not known).

In March 2017, Peters and Martinell entered a Stipulation to resolve Martinell's NOIAs to Peters' rights in Water Court Case No. 41A-156. Doc. 55, Ex. 13. Under the Stipulation, they agreed the source for Water Right Nos. 41A 25430-00 and 41A 25433-00 would be modified to "waste and seepage." *Id.* The points of diversion described in the Stipulation were the locations where the waste water entered Peters' property consistent with DNRC's recommendation and claim examination manual guidance as noted above. *Id.*, ¶¶ 3(a)(b)(d) and 4(a)(b)(d). The Stipulation described no ditches or other means of conveyance. Roger Peters attested that the Stipulation with Martinell was to "confirm[] our historic waste and seepage rights" and "[a]s Bill [Martinell] did not want us to claim a point of diversion from Nicholia Creek, we agreed to move the points of diversion to our property boundary" but "[i]n doing so, we did not disclaim or abandon any of our rights to the ditches

that cross the Martinell land or disclaim or abandon our rights to have water flows across the Martinell's land." Doc. 55, Ex. 2, ¶ 8.

**C. The Character of the Water Collecting in the “Marsh” or “Collection Area” on Martinell’s Property**

Situated on Martinell’s land in the NW¼ of Section 25 is an area referred to by Martinell’s expert witness, Russ Radliff, as a “marsh” and Peters’ expert witnesses, Julie Merritt and Bruce Anderson with WGM Group, as a “collection area.” Doc. 55, Ex. 15, 34:12-24; Ex. 17 (Ex. B map); Ex. 10, 139:17-19; Ex. 18, 7:6-8. A map annotated by Mr. Radliff is depicted below, where he labeled the “marsh” with an “M.” Doc. 55, Ex. 16.



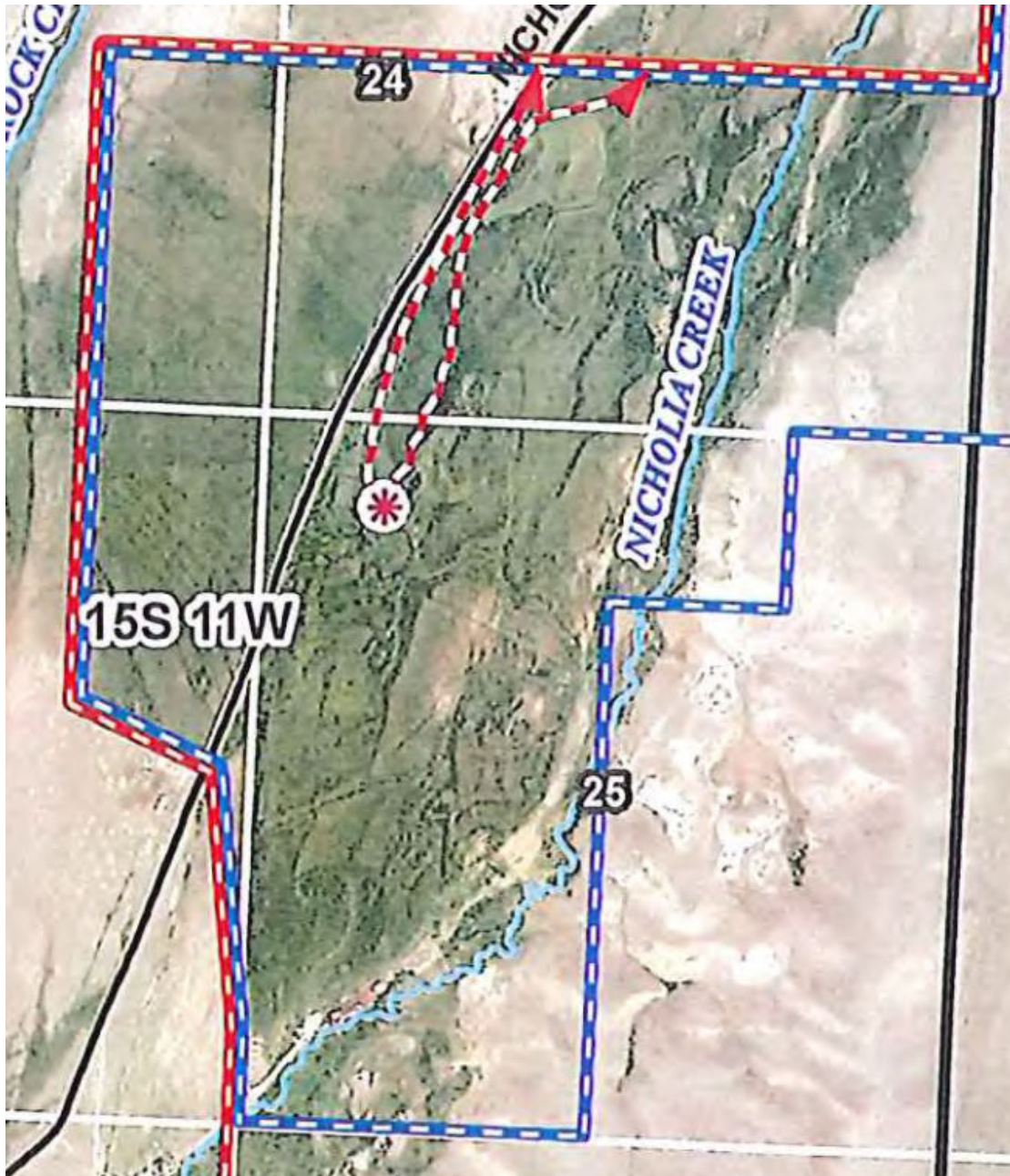
According to Mr. Radliff, water in the “marsh,” comes from the irrigation practices on Martinell’s “bench” lands west of Nicholia Creek Road, as well as upgradient irrigation south of the “marsh.” Doc. 55, Ex. 15, 40:12—41:12; Ex. 16. Mr. Radliff described the marsh as consisting of water from irrigation that “infiltrates in the ground” and discharges “from the hillside.” *Id.*, Ex. 15, 75:16-19.

