

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 25-0510

ROGERS D. PETERS and CARRIE A. PETERS,

Appellants,

v.

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

Appellees,

**ANSWER BRIEF OF APPELLEES
THE KENISON PLACE, LLC and WILLIAM J. MARTINELL**

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

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TABLE OF CONTENTS

| | |
|---|---------|
| Table of Authorities | iv - vi |
| Issues Presented | 1 |
| Statement of the Case | 2 |
| Statement of the Facts | 3 |
| Standards of Review | 19 |
| Summary of the Argument..... | 21 |
| Argument | 22 |
| I. THE DISTRICT COURT CORRECTLY GRANTED MARTINELL/KENISON’S MOTION FOR SUMMARY JUDGMENT AND DISMISSED COUNTS I, II, AND III OF PETERS’ <i>VERIFIED COMPLAINT</i> FOR LACK OF SUBJECT MATTER JURISDICTION; AND CORRECTLY DISMISSED PETERS’ COUNT IV FINDING THAT NO DITCH EASEMENT EXISTED..... | 22 |
| II. THE DISTRICT COURT CORRECTLY GRANTED MARTINELL/KENISON’S MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM NO. 2 FOR TRESPASS AND AWARDED INJUNCTIVE RELIEF AGAINST PETERS’ | 33 |
| III. THE DISTRICT COURT CORRECTLY AWARDED MARTINELL/KENISON’S “PREVAILING PARTY” ATTORNEY FEES AND COSTS PURSUANT TO MCA § 70- 17-112(5)..... | 35 |
| IV. THE DISTRICT COURT CORRECTLY DENIED PETERS’ PETITION SEEKING CERTIFICATION TO THE MONTANA WATER COURT UNDER MCA § 85-2- 406(2)(b)..... | 40 |
| Conclusion..... | 45 |
| Certificate of Compliance..... | 46 |

TABLE OF AUTHORITIES

CASES:

| | |
|--|------------|
| <i>Barrett, Inc. v. City of Red Lodge</i> , 2020 MT 26, 398 Mont. 436, 457 P.3d 233..... | 29, 30, 34 |
| <i>Borges v. Missoula County Sheriff's Office</i> , 2018 MT 14, 390 Mont. 161, 415 P.3d 976..... | 20 |
| <i>Branstetter v. Beaumont Supper Club</i> (1986), 224 Mont. 20, 727 P.2d 933..... | 13, 33 |
| <i>Brishka v. State</i> , 2021 MT 129, 404 Mont. 228, 487 P.3d 771..... | 20 |
| <i>Connolly v. Harrel</i> (1936), 102 Mont. 295, 57 P.2d 781..... | 23 |
| <i>Cordero v. Montana State University</i> , 2024 MT 167, 417 Mont. 385, 553 P.3d 422..... | 19 |
| <i>D.A. Davidson & Co. v. Slaybaugh</i> , 2024 MT 264, 418 Mont. 531, 558 P.3d 1100..... | 19 |
| <i>Doughy [sic: Dougherty] v. Creary</i> (Cal. 1866), 30 Cal. 290..... | 32 |
| <i>Engel v. Gampp</i> , 2000 MT 17, 298 Mont. 116, 993 P.2d 701..... | 14 |
| <i>Espy v. Quinlan</i> , 2000 MT 193, 300 Mont. 441, 4 P.3d 1212..... | 14 |
| <i>Gardiner-Park County Water & Sewer District v. Knight</i> , 2024 MT 121, 417 Mont. 1, 549 P.3d 1151..... | 19 |
| <i>Griz One Firefighting v. State</i> , 2020 MT 285, ¶38, 402 Mont. 115, 475 P.3d 739..... | 40 |
| <i>Groshelle v. Reid</i> (1995), 270 Mont. 443, 893 P.2d 314..... | 29 |
| <i>Hawkins v. State</i> , 2025 Mont. 134, 422 Mont. 437, 571 P.3d 1031..... | 20 |

Hutchinson v. Old Republic National Title Insurance Co., 2025 MT 2029,
420 Mont. 325, 563 P.3d 73720

In re A.H.S., 2025 Mont. 57, 421 Mont. 196, 571 P.3d 100220

In re Marriage of Sampley, 2025 MT 121, 379 Mont. 131, 347 P.3d 1281.....20

In re Estate of Scott, 2023 MT 97, 412 Mont. 303, 529 P.3d 86720

Klock v. Town of Cascade (1997), 284 Mont. 167, 943 P.2d 126229

Little Big Warm Ranch, LLC v. Doll, 2024 MT 3, ___ Mont. ___,
541 P.3d 104.....26

Montana v. Wyoming (2011), 563 U.S. 368, 131 S.Ct. 1765,
179 L.Ed.2d 79932

Musselshell Ranch II, 2012 MT 222, 366 Mont. 337, 286 P.3d 121238

Newton v. Weiler (1930), 87 Mont. 164, 286 P.13331

Robertson v. Hughes (1983), 204 Mont. 515, 668 P.2d 102530

Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248,
17 P.2d 1074.....32

TCF Enter. Inc. v. Rames, Inc., 2024 MT 38, 415 Mont. 306,
544 P.3d 206.....19

Town of Kevin North Central Montana Regional Water Authority,
2024 MT 159, 417 Mont. 325, 553 P.3d 39220

Upper Missouri Waterkeeper v. Broadwater County, 2025 MT 137,
422 Mont. 449, 571 P.3d 62620, 35

Wareing v. Schreckendgust (1996), 280 Mont. 196, 206, 930 P.2d 3728

Warnack v. Coneen Family Trust (1994), 266 Mont. 203, 879 P.2d 71528

Woolman v. Garringer (1872), 1 Mont. 535.....32

STATUTES:

Mont. Code Ann. § 3-7-501.....12, 21, 26

Mont. Code Ann. § 3-7-501(1).....26, 27

Mont. Code Ann. § 3-7-501(3).....26, 27

Mont. Code Ann. § 70-17-112.....14,15, 39

Mont. Code Ann. § 70-17-112(2).....14, 35

Mont. Code Ann. § 70-17-112(5).....1, 3, 14, 15, 21, 35, 36, 39, 40

Mont. Code Ann. § 85-2-406.....17,40

Mont. Code Ann. § 85-2-406(2)(b).....2,17,21,40, 41, 42, 44

RULES OF CIVIL PROCEDURE:

M.R.Civ.P. 56.....19

M.R.Civ.P. 58(a).....18

M.R.Civ.P. 58(d).....18

RULES OF APPELLATE PROCEDURE:

M.R.App.P. 4(5)(a)(ii).....18

Appellees The Kenison Place, LLC and William J. Martinell (“Martinell/Kenison”) submit this *Answer Brief on Appeal* in Response to Appellants Roger D. Peterson’s and Carrie A. Peters’ (“Peters”) *Opening Brief on Appeal* in this case.