Peters’ experts also testified to the character of the water arising on the Martinell property. Ms. Merritt concluded that water upgradient of the “Peters’ ditches” on the Martinell property is properly characterized “waste, seepage and subsurface” water. Doc. 55, Ex. 10, 67:6-10, 73:14-23. Ms. Merritt refers to the “marsh” area as the “collection area.” Doc. 55, Ex. 17 (Ex. B map); Ex. 10, 139:17-19. Mr. Anderson, a hydrologist, testified the water in the collection area is “waste, seepage, and subsurface” water coming out of the hillside to the west from Martinell’s “bench” irrigation. Doc. 55, Ex. 18, 25:1-8, 26:10-23, 61:1-6. He further testified the waste and seepage water is “not directly diverted or collected” at a discrete point. *Id.*, 39:7-19, 39:24—40:7.

**D. Wooden Control Structures on Martinell’s Land which Control the Flow of Waste and Seepage Waters into Peters’ Ditch**

Witnesses described the area immediately downgradient of the “marsh” or “collection area” on Martinell’s property where a wooden “control structure” exists. Mr. Radliff testified, on his site visit, the wooden control structure was not working as boards were removed. He testified that if working, the structures would “stop the

flow of water in two ditches.” Doc. 55, Ex. 15, 49:4-9. One ditch he described as “Martinells” ditch, and the “older” ditch that heads north but slightly west (as “Peters” ditch). Doc. 55, Ex. 20; Ex. 15, 49:9-13; *see also*, Ex. 14 (Radliff map), copied below with the two “disputed ditches” indicated in red and white, with the control structure indicated with a red asterisk:



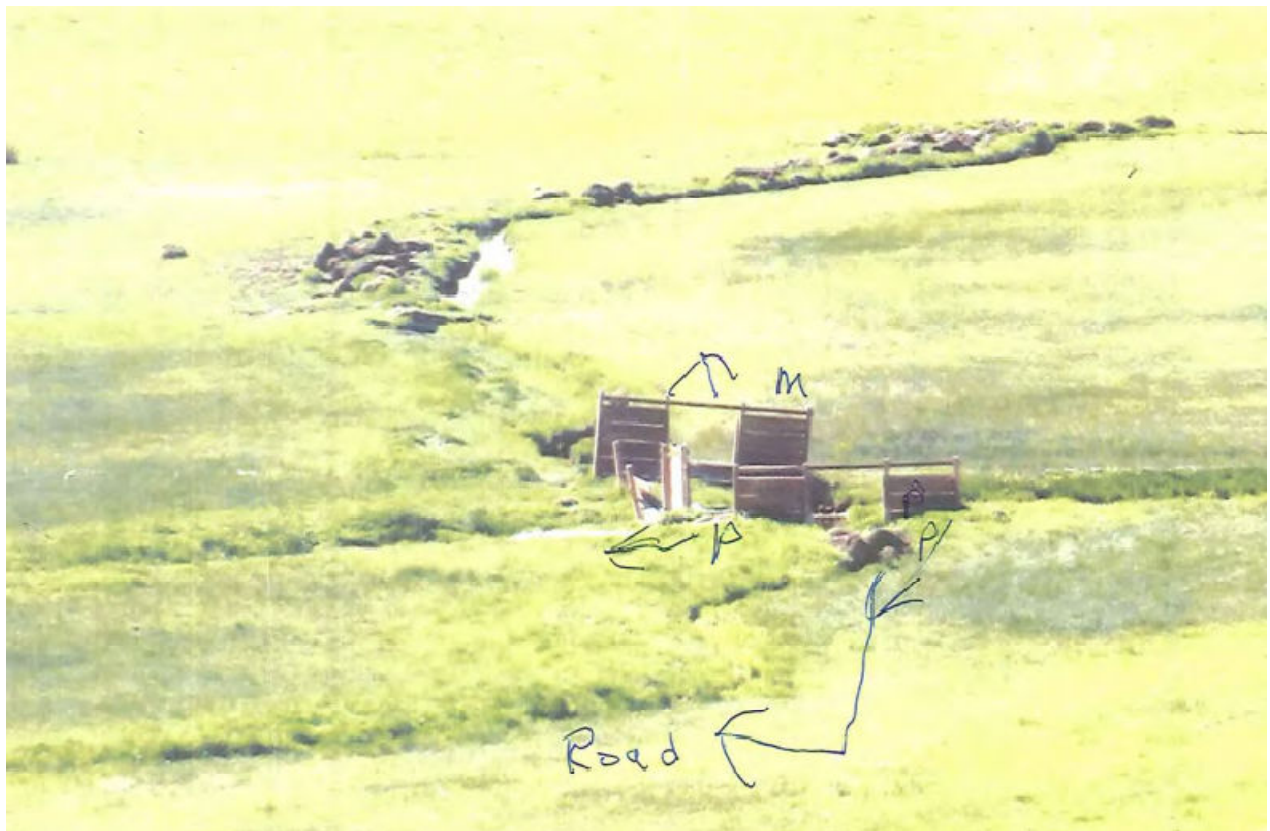
He testified the wooden control structure is more “accurately described” as the “intersection of four ditches, one being the ditch that comes from the marsh and another being a ditch that enters from the east and heading west to this point [the control structure].” Doc. 55, Ex. 15, 49:14-24.

Ms. Merritt similarly testified the waste and seepage water, collected over a large area, is directed to the control structure area by upgradient ditches. Doc. 55, Ex. 10, 85:6-21; *see also*, Ex. 17 (Ex. B map); Ex. 20 (1947 aerial map). She described the wooden structures as “check structures.” *Id.*, Ex. 10, 125:1-8. Bruce Anderson testified the control structures allow water to be “directed to one of the two ditches” below the collection or marsh area. *Id.*, Ex. 18, 33:5-20. He stated the structures allow “shifting of water between” the two ditches. *Id.*, 43:8-16. The structures could also allow water to be “split two ways.” *Id.*, 44:17-20.

#### **E. Peters’ Historical Use of the Wooden Control Structures**

George Duck, employed as “Farm Boss” for Peters, testified that Peters purchased their property adjacent to Martinell’s property in 2008. Doc. 55, Ex. 23; Ex. 21, 13:23—14:1. Shortly thereafter, Mr. Duck installed three (3) structures on Martinell’s property. *Id.*, 14:24—15:9. He testified at the location there previously were “poles and canvas dams.” *Id.*, 15:10-12. One structure was in “Roger [Peters]’s Ditch,” so water could be “shut off in the wintertime or when the ditch was not being used.” *Id.*, 16:25—17:2. One was installed in the ditch coming out of the “slough.”

*Id.*, 17:3-5. A third was installed to not “back water up” and flood Martinell’s land. *Id.*, 17:5-7. He labeled the routes that go to Peters’ property on a photograph of the location. Doc. 55, Ex. 21, 18:2—19:8, *see also*, Ex. 23 (Ex. A map), photograph copied below. Mr. Duck stated if the boards are not in the structure marked “P,” water will go down the ditch to Peters’ property “across the road” to irrigate the Peters’ property. Doc. 55, Ex. 21, 39:14—40:8.



Luke Peters, son of Roger Peters, testified that at the control structure area, tarps have been used to direct water to Peters Ditch. Doc. 51, Ex. N, 17:5-7. Roger Peters testified, since they moved to the area in 2008, Roger or his employees have gone to the control structure area to use planks and tarps as a means of diverting

water, and that the practice occurred regularly for a number of years. *Id.*, Ex. P, 77:2-9.

The practice of Peters and their predecessors using water available from the ditch system has occurred for decades without interference or interruption. Doc. 55, Material Fact Nos. 12 and 21-26 (record citations therein). The westernmost ditch crossing Martinell's land has been used and maintained by Peters, and their predecessors, for the delivery of water for irrigation purposes to Peters' property west of Nicholia Creek Road. *Id.* In fact, as noted above, the control structures situated within the ditches were repaired and replaced by Peters, and the western ditch as it crosses Martinell's land has been periodically maintained by Peters. *Id.*, Material Fact No. 22 (record citations therein). The record confirms use of the ditch and control structure has never been by permission. *Id.*, Material Fact Nos. 12, 22, 25-27 and 30 (record citations therein).

**F. Interference with Ditch Use and Water Use / Origins of the Dispute**

In early June 2021, Luke Peters checked the control structure on Martinell's property to start irrigating Peters' property. Luke found that the control structure had been damaged and was not operable. As a result, all water arising from the collection area above the control structure, and collected in the ditch system, was directed away from the Peters' Ditch. Doc. 1, ¶ 23; Doc. 55, Ex. 14.

On June 11, 2021, Luke again entered Martinell's property where he found that Peters' ditch had been filled in with dirt and rocks. Doc. 1, ¶ 24. Because of the blockage of the ditch, no water was conveyed to Peters' place of use under Peters' waste and seepage water rights. *See*, Doc. 55, Ex. 1 (map of place of use west of road). Doc. 55, Ex. 27, copied below, is a photograph of the condition of Peters' ditch in June 2021:



Peters did not remove the ditch blockage during the irrigation season of 2021 in hopes of resolving the dispute amicably. In April 2022, Bill Martinell informed Roger Peters that Martinell filled in the ditch over a belief that Peters had been involved in a “ditch case” involving Peters’ neighbor to the north, Ross Hansen, even though Roger Peters explained he was not in that case between Ross Hansen and Martinell. Doc. 1, ¶¶ 25-26; Doc. 55, Ex. 2, ¶ 11.

In deposition testimony, Bill Martinell admitted to putting rocks and filling in the ditch that led to Peters’ property but stated he did so as he “wanted to irrigate his ground” so he “shut Peters off.” Doc. 55, Ex. 6, 71:16—72:25, 73:6-9; Ex. 27. He did so knowing the water from the collection area on the Martinell land would not get to Peters’ property. Doc. 55, Ex. 6, 72:23-25. When asked about the Water Court Stipulation between Peters and Martinell, wherein Martinell recognized Peters’ waste and seepage water rights, Bill Martinell testified he “never did believe that the waste and seepage right was valid” but “we thought if we will go along with this agreement that [Peters’ counsel] drew up, that we would not have more needless litigation.” *Id.*, 67:19-25-68:1-16. As the record confirmed, Martinell has no water rights for waste and seepage water. Doc. 55, Material Fact No. 30 (record citations therein).

On July 11, 2022, Roger Peters filed a *pro se* complaint in District Court as a dissatisfied water user because Martinell’s actions had deprived Peters of the waste

and seepage water agreed upon in the Water Court Stipulation. Doc. 72, Ex. N. On August 12, 2022, after briefing by Martinell and Peters, the District Court dismissed the dissatisfied water user complaint, holding that the relief Peters sought was not the proper subject of a dissatisfied water user complaint and was not an action to determine the “substantive rights of a water user.” *Id.*, Ex. O. Thereafter, Peters filed their verified complaint in this case seeking relief to address these “substantive” rights.

#### IV. STANDARD OF REVIEW

A district court’s Rule 12(b)(1), M.R.Civ.P., ruling on a motion to dismiss for lack of subject matter jurisdiction is a conclusion of law reviewed by this Court *de novo* for correctness. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 102, 454 P.3d 655, 662 (citing *Harrington v. Energy W. Inc.*, 2015 MT 233, ¶ 7, 380 Mont. 298, 356 P.3d 441). The primary inquiry is “whether the court has the threshold authority to hear and adjudicate the type of claim at issue on the facts pled.” *Id.*, (citing *Harrington*, ¶¶ 9, 13). Generally, this means that well-pled facts must be taken “as true in the light most favorable to the claimant and then dismiss only if it clearly lacks authority to hear and adjudicate the claim as pled.” *Id.*

A district court’s ruling on a motion for summary judgment under Rule 56, M.R.Civ.P., is reviewed *de novo* to determine “whether the decision correctly found

that there were no genuine issues of fact and that the moving party was entitled to judgment as a matter of law. *Dick Anderson Const., Inc. v. Monroe Prop. Co., LLC*, 2011 MT 138, ¶ 16, 361 Mont. 30, 35, 255 P.3d 1257, 1261. Under this standard, “reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment.” *Id.* “We have stated on numerous occasions that the purpose of summary judgment is to encourage judicial economy through the elimination of any unnecessary trial. However, summary judgment is never to be a substitute for trial if there is an issue of material fact.” *Emery v. Federated Foods, Inc.*, 262 Mont. 83, 90, 863 P.2d 426, 431 (1993) (citing *Payne Realty v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90, 93 (1992)).

Whether legal authority exists to award attorney’s fees is a conclusion of law and reviewed *de novo*. *Wohl v. City of Missoula*, 2013 MT 46, ¶ 29, 369 Mont. 108, 123, 300 P.3d 1119, 1130 (citing *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 42, 354 Mont. 50, 221 P.3d 1230). If legal authority does exist, then this Court reviews the district court’s decision to grant or deny attorney’s fees for abuse of discretion. *Id.*, (citing *Hughes v. Ahlgren*, 2011 MT 189, ¶ 10, 361 Mont. 319, 258 P.3d 439).