ISSUES PRESENTED

The issues presented on appeal in this case are:

1. Whether the District Court correctly GRANTED Martinell/Kenison’s motion for summary judgment and dismissed Counts I, II, and III of Peters’ *Verified Complaint* for lack of subject matter jurisdiction; and correctly dismissed Count IV finding that no ditch easement existed.
2. Whether the District Court correctly GRANTED Martinell/Kenison’s motion for summary judgment on their counterclaim for trespass, when Peters admitted to multiple instances of trespassing onto Martinell/Kenison’s property to divert water through a “control structure” installed by Peters in a ditch on Martinell/Kenison’s property.
3. Whether the District Court correctly awarded Martinell/Kenison \$173,592.00 in prevailing party attorney fees and \$23,175.22 in costs, totaling \$196,767.22 pursuant to MCA § 70-17-112(5).
4. Whether the District Court correctly DENIED Peters’ motion to certify this case to the Montana Water Court as a claimed water distribution

controversy under MCA § 85-2-406(2)(b), when Peters did not file that petition with the district court until after all of Peters' claims had been dismissed on summary judgment.

STATEMENT OF THE CASE

Plaintiffs/Appellants Peters instituted this case against Defendants/Appellees Martinell/Kenison in 2022 by *Verified Complaint* including five counts: Count I seeking declaratory relief; Count II seeking injunctive relief; Count III claiming interference with water use; Count IV claiming interference with ditch rights; and Count V seeking recovery of attorney fees. Doc.1¹

In sum, Peters sought declaratory and injunctive relief allowing Peters to come onto Martinell/Kenison property and divert water into a certain ditch to which Peters claimed a ditch easement. Peters further alleged that Martinell/Kenison had unlawfully interfered with Peters' ditch rights, by prohibiting Peters from diverting water into this ditch, all after the Water Court determined that Peters had no point of diversion on Martinell/Kenison property.

¹ References to the Record will be in the form of "Doc.____" where each number corresponds to the document number assigned to the District Court's Register of Actions.

Appellees Martinell/Kenison answered denying Peters' *Verified Complaint* and counterclaimed seeking recovery of countervailing declaratory and injunctive relief and attorney fees from Peters arising from their multiple admitted trespasses and interference with Martinell/Kenison's ditch rights and water use. Doc.20. Defendants asserted that Peters had no ditch easement, and that Defendants had not interfered with any ditch rights of Peters in any event, because Peters had no right to divert water into any ditch on Martinell/Kenison property as adjudicated by the Water Court.

On motions for summary judgment filed by Martinell/Kenison following the close of discovery, the District Court dismissed Peters' *Verified Complaint* in its entirety; granted Martinell/Kenison's counterclaims for Peters' multiple admitted trespasses onto Martinell/Kenison's property to access the disputed ditch; and awarded Martinell/Kenison prevailing party attorney fees and costs pursuant to MCA § 70-17-112(5), from which Peters have filed this appeal. Doc.64.

STATEMENT OF THE FACTS

History of Peters' water rights on Martinell/Kenison Property

1. In 1981, Peters' predecessor-in-interest, Y.A. Bar Livestock Company, filed *Statements of Claim* 41A-25430 and 41A-25433 as part of the statewide adjudication of pre-1973 Montana water rights, claiming irrigation

rights diverted from Nicholia Creek and purportedly conveyed through the ditch at issue in this case, which crosses Martinell/Kenison's property to Peters' property. *Defendants' Answer and Counterclaims*, Doc.20, p.14, ¶31.

2. In 2008, Peters acquired the lands formerly owned by Y.A. Bar Livestock Company, and also water right claims 41A-25430-00 and 41A-25433-00. Doc.1, *Verified Complaint*, p.2.

3. In 2009, Peters cleaned the remnants of the disputed ditch on Martinell/Kenison property.² All that existed of the disputed ditch was a lower portion, and it did not connect with Nicholia Creek. Doc.1, *Verified Complaint*, p. 7-9, ¶¶14-15. Even after Peters' cleaning of the remnants of the ditch, it did not connect with Nicholia Creek.

4. At the same time, Peters also installed on Martinell/Kenison's property a new, so-called "control structure," which started diverting water into the disputed ditch to convey to Peters' property. Doc.1, *Verified Complaint*, p. 8-9, ¶15.

5. The control structure was built at an existing intersection of Martinell/Kenison irrigation ditches in which Martinell/Kenison picked up

² At the time William Martinell owned and operated the property. Now, The Kenison Place LLC owns the property, and William J. Martinell and his wife are its members.

their irrigation water and re-spread it across another part of their field.

Doc.51³, Ex.R (*Depo. Russ Radliff*, 42: 21 - 43:11⁴); Doc.51, Ex.S (*Depo. William Martinell*, 35:2 – 36:19). This was further documented by an historic map Martinell filed with the Water Court showing his Nicholia Creek water right irrigation ditches. Doc.51, Ex.T (highlighting by Russ Radliff). It was also documented by site visit and aerial photo interpretation maps of the ditch and place of use (Doc.51, Ex.R (*Depo.Ex. 18 and 21*)), and also by pictures of a 20-inch pipe diversion structure that irrigates Martinell/Kenison’s field. (Doc.51, Ex.R, *Depo. Ex.23*).

6. Peters’ water resource expert Bruce Anderson similarly testified that the purpose of the control structure was to ensure that water did not go down a certain ditch on Kenison property, but instead went down the disputed ditch to Peters’ property. Doc,51, Ex.Q (*Depo. Bruce Anderson*, (43:25 – 44:25.)

³ Doc.51 is *Brief Supporting Defendants’ Motions for Summary Judgment, and Dismissal with Prejudice of Plaintiffs Verified Complaint for Lack of Subject Matter Jurisdiction* (July 19, 2024).

⁴ Any Document with line and page numbers will be cited as “___:___” with page number followed by line number.

7. Peters had no water right that claimed such use of water from Martinell/Kenison property, or that claimed any such diversion of water on Martinell/Kenison property.

Prior adjudication of Peters' water rights in Montana Water Court.

8. On May 9, 2013, the Montana Water Court issued *Preliminary Decree Abstracts* for Peters' water right claims 41A-25430-00 and 41A-25433-00 -- both subject to "issue remarks" indicating that "[t]he claimed means of diversion may be incorrect and cannot be confirmed due to lack of data." Doc.51, Ex.A, Ex.B.