Lastly this Court reviews *de novo* “a district court’s interpretation and application of a statute,” specifically whether to grant certification to the Water Court under M.C.A. § 85-2-406(2)(b). *Dick Irvin Inc. v. State*, 2013 MT 272, ¶ 18,

372 Mont. 58, 63, 310 P.3d 524, 528 (citing *In re J.D.N.*, 2008 MT 420, ¶ 8, 347 Mont. 368, 199 P.3d 189); *see also Fellows v. Saylor*, 2016 MT 45, ¶ 13, 382 Mont. 298, 303, 367 P.3d 732, 736.

## V. SUMMARY OF ARGUMENT

The District Court's orders and judgment in this case rest on a mistaken premise; namely, in order for Peters to seek relief from Martinell's act of burying Peters' ditch and redirecting waste and seepage water away from Peters, Peters' underlying water rights must have a point of diversion described on Martinell's property. From this mistaken starting point, the District Court's orders reached a series of erroneous conclusions.

The primary error of the District Court was dismissing Peters' claims for lack of subject matter jurisdiction. First, Peters' claim of ditch interference under M.C.A. § 70-17-112 (Count IV) is independent of the description of the point of diversion on Peters' water right abstracts. As this Court has repeatedly held, water rights and ditch rights are wholly separate and distinct property interests. Thus, the determination of Peters' rights in the ditch that Martinell has blocked, or Peters' claim of Martinell's interference in Peters' use of the ditch, are not dependent upon the point of diversion described for Peters' water rights. The District Court was clearly vested with subject matter jurisdiction over Peters' claims of unlawful ditch interference by Martinell.

Second, Peters' claims for interference with water use (Count III) is also independent of the point of diversion described on Peters' water right abstracts. District Courts are vested with jurisdiction to address water distribution matters, which include claims related to allegations of unlawful interference. Here, the record established Martinell's actions of filling in the ditch and rerouting water, which historically served Peters' property, was intentional, malicious, and unlawfully deprived Peters of water under Peters' valid and enforceable waste and seepage water rights. The District Court had jurisdiction over Peters' claims of interference with Peters' water use and erred in dismissing Count III for lack of subject matter jurisdiction.

Third, when the District Court determined it could not grant Peters any relief from Martinell's interference, it committed further error by implicitly condoning Martinell's use of the "waste and seepage" water to which Martinell had no right to use. Thus, while the District Court erroneously disclaimed jurisdiction to grant Peters any relief from Martinell's interference with Peters' rights, at the same time, the District Court sanctioned Martinell's purported use of the waste and seepage water when Martinell has no such waste and seepage water rights. In essence, the District Court feigned reluctance to "re-adjudicate" Peters' rights, but in the same breath terminated Peters' water rights and created new water rights for Martinell, which is a *de facto* adjudication of their water rights.

Relatedly, the District Court erred as a matter of law in granting summary judgment to Martinell on their counterclaim of trespass. The question of trespass is wholly interwoven with Peters' claim of interference with Peters' prescriptive ditch easement rights. Because the District Court erred in dismissing Peters' ditch interference claims for lack of subject matter jurisdiction, the order granting summary judgment to Martinell on the counterclaim of trespass is also mistaken. Further, contrary to the District Court's Order, Peters had established sufficient material facts supporting Peters' claim of prescriptive ditch easement rights to defeat Martinell's motion for summary judgment. On review, the District Court should be reversed on its determination that Martinell was entitled to summary judgment on trespass.

Further, and related to the errors noted above, the District Court erred in finding Martinell to be the prevailing party under M.C.A. § 70-17-112(5) for purposes of attorney's fees and costs for ditch interference claims brought under the statute. First, upon the District Court's dismissal of Peters' claims for ditch interference for lack of subject matter jurisdiction, the District Court deprived itself of jurisdiction to go further in awarding fees and costs to Martinell as a "prevailing party." Second, the District Court should have never addressed this question summarily, as dismissal of Peters' ditch interference claims (Count IV) was error as a matter of law, as was the District Court's order granting summary judgment on

Martinell's trespass claim. Third, under well-established precedent, fees and costs under M.C.A. § 70-17-112(5) requires the prevailing party to prevail on *all* claims under the statute. Here, Martinell did not do so. The District Court's award of fees and costs must be reversed.

Finally, although not directly related to Peters' claims under the complaint, the District Court also committed legal error by proceeding to award fees and costs and enter judgment without certifying the distribution controversy to the Water Court as requested by Peters. The District Court's errors, and this appeal, could have been corrected, or avoided, had the District Court certified both Peters' water right claims, and Martinell's water right claims, to the Water Court as Peters requested. Under Montana law, the District Court was required to certify and committed legal error by failing to do so.

After review, the judgment and orders of the District Court should be reversed and vacated, and this matter remanded with instructions to reinstate Peters' claims for disposition on the merits.

## VI. ARGUMENT

### A. **Peters' Water Rights Do Not Need a Point of Diversion Described on Martinell's Land for Peters to Seek Relief from Martinell's Interference with Peters' Ditch**

The crux of this appeal is whether the District Court had subject matter jurisdiction over the claims and relief sought under Peters' verified complaint.

According to the District Court's Orders, because Peters' water rights do not identify a point of diversion on Martinell's property, the Court lacked jurisdiction over Peters' claims for ditch interference. Further, according to the District Court, because Peters' rights describe the property line boundary as the point of diversion, Peters cannot establish they have a ditch easement on Martinell's property, and Peters cannot enter the Martinell property to take water below the "collection area." Appx. A at 17-18. The District Court's order not only effectively rendered Peters' ditch rights and water rights useless, but also stands Montana law on ditch easement rights on its head.

**1. Under Montana Law, Water Rights and Ditch Rights Are Wholly Separate Property Interests**

The District Court's Order dismissing Peters' verified complaint erroneously conflates two entirely separate and distinct property interests, water rights and ditch rights. According to the District Court, without a water right describing a point of diversion on Martinell's land, Peters cannot enter Martinell's property to "divert" water into Peters' ditch regardless of whether Peters alleged they have a ditch easement. Appx. A at 17-18. Further, under the District Court's analysis, without a water right describing a point of diversion allowing Peters to do so, the Court lacked subject matter jurisdiction over Peters' claims for ditch interference. *Id.* In other words, according to the District Court, the point of diversion description of Peters' water rights is determinative of the entire action. Montana law recognizes otherwise.