9. On February 13, 2015, Martinell filed *Notices of Intent to Appear* with the Water Court against claims 41A-25430-00 and 41A-25433-00, objecting that: "There is no means of conveyance nor POD [Point of Diversion]. The means of diversion is incorrect." Doc.51, Ex.C, Ex.D.

10. On August 7, 2015, pursuant to Montana Water Court order in Case No. 41A-156, DNRC water resource specialist Myles VanHemelryck conducted a field investigation of these water rights – attended by Roger Peters and his legal counsel – to address the issues identified by DNRC and Martinell/Kenison. On October 13, 2015, VanHemelryck submitted a *Field Investigation Report* to the Water Court, stating in pertinent part as follows:

When arriving at the claimed point of diversion location, Mr. Peters stated he did not have a physical point of diversion for his water right 41A 25430-00 [and 41A 25433-00] from Nicholia Creek. It appears that the source used by Mr. Peters is waste water picked up from William Martinell's Nicholia Creek irrigation off his property in Sec 25 and S2 of Sec 24.

This water right may be considered a "Waste and Seepage" right with the point of diversion where Mr. Peters takes control of the water when it enters his property.

Doc.51, Ex.E (Emphasis added.)

11. On October 28, 2015, Peters filed *Comments on DNRC Field Investigation Report* with the Water Court stating that “an amendment to the point of diversion may be necessary **to address where Peters takes control of the water**” and that “[t]he location of the diversion ... should be described as **the entire east-west property line along Sections 23 and 24, Township 15 South, Range 11 West.**” Doc.51, Ex.F, p.3-4, item #3 (Emphasis added.)

12. On February 8, 2016, Peters filed a *Verified Motion to Amend Water Right Claim Nos. 41A 25430-00 and 41A 25433-00* with the Water Court, in which Roger and Carrie Peters both signed, dated, and declared under penalty of perjury that the proposed amendments “accurately reflect historic use of these claims.” Doc.51, Ex.G. The *Verified Motion to Amend* sought to amend modify the rights to “waste and seepage” rights, with the point of diversion comprising Peter’s property boundary in Sections 23 and

24, Township 15 South, Range 11 West. Doc.51, Ex.G. An attached map depicted this. Doc.51, Ex.G. Nothing therein identified the disputed ditch or control structure as a part of either water right claim. Doc.51, Ex.G.

13. On about March 3, 2017, Peters and Martinell entered into a settlement *Stipulation and Agreement* in Water Court Case 41A-156, purporting to fully resolve Peters' water right claims 41A-25430-00 and 41A-25433-00. Doc.51, Ex.H.

14. The *Stipulation and Agreement* proposed amending the source of 41A 25430-00 and 41A 25433-00 from "Nicholia Creek" to "Waste and Seepage" and amending the authorized points of diversion to "dikes" in the S2S2SENE of Section 23 and the S2S2N2 of Section 24, all of Township 15 South, Range 11 West – comprising the entire east-west property boundary of Peters' property in Sections 23 and 24, just as Peters had requested. Doc.51, Ex.H.

15. On May 12, 2017, the Montana Water Court issued a *Master's Report* approving the settlement *Stipulation and Agreement* and specifically finding that it resolved the location of diversions under the rights, and further finding that it resolved Martinell's point of diversion objection. Doc.51, Ex.I (FOF 8-9, p.4).

16. On May 31, 2017, with no objections having been filed against the *Master's Report*, the Montana Water Court entered its *Order Adopting Master's Report* as a final order of the Water Court. Doc.51, Ex.J.

17. Nothing in the *Stipulation and Agreement*, the *Master's Report* or the *Order Adopting Master's Report* identified the disputed ditch or control structure, nor identified any point of diversion or conveyance on Martinell/Kenison property. Doc.51, Ex.H, Ex.I, Ex.J.

18. No party appealed the *Order Adopting Master's Report* in case 41A-156, rendering it the Water Court's final order.

19. The final post decree abstracts of water rights 41A 25430-00 and 41A 25433-00, as adjudicated by the Montana Water Court, are set forth in Doc.51, Ex.K, Ex.L.

20. Peters admitted in discovery that their waste and seepage water rights 41A 25430-00 and 41A 25433-00 were fully and accurately adjudicated by the Montana Water Court in Case 41A-156. Doc.51, Ex.M.

Peters' testimony as to the use of the "control structure"

21. After the Water Court adjudicated Peters' rights to waste water in Case 41A-156 – namely that Peters have only a right to divert such water once it reaches Peters property – Peters continued entering upon Kenison property

and diverting water away from Martinell/Kenison ditches and into the disputed ditch.

22. Peters expressly admit the existence of “control structures (similar to checks or headgates)” located on Kenison property (Doc.1, *Verified Complaint*, p.8, ¶15). which “control,” “direct,” and “back up” water into the disputed ditch. Doc.51, Ex.N (*Depo. Luke Peters*, 17:5-7).

23. In deposition, Roger Peters admitted that, since 2008, Peters have repeatedly entered onto Martinell/Kenison property and diverted water into the disputed ditch. Doc.51, Ex.P (*Depo. Roger Peters*, 77:2-9: “**Q:** Since you moved into the area in 2008, have you or your employees or other agents gone onto Martinells’ property to put in planks, tarps, or any other means of diverting water? **A: Yes.** **Q:** And that was a fairly regular practice for a number of years, correct? **A: Correct.**”). Moreover, Luke Peters admitted the same in his deposition. Doc.51, Ex.N (*Depo. Luke Peters*, 17:5-7: “**Q.** And that was the purpose of putting those tarp dams in was to direct water into your ditch? **A.: Correct.**”)

24. Peters’ own expert witness, Bruce Anderson, testified in his deposition that the “control structure” “directs” water into the disputed ditch, and that absent Peters operating the control structure the water would

instead go down another ditch supplying Martinell/Kenison property. Doc.51, Ex.Q (*Depo. Bruce Anderson*, 43:25 – 44:25).

25. Mr. Anderson further testified in deposition that Luke Peters admitted to him that the majority of water in the disputed ditch was diverted by Peters using the control structure on Martinell/Kenison property. Doc.51, Ex.Q (*Depo. Bruce Anderson*, 33:18-34:14). Mr. Anderson agreed that the majority of the water in the disputed ditch came from the “control structure.” *Id.*

26. Peters admit they have no water right authorizing such diversions from the control structure on Martinell/Kenison property. Doc.51, Ex.P (*Depo. Roger Peters*, 59:19 – 60:1 (“**Q:** You would acknowledge, wouldn’t you, that you have no water right claiming that control structure as a point of diversion? **A: Correct.**”).