As this Court has held repeatedly, water rights and ditch rights are separate and distinct property rights. *Connolly v. Harrel*, 102 Mont. 295, 57 P.2d 781, 783 (1936), citing *Maclay v. Missoula Irrigation Dist.*, 90 Mont. 344, 3 P.2d 286 (1931); *McDonnell v. Huffine*, 44 Mont. 411, 120 P. 792 (1912). As recognized, the water right is entirely distinct from the right to the ditch, canal, or other means by which it is conveyed. *McDonnell*, 120 P. at 795. The latter is an easement over land, and the former an incorporeal hereditament. *Id.* The water right is usufruct, the right to use of water for beneficial purposes. The right to the “*ditch, canal, or other structure* in which water is conveyed for irrigation” is an easement over the land occupied by the means of conveyance. *Mannix v. Powell County*, 60 Mont. 510, 199 P. 914 (1921) (emphasis supplied); *Hughes v. King*, 142 Mont. 227, 229, 383 P.2d 816, 817 (1963). Under Montana law, in its basic form, having a right to one is not dependent upon having the right to the other. *Connolly*, 57 P.2d at 783 (one may own a water right without a ditch right, or a ditch right without a water right).

This Court has also recognized the distinction between the adjudication of water rights and ditch rights. Adjudication of water rights are not adjudications of the ditch or channel through which the water is conveyed. *Missoula Light Water Co. v. Hughes*, 106 Mont. 355, 77 P.2d 1041, 1046-47 (1938) (citations omitted). This distinction has been reiterated by two Water Court Judges, former Chief Water Judge Russ McElyea and current Chief Judge Stephen Brown. In their treatise, “Montana

Water Law,” it is noted: “the right to convey water across land owned by another is *not an inherent part of a water right*. Instead, this right is a separate property right – a form of easement commonly known as a “ditch right.” Stephen R. Brown, Michelle L. Bryan & Russ McElyea, “Montana Water Law,” Chapter VII.E. at 290 (emphasis supplied). In other words, Peters’ right to direct and transport water through and across Martinell’s land from the collection area, from the wooden control structure, or across any other point, is *not* dependent upon a point of diversion being described under Peters’ water rights on the servient estate, Martinell’s property.

More directly, this Court has recognized the determination of ditch easements or ditch rights is entirely “bifurcated” from whether a water right exists. *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991). Accordingly, in *Mildenberger*, this Court affirmed the District Court’s determination that Mildenberger possessed an easement by prescription in the ditch crossing the Galbraith’s property without the requirement that a water right be adjudicated on the servient estate. *Id.*, at 135. Further, Montana law expressly recognizes the right of taking water, the right of receiving water from land, and the right of having water flow “without diminution or disturbance of any kind,” are servitudes which may attach to land and are then called “easements.” M.C.A. § 70-17-101(5), (9), and (11). These rights are not predicated or conditioned on a water right point of diversion being adjudicated on the land burdened, again because the easement right is a

separate and distinct form of property. Further, under Mont. Code Ann. § 70-17-112 (2), “A person may not encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.” The statute does not condition its enforcement on a water right specifically describing a point of diversion being situated or adjudicated upon the servient estate.

In this case, Peters’ water rights describe the rights to the source of water. In the instance of Water Right Nos. 41A 25430-00 and 41A 25433-00, the water is described as “waste and seepage water” which arises on Martinell’s land, and is conveyed to Peters’ property through Martinell’s land in the “disputed ditches.” As the record confirms, the point of diversion described at the property boundary is consistent with DNRC’s recommendations, and in line with how waste and seepage water rights are described under the adjudication claims examination manual—when the exact boundaries of the collection area are not known, the point of diversion will be where the water leaves the drain ditch to the place of use. Doc. 55, Ex. 29 at 309.

Peters’ water rights do not need to describe a point of diversion on Martinell’s land in order for Peters to have the right to enter and convey water to Peters’ property as has historically occurred. Such a notion ignores the real property right to convey water across the lands of another (i.e., an easement) in order to enjoy the water, the subject of the appropriation. In other words, when entering Martinell’s property to

control, direct, and convey the water within the waste and seepage ditch system to Peters' property, Peters is exercising their easement interests, not their water rights. The District Court ignored this bedrock distinction in Montana law and erred in holding that Peters needed a point of diversion described on Peters' water rights to Martinell's lands in order for Peters to pursue claims of ditch interference against Martinell.

The District Court's Order dismissing Peters' ditch interference claims for lack of subject matter jurisdiction was erroneously premised on the notion that Peters' water rights must first have a point of diversion adjudicated on Martinell's property. The reasoning is wrong under Montana law. The District Court's dismissal of Peters' Count IV should be reversed.

**Peters' Claim of Interference with Water Use is also Not Dependent on a Point of Diversion Being Described on Martinell's Land**

As with Peters' claim for interference with ditch use, the District Court dismissed Peters' claim for interference with water use (Count III) for lack of subject matter jurisdiction. Appx. A at 18. Again, the District Court reasoned, without a point of diversion described on Martinell's land, the District Court lacked jurisdiction to provide Peters any relief. *Id.* The District Court was wrong.

**1. Under Montana Law, Peters' Waste and Seepage Water Rights are Valid and Enforceable from Intentional and Malicious Interference**

Before the District Court, Peters recognized their water rights had been adjudicated by the Water Court as having the source identified as “waste and seepage” water, and the “point of diversion” identified as the property boundary between Martinell and Peters. Doc. 55 at 23. As Peters explained to the District Court, a precise or definite “point of diversion” is not possible to describe for waste and seepage water which arises and is collected over a broad area. As the record supports, the area from the Martinell’s property which drains waste and seepage water to the ditch which collects the water leading to Peters is extensive. Doc. 55, Ex. 19; Material Fact No. 17 (record citations therein). In these circumstances, the point of diversion will be “where the water leaves the drain ditch to the place of use” as set forth in the DNRC’s guidance on waste and seepage rights. Doc. 55 at 23-24; Ex. 29 at 309.

However, according to the District Court, Peters cannot “sidestep the Water Court’s adjudication of their water rights as waste and seepage water with a POD at their property line.” Appx. A at 18; Appx. B at 3. Peters was not asking the Court to do so, as Peters’ waste and seepage water rights are protectable and enforceable, as adjudicated by the Water Court. As Peters pled in their verified complaint, and as the record confirms, Martinell intentionally and maliciously blocked the flow of

water from the ditch that conveyed Peters' waste and seepage waters to their property, which interfered with Peters' ditch rights and water use. Doc. 1, ¶¶ 25-26, 30; Doc. 55, Material Fact Nos. 27-30 (record citations therein). Again, the District Court erred in dismissing Peters' claims.