27. Based on the record described above, the District Court entered its *Order on Defendants’ Motions for Summary Judgment and to Dismiss* (Dec. 17, 2024), finding and ruling that Peters had failed to prove their claimed ditch easement. Doc.64, p.17:16-18. The District Court further held it did not have subject matter jurisdiction to declare that Peters could divert from a point of diversion that was contrary to the Montana Water Court’s prior adjudication of their water rights. Specifically, the District Court held:

“Plaintiffs [Peters] have not established they have a ditch easement on the Martinell Property. Plaintiffs have filed no Motion for Summary Judgment on the issue of prescriptive easement. Furthermore, this Court disputes Plaintiffs’ ability to establish a prescriptive easement because of their admissions in the Water Court case that their POD [point of diversion] is at their property line. Nevertheless, even if Plaintiffs could establish a prescriptive easement for the Peters Ditch, this does not give them the right to divert water into the Peters Ditch because they do not have a water right allowing them to do so. As previously mentioned, the Water Court adjudicated, and Plaintiffs stipulated, their water rights are waste and seepage water with a POD at their property line. Defs.’ MSJ, [Doc.51] Ex. E at 2-3 Therefore, Plaintiffs cannot enter the Martinell Property to divert water into the Peters Ditch regardless of whether Plaintiffs believe they have a ditch easement or that their waste and seepage water originates in a collection area on the Martinell Property because their water rights do not include a POD on the Martinell Property. In his deposition, Roger Peters even admitted he does not have a water right with a control structure in the Peters Ditch – which is squarely on the Martinell Property – as a point of diversion. Defs.’ MSJ [Doc.51], Ex. P at 59:19-60:1.

For these reasons, Plaintiffs cannot sidestep the Water Court’s adjudication of their water rights as waste and seepage water with a POD at their property line by requesting a declaratory judgment allowing them to divert water – which is commingled with Defendants’ water – into a ditch – which they have failed to establish is theirs – to transport water to the Peters’ Property. This Court lacks the jurisdiction to declare as such. Mont. Code. Ann. § 3-7-501. Lastly to this point, again, Plaintiffs do not have a ditch easement for the Peters Ditch, nor have they proved they do, nor do they have a right to divert water into the Peters Ditch. Therefore, Defendants cannot legally interfere with a ditch right Plaintiffs do not legally have. For these reasons,

Defendants' Motion to Dismiss Counts I – IV of Plaintiffs' Verified Complaint will be granted. . . .

Doc.64, p.17:17 – 18:15.

28. As to Defendants' counterclaims raised on summary judgment, the District Court held that Peters had repeatedly trespassed on Martinell/Kenison property, finding and holding:

. . . .The elements of trespass are: (1) an intentional entry, (2) by the defendant or a thing, (3) without consent or legal right. *Branstetter v. Beaumont Supper Club*, 224 Mont. 20, 727 P.2d 933 (1986). The first and second element are satisfied by Plaintiffs' [Peters'] own Verified Complaint, where they state "in early June of the 2021 irrigation season, Luke Peters ... was attempting to irrigate Peters' property. As was historic practice, he checked the control structures and dams situated on the Defendants' property used to back up water into the Peters' Ditch." Pls.' Verified Complaint [Doc.1] ¶23. Plaintiffs go on to provide, "On June 11, 2021, Luke Peters again entered Defendants' property along the ditch." *Id.* at ¶24. The third element is also satisfied because Plaintiffs do not have a ditch easement or a water right allowing them to enter the Martinell Property to divert water into the Peters Ditch. . . .

Because this Court is granting Defendants Summary Judgment on their Trespass claim, their claim for injunctive relief preventing Plaintiffs from entering the Martinell Property to divert water will also be granted.

Doc.64, p.19-12 – 28.

29. On Defendants' claim for prevailing party attorney fees, the Court found that Defendants had prevailed on all claims made by either party

pursuant to MCA § 70-17-112 and were therefore statutorily entitled to their costs and attorney fees as follows:

. . . . If a legal action is brought to enforce [Mont. Code Ann. § 70-17-112(2)], the prevailing party is entitled to cost and reasonable attorney fees.” *Id.* at (5). To be deemed a “prevailing party for purposes of § 70-17-112(5), MCA a party must successfully prevail on all claims pursuant to this statute.” *Espy v. Quinlan*, 2000 MT 193, ¶28, 300 Mont. 441, 4 P.3d 1212 (quoting *Engel v. Gampp*, 2000 MT 17, ¶40, 298 Mont. 116, 993 P.2d 701). Here, Plaintiffs brought this suit seeking enforcement of a ditch right, which they do not possess. However, this is not dispositive of Defendants’ Motion for Summary Judgment regarding attorney fees under § 70-17-112(5) because Defendants counterclaimed Plaintiffs are trespassing onto their property to access the Peters Ditch. Therefore, for Defendants to be successful on their claim for attorney fees, Defendants must be successful on their Trespass Counterclaim.

* * * *

[As Defendants prevailed on their trespass claim, t]herefore, Defendants’ Motion for Summary Judgment on attorney’s fees and Motion for Summary Judgment will be granted. Because this Court is granting Defendants Summary Judgment on their Trespass claim, their claim for injunctive relief preventing Plaintiffs from entering the Martinell Property to divert water will also be granted.

Doc.64, p.18:28—19:27.

30. In the end, the District Court ordered as follows:

1. Defendants’ Motion to Dismiss Counts 1 – IV of Plaintiffs’ Verified Complaint is GRANTED.
2. Defendants’ Motion for Summary Judgment is DENIED in part as MOOT as to res judicata, judicial estoppel, and ditch interference and GRANTED as to Trespass and attorney fees.

3. The Defendants have 30 days from today's date to provide their requested amounts for attorney fees.

Doc.64, p.20:17 – 22.

31. On January 26, 2025, Defendants filed (1) a *Motion and Brief Supporting Motion Requesting Award of Defendants/Counterclaimants' Attorney Fees* and supporting materials requesting \$289,320.00 in attorney fees and (2) *Defendants / Counterclaimants' Certified Bill of Costs* requesting \$23,175.22 in costs. Doc.65; Doc.66.

32. On January 30, 2025, Plaintiffs Peters filed a *Response and Objection* (1) contesting whether Defendants were “prevailing parties” pursuant to MCA. § 70-17-112(5) due to the District Court’s dismissal of Plaintiffs’ Peters’ claims for lack of subject matter jurisdiction, by which Plaintiffs Peters contended that the District Court lost subject matter jurisdiction of the entire case; (2) contesting whether Martinell/Kenison had prevailed on all claims in the case brought pursuant to MCA § 70-17-112; and (3) contesting the amount of fees and costs sought by Martinell/Kenison. Doc.68.

33. On March 10, 2025, the District Court issued an *Order* (Doc.70) disposing of Defendants’ arguments concerning prevailing party, subject matter jurisdiction, and mootness, holding:

[T]here is a critical distinction necessary here to distinguish this situation from the Plaintiffs' general assertions. The dismissal was not granted solely on the black and white determination of a lack of jurisdiction but focused on the attempt to assert a claim by side stepping the Water Court to create a controversy. The Plaintiffs' claims were ultimately dismissed because for them to prevail this Court would have had to create a water right and ditch easement to then enforce. The Court cannot create this right, as it has no jurisdiction to do so. This conclusion though does not end the equation because the Defendants were successful in defending themselves from a ditch interference claim, regardless of the way in which they ultimately prevailed. There is a distinction between prevailing because there is no jurisdiction and prevailing because there was no controversy (here a ditch right) to begin with. Additionally, as the Court's reasoning was nuanced to the claim specifically brought, the Court determined it was appropriate to continue and resolve all claims, which included the finding of trespassing. The claim was not for the creation of a ditch right, but rather for the enforcement of one the Plaintiffs asserted existed. This Court was required to dismiss the claim on jurisdictional grounds, but additionally due to the specific request of the Plaintiffs and counterclaims, see the matter completely through. If it had not, there would continue to be no established ditch right and the Plaintiffs' admitted trespass would be ignored.

Doc.70, p. 2-3. The *Order* went on to set a hearing on the amount of reasonable attorney fees and costs.

34. On April 25, 2025, – four months after all of their claims had been dismissed, and with a hearing already scheduled on Defendants' requested prevailing party attorney fees – Peters' filed a *Petition for Certification of Water Distribution Controversy to the Montana Water Court under Mont.*

Code Ann. § 85-2-406; Motion to Stay and Brief in Support requesting certification of the case to the Montana Water Court to determine “whether Peters or Martinell are entitled to the waters in the collection area and the wooden control structure area, and to clarify the relevant water rights as to the source, point(s) of diversion, and means of diversion elements, and whether an informational remark is needed on Peters’ waste and seepage claims to further clarify distribution of these rights.” Doc.72, p. 13-14.

35. On May 9, 2025, Martinell/Kenison responded by filing a *Brief Opposing [Peters’] Petition for Certification to the Montana Water Court Under Mont. Code Ann. § 85-2-406* arguing that:

There are two fatal flaws with Peters’ petition for certification of this case to the Water Court. First, per MCA § 85-2-406(2)(b), a motion for certification to the Water Court can only be made in a controversy arising “upon a source of water in which not all existing water rights have been conclusively determined according to part 2 of this chapter [Adjudication of Water Rights].” Here all of the existing water rights identified by Peters’ petition have been conclusively determined by final orders already issued by the Water Court.

Second, also per MCA § 85-2-406(2)(b), a motion for certification to the Water Court may be made “[w]hen a water distribution controversy arises – not as here, after the controversy has already been determined.” *Id.*, at p. 2.

Doc.73, p.2.

36. On May 20, 2025, the District Court held an evidentiary hearing on Defendants' requested attorney fees and costs, including testimony and exhibits presented by Defendants' counsel William P. Driscoll and Ryan McLane and their attorney fees expert witness attorney John Tietz; and testimony and exhibits presented by Plaintiffs' counsel John E. Bloomquist and Plaintiffs' attorney fees expert witness Eric E. Nord. *See* Doc.77.

37. On June 18, 2025, the District Court issued its *Order on Motion for Attorney Fees* awarding Martinell/Kenison \$173,592.00 in fees – a 40% reduction in the \$289,320.00 amount requested, and \$23,175.22 in costs as requested, totaling \$196,767.22. Doc.80, p.17.

On August 12, 2025, the District Court entered its *Judgment*, Doc.88, pursuant to M.R.Civ.P. 58(a) and (d) and M.R.App.P.

4(5)(a)(ii) as follows:

1. On December 17, 2024, this Court issued its *Order on Defendants' Motions for Summary Judgment and to Dismiss*. On June 18, 2025, this Court entered its *Order on Motion for Attorneys' Fees*. Pursuant to these orders, judgment is entered as follows:

a. Plaintiffs' *Verified Complaint* filed August 10, 2022, against Defendants is dismissed with prejudice in its entirety; and the December 17, 2024 Order is adopted into this Judgment.

b. Defendants are entitled to recover from Plaintiffs their attorney fees awarded to Defendants by the Court in the

amount of \$173,592.00 and costs awarded by the Court in the amount of \$23,175.22, totaling \$196,767.22, with statutory interest accruing since June 18, 2025, pursuant to § 25-9-205, MCA.

2. Plaintiffs' April 25, 2025 *Petition for Certification to the Montana Water Court* and Defendants' *Rule 11 Motion* are deemed Denied by this Court as a result of the Court's Orders issued on December 17, 2024, and June 18, 2024.

Doc.88.

STANDARDS OF REVIEW

Rulings on summary judgment are reviewed “de novo, applying the same criteria as the district court under Rule 56 of the Montana Rules of Civil Procedure. *TCF Enter., Inc. v. Rames, Inc.*, 2024 MT 38, ¶14, 415 Mont. 306, 544 P.3d 206. Summary judgment is appropriate when the moving party establishes “both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.” *Gardiner-Park County Water & Sewer District v. Knight*, 2024 MT 121, ¶13, 417 Mont. 1, 549 P.3d 1151. A court reviews facts in the light most favorable to the non-moving party. *D.A. Davidson & Co. v. Slaybaugh*, 2024 MT 264, ¶12, 418 Mont. 531, 558 P.3d 1100. “A genuine issue of material fact is a fact materially inconsistent with proof of an essential element of a claim or defense at issue.” *Cordero v. Montana State University*, 2024 MT 167, ¶19, 417 Mont. 385, 553 P.3d 422. If the moving party satisfies its burden, the burden shifts to the non-moving

party to prove, by more than a mere denial and speculation, that a genuine issue does exist. *Brishka v. State*, 2021 MT 129, ¶9, 404 Mont. 228, 487 P.3d 771. If the district court finds no genuine issues of material fact exist, the court must determine whether the moving party is entitled to judgment as a matter of law. *Brishka*, ¶9 (citing *Borges v. Missoula County Sheriff's Office*, 2018 MT 14, ¶16, 390 Mont. 161, 415 P.3d 976).” *Hutchinson v. Old Republic National Title Insurance Co.*, 2025 MT 2029, ¶10, 420 Mont. 325, 563 P.3d 737.