Under Montana law, appropriations of waste and seepage waters are valid and enforceable appropriations. *See*, Memorandum and Order, *In re Claim 40A-23271*, 2000 WL 36119209, \*3 (Mont. Water Ct. Jan. 19, 2000). Further, this Court has recognized valid appropriations of waste water may not be interfered with by the landowner whose land the water arises upon, or whose land the water may cross, by maliciously or arbitrarily changing the flow of the waste water to the injury or detriment of the appropriator. *Newton v. Weiler*, 87 Mont. 164, 286 P. 133, 139 (1930).

In this matter, the record established that Martinell's acts of burying Peters' ditch, and in dismantling the control structures situated within the ditch to re-route the water away from Peters, was deliberate, intentional, and done with knowledge that Peters would be injured. In fact, as discovery revealed, Bill Martinell had no intention of recognizing the validity of Peters' waste and seepage water rights when he signed the Water Court Stipulation. Doc. 55, Material Fact Nos. 10-11 (record citations therein). A more direct case of intentional and malicious interference with water use is difficult to conceive.

Peters' Count III, interference with water use, was not dependent upon the point of diversion described for Peters' waste and seepage water rights. The District Court has subject matter jurisdiction over claims which implicate the distribution of water among water users. M.C.A. § 85-2-406(1) (district court jurisdiction over water distribution). Peters' claim for relief did not request the District Court alter or modify Peters' waste and seepage rights in any manner. Peters requested straightforward relief, well-grounded in Montana law, to prevent the intentional and malicious rerouting of waste and seepage water by Martinell to the injury of Peters. The District Court erred by dismissing Peters' Count III for lack of subject matter jurisdiction.

**2. Martinell's Interference with Water at the Control Structure Area Results in Martinell Taking Waste and Seepage Water which They Have No Water Right to Use**

The record confirmed the only valid water rights related to waste and seepage water use belong to Peters under 41A 25430-00 and 41A 25433-00. Martinell admittedly has no water rights for waste and seepage water. Doc. 55, Material Fact Nos. 15 and 30 (record citations therein).

As Peters' expert witness confirmed, the water collected in the ditch leading to Peters' property is waste and seepage water. *Id.* Since Peters has water rights for this water, Peters' claim that Martinell was unlawfully interfering with waste water destined for Peters was properly before the District Court. Doc. 55 at 22. While the

District Court accused Peters of “side stepping” the Water Court, it is the District Court who “side stepped” Peters’ claim for relief from Martinell’s interference with their waste and seepage rights which Peters and their predecessors have historically used for decades when the District Court erroneously concluded it lacked jurisdiction to grant Peters’ any relief. As shown, the District Court *does* have jurisdiction and was required to address Peters’ claim that Martinell was improperly rerouting water which Peters, not Martinell, was entitled to use.

The result of the District Court’s reasoning in dismissing Peters’ Count III is that Martinell can continue to deliberately and intentionally interfere with Peters’ water rights in contravention of the Water Court Stipulation and Montana law; take water to which Martinell has no water right; and Peters has no avenue to complain. The District Court’s reasoning also, in effect, does what the District Court said it lacked jurisdiction to do: effectively readjudicate Peters’ rights by determining that a description of a point of diversion to the control structure area was an element of Peters’ water rights requisite to Peters’ ability to enforce Peters’ rights. In so doing, the District Court erroneously disregarded the methodology for adjudicating waste and seepage rights—assigning the point of diversion “where the water leaves the drain ditch to the place of use” and instead determined the point of diversion needed to be on Martinell’s land for Peters to enforce their water rights. The District Court erred in so holding and, after review, should be reversed.

C. **The District Court Erred in Granting Summary Judgment on Martinell's Counterclaim of Trespass**

In the District Court's discussion of Peters' ditch easement claim and Martinell's counterclaim of trespass, the District Court's reasoning is again convoluted. First, the District Court reasoned, Peters "do not have a ditch easement for Peters' Ditch, nor have they proved they do, nor do they have a right to divert water in the Peters' Ditch. Therefore, [Martinell] cannot legally interfere with a ditch right that [Peters] do not legally have." Appx. A at 18. Although difficult to pinpoint, the District Court's reasoning that Peters "do not have a ditch easement" appears to be related to the District Court's belief that Peters' water rights needed to describe a point of diversion situated on Martinell's property. As discussed above, the District Court's reasoning is at odds with Montana law.

Further, as to Peters' claim of prescriptive ditch easement rights, as the record established, Peters had set forth sufficient material facts to establish a *prima facie* case in and to Peters' ditch, which, at a minimum, was sufficient to defeat Martinell's motion for summary judgment. *See*, Statement of Facts, Part III.E., *supra*; *see also*, Doc. 55, Ex. 21, 22:22-24, 29:5-20; Ex. 7, ¶¶ 2, 4, 5, 7, and 9. As the record confirmed, the ditches on Martinell's property near the "collection area" or "marsh" above and below the "control structure" area have been in place for decades. Doc. 55, Ex. 8, 71:19—72:23; Ex. 21, 22:3-24; Ex. 6, 10:2-15; Ex. 7, ¶ 5; *see also*, Ex. 20 (1947 aerial photograph) and Ex. 24 (1954 aerial photograph). In discovery,

Martinell provided numerous examples of continuous use of the ditch by Peters. Doc. 55, Ex. 9, 20:5-10, 21:3, 22:2, 26:21-25; Ex. 26 at 11-15; Ex. 6, 58:13-16. As the record demonstrated, the continuous use by Peters has never been permissive. Doc. 55, Material Fact No. 30 (record citations therein). All this evidence provided to the District Court, in response to Martinell's motions, is material and supportive of Peters' claims for a prescriptive ditch easement since at least 2008, and the same has been open, exclusive, adverse, continuous, and uninterrupted for the statutory period. *Steiger v. Brown*, 2007 MT 29, ¶ 19, 336 Mont. 29, 152 P.3d 705. At a minimum, reasonable inferences drawn from this evidence in favor of Peters, as the District Court is required to do, were sufficient to dispose of Martinell's motion for summary judgment. *Dick Anderson Const., Inc.*, ¶ 16.