Whether a district court has subject matter jurisdiction is reviewed de novo *Hawkins v. State*, 2025 Mont. 134, ¶9, 422 Mont. 437, 571 P.3d 1031, citing *In re Estate of Scott*, 2023 MT 97, ¶9, 412 Mont. 303, 529 P.3d 867. A district court’s determination of whether it has subject matter jurisdiction is a conclusion of law reviewed for correctness. *In re A.H.S.*, 2025 Mont. 57, ¶8, 421 Mont. 196, 571 P.3d 1002, citing *In re Marriage of Sampley*, 2025 MT 121, ¶6, 379 Mont. 131, 347 P.3d 1281.

A district court’s decision on attorney fees is reviewed de novo whether there is legal authority to award attorney fees, *Upper Missouri Waterkeeper v. Broadwater County*, 2025 MT 137, ¶8, 422 Mont. 449, 571 P.3d 626, citing *Town of Kevin North Central Montana Regional Water Authority*, 2024 MT 159, ¶6, 417 Mont. 325, 553 P.3d 392, and if legal authority exists, a district court’s grant or denial of attorney fees is reviewed for abuse of discretion. *Id.*

“A trial court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in a substantial injustice.” *Id.* at ¶8

SUMMARY OF THE ARGUMENT

The District Court case correctly granted Martinell/Kenison’s motions for summary judgment, as follows:

(1) dismissing Counts I, II, and III of Peters’ *Verified Complaint* because the requested relief of those claims fell within the exclusive subject matter jurisdiction of the Montana Water Court pursuant to MCA § 3-7-501; and further dismissing Count IV of Peters’ *Verified Complaint*, finding and holding that Peters had not established the existence of the alleged ditch easement on Martinell/Kenison property; and

(3) granting Martinell/Kenison’s Counterclaim No. 2 of trespass and awarding injunctive relief against Peters, holding that Peters had trespassed multiple times on Martinell/Kenison property; and

(4) awarding Martinell/Kenison’s prevailing party attorney fees and costs pursuant to MCA § 70-17-112(5) on Peters’ ditch interference claim; and

(5) refusing to grant Peters’ motion to resurrect and certify claims to the Montana Water Court pursuant to MCA § 85-2-406(2)(b), when said

motion was filed after all of Peters' *Verified Complaint* had already been dismissed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED MARTINELL/KENISON'S MOTION FOR SUMMARY JUDGMENT AND DISMISSED COUNTS I, II, AND III OF PETERS' *VERIFIED COMPLAINT* FOR LACK OF SUBJECT MATTER JURISDICTION; AND CORRECTLY DISMISSED PETERS' COUNT IV FINDING THAT NO DITCH EASEMENT EXISTED

This entire lawsuit is premised upon Peters' baseless legal argument that Peters can divert water pursuant to a "ditch easement," even when Peters have no water right authorizing such a diversion of water at that location. More specifically, Peters sought a declaratory judgment that Peters had a ditch easement on Martinell/Kenison property, and that pursuant to that *easement* Peters were entitled to divert water into a ditch on Martinell/Kenison property, even when Peters' water rights 41A-25430-00 and 41A-25433-00 -- as adjudicated by the Water Court -- do not permit any diversion of water on Martinell/Kenison property. Upon this shaky foundation, Peters further claimed that Martinell/Kenison were interfering with Peters' alleged ditch easement and water rights by preventing Peters from entering Martinell/Kenison property to divert water. Thus, Peters

further alleged that Martinell/Kenison should be enjoined from preventing Peters' entrance.

However, even Peters admit that a ditch easement and a water right are wholly separate legal rights. *See Opening Br.*, p.25-26. "[The Montana Supreme Court has] held repeatedly that water rights and ditch rights are separate and distinct property rights. One may own a water right without a ditch right, or a ditch right without a water right." *Connolly v. Harrel* (1936) 102 Mont. 295, ___ 57 P.2d 781, 783.

It cannot be overstated: Contrary to this long-standing body of law, Peters' present complaint amounts to the argument of: 'I have a ditch easement; therefore I must have a right to divert water into the ditch.' Under Montana law, this is simply incorrect. Even if Peters had such a ditch easement – which is *not* what the District Court found – that ditch easement does not give rise to any right to divert water into the ditch. The ditch easement and water rights are wholly separate.

Yet Peters spends considerable effort in their *Opening Brief* arguing that their diversions are not an exercise of their water rights, but instead an exercise of their alleged ditch rights. *See Opening Br.* p. 27-28 ("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.”) This argument is at best misleading, and at worst disingenuous; in order to “control, direct, and convey” water in the ditch, Peters *must* first divert that water into the ditch. Even Peters’ own expert testified that Peters’ purpose in coming onto Martinell/Kenison property was to divert water into the ditch, and absent such diversion the water would flow unabated to Martinell’s fields. Doc.51, Ex.Q (*Depo. Bruce Anderson*, 43:25-44:25). Accordingly, the issue returns to what Peters’ water rights allow, and those water rights do *not* allow Peters to divert water on Martinell/Kenison property.

As amply established by the facts set forth in this case, Peters’ water rights 41A-25430-00 and 41A-25433-00 were *fully adjudicated* by the Montana Water Court (Doc.51, Ex.I, Ex.J, Ex.K, Ex.L) exactly *as requested by Peters* (Doc.51, Ex.G), and *as agreed to by Martinell* (Doc.51, Ex.H) – as waste and seepage water off of Martinell/Kenison’s property onto Peters’ property.⁵ Under the final adjudication of Montana Water Court Case 41A-156, the Water

⁵ Peters’ *Opening Brief* spends considerable time presenting revisionist history regarding the prior Water Court case, arguing that Peters were simply going along with DNRC policy regarding the claimed points of diversion. *Opening Br.*, p.7-9. This is not supported by the Water Court pleadings in Case 41A-156, which unambiguously establish that Peters specifically moved for the Water Court to adjudicate that Peters diverted this waste and seepage water on his property. Peters prevailed in the Water Court on their motion.

Court confirmed that the points of diversion for 41A-25430-00 and 41A-25433-00 were located wholly upon Peters' property, comprising the entire east-west boundary of Peters' property in Sections 23 and 24, Township 15 South, Range 11 West. Doc.51, Ex.K, Ex.L. This is where the water enters Peters' property.