The District Court appeared to fault Peters on their claim of a prescriptive easement by "disagreeing" that Peters has not "established" a ditch easement on Martinell's property, and that Peters' "filed no motion for summary judgment on the issue of a prescriptive easement." Appx. A at 17. In addition to the District Court's improper reasoning that Peters needed a water right describing a point of diversion on Martinell's land, the District Court apparently believed Peters needed to prove the existence of a prescriptive ditch easement at the summary judgment motion phase by filing their own motion. Such a notion is wrong as a matter of law. All that

Peters needed to establish were sufficient issues of material fact related to their claim for a prescriptive easement which the record confirms they demonstrated.

Under the District Court’s Order, the Court then reasoned for Martinell to be “successful” on their claim for attorney’s fees under M.C.A. § 70-17-112(5), Martinell must succeed on Martinell’s counterclaim of trespass. Appx. A at 19. In analyzing this claim, the District Court cited to facts from Peters’ verified complaint for the trespass elements of, 1) intentional entry to property, 2) by the Defendant (Peters). *Id.*, citing Doc. 1, ¶¶ 23-24. The District Court then went on to reason, the third element of trespass, 3) entry without consent or legal right, was also met as Peters does not have a “ditch easement or water right” allowing them to enter the Martinell property. *Id.* The District Court’s reasoning should again leave this Court scratching its head.

First, as noted previously, the District Court’s belief that Peters did not possess a ditch easement to Martinell’s property was largely based on its erroneous conclusion that Peters needed a water right describing a point of diversion on Martinell’s land. Second, Peters did in fact establish sufficient record facts related to the elements of prescription for purposes of avoiding summary judgment on Peters’ claim of a legal right to the use of Peters’ ditch. Under either scenario, it was erroneous for the Court to hold the third element of trespass—lack of consent, or lack of legal right—had been established as a matter of law for summary judgment

purposes. Peters' prescriptive easement claims remained valid. It was the District Court's reasoning which was not. Upon review, this Court should reverse the District Court's Order that Martinell was entitled to summary judgment on the counterclaim of trespass.

**D. The District Court Erred in Granting Summary Judgment to Martinell as a Prevailing Party under M.C.A. § 70-17-112(5)**

First, as shown herein, the District Court incorrectly dismissed Peters' claim for interference with Peters' ditch easement rights by holding Peters needed a water right describing a point of diversion on Martinell's lands for the District Court to have jurisdiction over Peters' claims. However, the District Court committed further error by proceeding to grant Martinell's counterclaims for trespass and attorney's fees under M.C.A. § 70-17-112(5). "[O]nce a court determines that it lacks subject matter jurisdiction, 'it can take no further action in the case other than to dismiss it.'" *Stanely v. Lemire*, 2006 MT 304, ¶ 31, 334 Mont. 489, 148 P.3d 643 (quoting Rule 12(h)(3), M.R.Civ.P.; *In re Marriage of Miller*, 259 Mont. 424, 427, 856 P.2d 1378, 1380 (1993)). Where the subject matter of Defendants' counterclaims is the same as Plaintiff's cause of action, i.e., they grew out of the same transaction or conduct, as is the case here, the Court's jurisdiction, or lack thereof, is the same for each. *See, Gilna v. Barker*, 78 Mont. 357, 254 P. 174, 177 (1927). It was legal error for the Court to proceed to grant Martinell's counterclaims after it had divested itself of jurisdiction of Peters' claims.

Second, as indicated above, the District Court erred in holding Martinell was entitled to summary judgment on the counterclaim of trespass as material facts were in dispute and the elements of trespass had not been established as a matter of law. Thus, the District Court had no legal basis to find Martinell a prevailing party under M.C.A. § 70-17-112(5).

Third, and finally, Martinell did not prevail on all claims brought under M.C.A. § 70-17-112. This Court has made clear that attorney’s fees are only awarded when the party prevails on *all* claims raised pursuant to M.C.A. § 70-17-112. *Musselshell Ranch Co. v. Seidel-Joukova* (“*Musselshell Ranch II*”), 2012 MT 222, ¶ 27, 366 Mont. 337, 286 P.3d 1212; *see also, Engel v. Gampp*, 2000 MT 17, ¶ 40, 298 Mont. 116, 993 P.2d 701. While the District Court disposed of Peters’ claims made under M.C.A. § 70-17-112, the District Court reached no determination upon Martinell’s misplaced Counterclaim No. 3 alleging interference *by Peters* upon *Martinell’s* “ditch rights” apparently on Martinell’s own property. *See*, Doc. 20, ¶¶ 117-118. Under this Court’s precedent, Martinell cannot be deemed a “prevailing party” for failure to prevail on all of Martinell’s claims raised under M.C.A. § 70-17-112.

**E. The District Court’s Award of Fees and Costs under M.C.A. § 70-17-112(5) is Mistaken**

Following the District Court’s erroneous conclusion that Martinell was a “prevailing party” under M.C.A. § 70-17-112(5), Martinell requested an award of

\$289,320.00 for 723.3 hours of work and \$23,175.22 in costs. Docs. 65 and 67. Martinell did not provide any billing entries or invoices, just an “itemization” supported by attorney affidavits. Peters filed an objection to the reasonableness of Martinell’s requested attorney’s fees citing that many of the entries in the “itemization” provided by Martinell were “excessive, redundant, or otherwise unnecessary.” *Ihler v. Chisholm*, 2000 MT 37, ¶ 51, 298 Mont. 254, 269, 995 P.2d 439, 449–50 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939–40, 76 L. Ed. 2d 40 (1983) (superseded by statute on other grounds)). Doc. 68.

On May 20, 2025, the District Court held an evidentiary hearing on the reasonableness of the award of fees and costs requested by Martinell, and on June 18, 2024, awarded \$196,767.22 in attorney’s fees and costs. Doc. 80. While the District Court’s Order provided examples of “problematic billing entries,” the District Court stated that the examples were “not exhaustive” and reduced the requested amount of attorney’s fees generally by 40%, leaving it to Peters to speculate which items were considered reasonable. *Id.*

As Peters demonstrated, at no time prior to, or during, the hearing did Martinell ever produce invoices for the actual fees and costs billed to Martinell. Doc. 68 at 3. Rather, Martinell relied upon affidavits of counsel attesting to a continuous “itemization” of time entries between August 2022 and December 2024. Doc. 66. As such, it is unknown how much of the fees were actually incurred by Martinell.

Yet, the District Court disregarded this and awarded fees based upon the “itemization” supported only by attestations of counsel. This is the same “itemization” that the District Court provided an unexhaustive list of examples that were “excessive, clerical, or generally hard to decipher.” In these circumstances, more reliable evidence was needed.