Accordingly, the District Court correctly disposed of this issue as follows:

As previously mentioned, the Water Court adjudicated, and Plaintiffs stipulated, their water rights are waste and seepage water with a POD [point of diversion] at their property line. [Doc.51], Ex. E at 2-3. Therefore, Plaintiffs cannot enter the Martinell Property to divert water into the Peters Ditch regardless of whether Plaintiffs believe they have a ditch easement or that their waste and seepage water originates in a collection area on the Martinell Property, because their water rights do not include a [point of diversion] on the Martinell Property. In his deposition, Roger Peters even admitted he does not have a water right with a control structure on the Peters Ditch – which is squarely on the Martinell Property – as a point of diversion. [Doc.51], Ex. P at 59:19-60:1.

Order on Defendants' Motions for Summary Judgment and to Dismiss, Doc.64, 17:24-18:4 (hereinafter "*Order on MSJ*").

Based on this clear record, the District Court was entirely correct to hold that it did not have subject matter jurisdiction to grant Peters' declaratory and injunctive relief that would authorize Peters to divert water

contrary to Peters' water rights. The Water Court has exclusive subject matter jurisdiction to make that determination pursuant to Section 3-7-501(1) and (3), MCA. *See Little Big Warm Ranch, LLC v. Doll*, 2024 MT 3, ¶20, ___ Mont. ___, 541 P.3d 104 (“The Legislature created the Water Court and provided it exclusive jurisdiction to interpret and adjudicate the scope of water rights.”).

Thus, the District Court properly held:

For these reasons, Plaintiffs cannot sidestep the Water Court's adjudication of their water rights as waste and seepage with a POD [point of diversion] at their property line *by requesting a declaratory judgment allowing them to divert water* – which is commingled with Defendants' water – into a ditch – which they have failed to establish is theirs – to transport water to the Peters Property. This Court lacks the jurisdiction to declare as such. Mont. Code Ann. § 3-7-501.

Order on MSJ, Doc.64, 18:5-18:10. (emphasis added).

Peters are careful *not* to assert that their declaratory and injunctive claims (Counts I and II) were improperly dismissed for lack of subject matter jurisdiction, as those claims facially sought to alter Peters' water rights.

Instead, Peters oversimplify and attack the District Court's order regarding its dismissal of Peters' claims of “interference with water use” (Count III) and “interference with ditch rights” (Count IV), contending that such claims are within the District Court's subject matter jurisdiction, and should not have been dismissed. *Opening Br.* p. 24, 28. These arguments are misleading.

As to Peters' water use interference claim, the District Court properly dismissed that for lack of subject matter jurisdiction, as the premise of that claim alleged that Martinell/Kenison improperly interfered with Peter's right to divert water on Martinell/Kenison property. As discussed above, the Water Court had already determined that Peters had no such water right (Doc.51, Ex.I, Ex.J, Ex.K, Ex.L), and thus the District Court determined it had no subject matter jurisdiction to determine Peters' water rights otherwise. *See* MCA § 3-7-501(1) and (3). The District Court was entirely correct to dismiss this count for lack of subject matter jurisdiction, holding that:

[E]ven if Plaintiffs could establish a prescriptive easement for the Peters Ditch, this does not give them the right to divert water into the Peters Ditch because they do not have a water right allowing them to do so. . . . Plaintiffs cannot enter the Martinell Property to divert water into the Peters Ditch regardless of whether Plaintiffs believe . . . that their waste and seepage water originates in a collection area on the Martinell Property, ***because their water rights do not include a [point of diversion] on the Martinell Property.***

Order on MSJ, Doc.64, 17:21-18:2 (emphasis added).

As to Peters' ditch interference claim, Peters incorrectly assert that this claim was dismissed for of lack of subject matter jurisdiction. Instead, that claim was dismissed because Peters failed to establish that any such ditch easement existed on Martinell/Kenison property. The District Court made that

finding clear, holding that:

Plaintiffs attempt to categorize this suit as a dispute over Defendants' interference with their alleged ditch easement on the Martinell Property. ***This Court disagrees and finds Plaintiffs have not established they have a ditch easement on the Martinell Property.*** Plaintiffs have filed no Motion for Summary Judgment on the issue of prescriptive easement.

Order on MSJ, Doc.64, 17:2-17:19. (emphasis added).

While Peters generally allege the existence of an easement, they made no attempt whatsoever to prove it – nor even to assert what type of easement it was. Under Montana law, as Peters claimed the existence of the alleged easement, it was solely Peters' burden to prove the existence of that easement. *Wareing v. Schreckendgust* (1996), 280 Mont. 196, 206, 930 P.2d 37, 43 (“[A] prescriptive easement claimant has the burden to prove ***each element*** of the prescriptive claim.”)(emphasis added)(*citing Warnack v. Coneen Family Trust* (1994), 266 Mont. 203, 216, 879 P.2d 715, 723 (1994)).

This holding is critically important, because Martinell/Kenison's motion for summary judgment on its trespass counterclaim against Peters was factually based in no small part on the sworn deposition testimony of Roger Peters and Luke Peters admitting to regularly trespassing on Martinell/Kenison property. Doc.51, Ex.P (*Depo. Roger Peters*, 77:2-9); Doc.51, Ex.N (*Depo. Luke Peters*, 17:5-7).

In response to Martinell/Kenison’s motion for summary judgment on its trespass counterclaim, Peters merely alleged the existence of a ditch easement, and asserted conclusory statements that Peters had therefore not trespassed. Nowhere did Peters assert any genuine issue of material fact or make any attempt at proving the existence of any such easement.

The summary judgment standard, however, is clear: “In order to meet its burden, the party opposing the motion must present substantial evidence, not mere denial, speculation, or conclusory statements.” *Klock v. Town of Cascade* (1997), 284 Mont. 167, 174, 943 P.2d 1262. “[T]he opposing party cannot rest upon mere allegations in the pleadings, but has an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice.” *Id.* (quoting *Groshelle v. Reid* (1995), 270 Mont. 443, 447, 893 P.2d 314).

This Court has previously explained what the summary judgment standard demands in the context of an asserted easement. In *Barrett, Inc. v. City of Red Lodge*, this Court held:

“In [summary judgment on an easement], the district court judge need not weigh evidence, choose one disputed fact over another, or assess credibility of the witnesses. He or she must *identify the applicable law*,

apply it to the uncontroverted facts, and determine who wins the case.”