As this Court has explained, “Hours that are not properly billed to one’s client *also are not properly billed to one’s adversary* pursuant to statutory authority.” *Ihler*, ¶ 51 (emphasis added). This Court has also explained that award of fees must be supported with “competent evidence.” *Rossi v. Pawiroredjo*, 2004 MT 39, ¶ 29, 320 Mont. 63, 69, 85 P.3d 776, 781 (quoting *First Sec. Bank v. Tholkes*, 169 Mont. 422, 429, 547 P.2d 1328, 1332 (1976)). The District Court made no attempt to verify whether the hours requested by Martinell in the “itemization” were billed to Martinell beyond attestations of Martinell’s counsel. Accordingly, the District Court’s award of fees based upon the “itemization” was erroneous under the governing standard and should be reversed as an abuse of discretion.

**F. The District Court’s Failure to Certify to the Water Court as Required by Statute Was Error as a Matter of Law**

As explained herein, the errors of the District Court in dismissing Peters’ verified complaint and granting summary judgment in favor of Martinell are numerous and are the subject of this appeal by Peters. However, prior to the evidentiary hearing regarding Martinell’s request for fees and costs and final

disposition of the matter, Peters petitioned the District Court to certify the water distribution controversy between Peters and Martinell to the Chief Water Judge pursuant to M.C.A. § 85-2-406(2)(b) and stay the District Court proceedings pending certification. Doc. 72. The District Court did not rule on Peters’ petition, or the motion to stay, until its August 12, 2025 entry of judgment where the Court stated that Peters’ petition was “deemed denied.” Appx. D, Doc. 88.

As Peters informed the District Court, while Peters disagreed with the premise of the District Court’s Order that Peters’ water rights required a point of diversion described on Martinell’s property, *if* Peters’ water rights as described by the Water Court *was* determinative of the entire case, the District Court could, and should, certify Peters’ rights, and those of Martinell, to the Water Court to review the elements of their respective rights and fully and finally resolve the dispute between Peters and Martinell. While not the central issue in this appeal, certification was Peters final attempt to save their waste and seepage rights validly adjudicated during the Basin 41A Preliminary Decree that had now, essentially, been rendered null and void by the District Court’s Orders. Docs. 64 and 70. Failure to certify this water distribution controversy was yet another legal error committed by the District Court.

First, M.C.A. § 85-2-406(2)(b) states that “[i]f a certification request is made, the district court *shall* certify to the chief water judge the determination of the existing rights that are involved in the controversy according to part 2 of this chapter.

M.C.A. § 85-2-406(2)(b) (emphasis added). Thus, the District Court was under a statutory obligation to certify the matter once Peters made the request.

Second, as explained previously, the Water Court adjudicated Peters' water as waste and seepage water rights with a point of diversion described as the property boundary line. The description of the point of diversion was the product of recommendations from DNRC's Water Resources Specialist, who did not investigate the extent of the source or means of conveyance related to Peters' water rights at issue, and DNRC's claim's manual guidance on how to describe the point of diversion for waste and seepage rights in the adjudication. Thereafter, a water distribution controversy arose when Martinell prevented Peters from receiving water under Peters' waste and seepage water rights, and Martinell made claim to the water "collected" at the control structures and in the ditch formerly used by Peters. Doc. 72 at 13-15. Peters and Martinell disputed, and continue to dispute, the areas where waste and seepage waters are collected and conveyed to Peters' property and Martinell's right to the same water, as Martinell was not decreed, nor did the Water Court ever adjudicate, a right by Martinell to use waste and seepage waters. *Id.*, at 15.

While the Water Court is the exclusive venue to determine such questions (*see, Baker Ditch Co. v. Eighteenth Jud. Dist.*, 251 Mont. 251, 255, 824 P.2d 260, 262 (1992)), Peters' claims for relief from interference with Peters' ditch rights and

water use were properly before the District Court. However, the District Court dismissed Peters' verified complaint based upon its mistaken belief that Peters' water rights needed to describe a point of diversion on Martinell's land. In doing so, the District Court authorized Martinell's ongoing interference with Peters' rights and rendered them useless based on the point of diversion description on Peters rights as adjudicated by the Water Court and as stipulated to by Peters and Martinell. Thus, the matter was ripe for certification to the Water Court to fully and finally resolve the dispute between Martinell and Peters, and it was error for the District Court to deny Peter's petition for certification. *See, Fellows*, ¶ 28: ("the purpose of certification under § 85-2-406(2)(b), MCA, is to provide sufficient information to the District Court to facilitate resolution of the underlying water distribution controversy.").

The District Court's failure to certify the matter to the Water Court has forced Peters to continue to seek protection of Peters' ditch and water rights before this Court, as the District Court's Order authorizing Martinell's continued interference with Peters' rights is final. However, as explained herein, Peters' claims were properly brought before the District Court to enforce Peters' ditch rights and protect against Martinell's intentional and malicious interference with Peters' waste and seepage water rights, and *it is still Peters' position on appeal* that this Court is able to provide Peters' the relief originally requested in Peters' verified complaint by

reversing the District Court's Orders. Thus, the District Court's failure to certify the matter to Water Court and stay the matter pending certification is just one of several legal errors committed by the District Court. On remand, this Court should provide clear instructions to the District Court to prevent further jurisdictional errors. Namely, that it possesses the requisite jurisdiction to rule on Peters' claims for relief from Martinell's interference with Peters' ditch rights and water rights.

## VII. CONCLUSION

The District Court had subject matter jurisdiction over Peters' claims under the verified complaint. The District Court erred in dismissing Peters' claims based on the point of diversion described on Peters' water rights and ignoring well-established law on the enforceability of Peters' ditch rights and water rights. The District Court also erred in granting summary judgment to Martinell on their claims of trespass and awarding attorney's fees under M.C.A. § 70-17-112(5). The District Court Orders should be reversed, and judgment should be vacated. The matter should be remanded to the District Court with instructions to reinstate Peters' claims made under the verified complaint for disposition on the merits.

Respectfully submitted this 24<sup>th</sup> day of September 2025.

PARSONS BEHLE & LATIMER

*/s/ John E. Bloomquist*  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,808, excluding Table of Contents, Table of Authorities, Certificate of Compliance, and Appendices.

PARSONS BEHLE & LATIMER

*/s/ John E. Bloomquist*  
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