Barrett, Inc. v. City of Red Lodge, 2020 MT 26, ¶8, 398 Mont. 436, 457 P.3d

233. A review of Peters’ response brief on summary judgment establishes that: (A) Peters never once asserted what type of easement Peters was claiming, nor otherwise asserted any applicable law governing the creation of this alleged easement, (B) Peters did not dispute any of the facts alleged by Martinell/Kenison, and (C) Peters did not establish that there was a genuine issue of material fact concerning the existence of the alleged ditch easement. For example, Peters made no attempt to show a continuous and uninterrupted use of the ditch system for the necessary period of time, nor did Peters’ show that the easement was made or initiated in adversity. *See e.g. Robertson v. Hughes* (1983) 204 Mont. 515, 520, 668 P.2d 1025, 1028 (holding that if the use of another person’s property begins as a permissive use, it cannot ripen into a prescriptive right no matter how long it continues, unless there is a distinct and positive assertion of a right hostile to the owner.) In short, Peters relied entirely on the mere allegation of a ditch easement, and did not comply with the requirements this Court set forth in *Barrett* to establish the existence of the alleged ditch easement on summary judgment.

Thus, based on the evidence before the District Court, it was entirely proper for the District Court to hold on summary judgment that: “Plaintiffs do not have a ditch easement for Peters Ditch, nor have they proved they do, nor do they have a right to divert water into the Peters Ditch. Therefore, Defendants cannot legally interfere with a ditch right that Plaintiffs do not legally have.” *Order on MSJ*, Doc.64, 18:12-14.

Finally, Peters spend several pages of their brief asserting facts about the “character” of the water Peters seeks to divert, attempting to prove that it is “waste and seepage” (*Opening Br.*, p.10), and more pages contending that the District Court “committed further error by *implicitly condoning* Martinell’s use of the ‘waste and seepage’ water” (*Opening Br.*, p.21). This is an empty argument. The District Court order said nothing about Martinell/Kenison’s water rights, and they are not on appeal.

In this same vein, Peters next allege that Martinell/Kenison cannot maliciously interfere with Peters’ waste water rights, citing to *Newton v. Weiler* (1930), 87 Mont. 164, ___, 286 P.133, 139. All of these arguments are simply inapplicable, because Peters’ “waste and seepage” – as a matter of Montana law – does not entitle Peters to enter onto Martinell/Kenison property and take water. The water does not become waste or seepage until Martinell/Kenison are done using it and lose control of the water.

As this Montana Supreme Court has long held: “[a] party cannot acquire rights to waste water *as against the first user*. He may make use of the water, but *the first appropriator can assume possession of same at any time*.” *Woolman v. Garringer* (1872), 1 Mont. 535, 537 (Mont. 1872) (emphasis added), citing *Doughy [sic: Dougherty] v. Creary* (Cal. 1866), 30 Cal. 290. Montana law thus recognizes the common sense principle that “waste and seepage water” (e.g., the remainder of water which is first diverted and put to use by a first water user) does not become “waste” until the first water user is done using it. In this regard, this Court has explained when water becomes ‘waste water,’ holding that: “[T]he owner of a water right *may collect and recapture water* which he is entitled to use so long as the water remains within his or her *possession and control*. However, once the water gets beyond his control, it becomes waste and is subject to appropriation by another user.” *Rock Creek Ditch & Flume Co. v. Miller* (1933), 93 Mont. 248, ___, 17 P.2d 1074, 1080 (emphasis added.) Even the United States Supreme Court has held: “where the original appropriator retains possession or control of the waste and seepage water from irrigation of his lands, he is entitled to reuse these waters for his own benefit.” *Montana v. Wyoming*, 563 U.S. 368, 381, 131 S.Ct. 1765, 179 L.Ed.2d 799 (2011) (quoting *Woolman*, 1 Mont. at

537)(emphasis added). Thus, the District Court correctly noted this aspect of Peters' water rights, holding that:

“Plaintiffs cannot sidestep the Water Court’s adjudication of their water rights *as waste and seepage with a POD [point of diversion] at their property line* by requesting a declaratory judgment allowing them to divert water – which is commingled with Defendants’ water – into a ditch – which they have failed to establish is theirs – *to transport water to the Peters Property.*”

Order on MSJ, Doc.64, 18:6-9.

For all the foregoing reasons, the District Court’s grant of summary judgment dismissing Counts I-III of Peters’ *Verified Complaint* for lack of subject matter jurisdiction, and dismissing Count IV on the finding no such ditch easement existed, should be AFFIRMED.

II. THE DISTRICT COURT CORRECTLY GRANTED MARTINELL/KENISON’S MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIM NO. 2 FOR TRESPASS AND AWARDED INJUNCTIVE RELIEF AGAINST PETERS’.

Based on Peters’ own admissions and the additional facts set forth above, the District Court correctly found and held in its *Order on MSJ* as follows:

The elements of trespass are: (1) an intentional entry, (2) by the defendant [or, in this case the plaintiff/counterclaim defendants] or a thing, (3) without consent or legal right. *Branstetter v. Beaumont Supper Club*, 224 Mont. 20, 24, 727 P.2d 933, 935 (1986). **The first and second elements are satisfied by Plaintiffs’ own Verified Complaint, where they state “in early June**

of the 2021 irrigation season, [Plaintiffs' son] Luke Peters ... was attempting to irrigate the Peters' property. As was historic practice, he checked the control structures and dams situated on the Defendants' property used to back up water into the Peters Ditch." Pls.' Verified Compl. [Doc.1], ¶23. Plaintiffs go on to provide, "On June 11, 2021, Luke Peters again entered Defendants' property along the ditch." *Id.* at ¶24. The third element is also satisfied because Plaintiffs do not have a ditch easement or a water right allowing them to enter the Martinell Property to divert water into the Peters Ditch. ... Because this Court is granting Defendants Summary Judgment on their Trespass Claim on their Trespass Claim, their claim for injunctive relief preventing Plaintiffs from entering the Martinell Property to divert water will also be granted. (Emphasis added.)

Order on MSJ, Doc.64, 19:14-24.

Peters attempt to attack this ruling by alleging that the District Court failed to satisfy the third element of trespass; entry without consent or legal right. *Opening Br.*, p.33-34. This argument is without merit, as it rests again on Peters' incorrect assertion that they had established the existence of a ditch easement on Martinell/Kenison property. As explained in the previous section, Peters' response brief on summary judgment made no attempt even to assert what type of easement Peters were claiming, let alone set forth sufficient facts to establish the existence of that easement. Accordingly, Peters wholly failed to meet their burden to avoid summary judgment, or even to establish a genuine issue of material fact. *See Barrett*, 2020 MT 26, at ¶8.

Moreover, in its March 10, 2025 *Order*, the District Court recognized the need to “resolve all claims” including Martinell/Kenison’s counterclaim of trespass, as a matter of doing complete justice, or otherwise “there would continue to be no established ditch right and the Plaintiffs’ admitted trespass would be ignored.” Doc.70, p.3. It was therefore entirely proper, and indeed necessary, for the District Court to resolve Martinell/Kenison’s trespass counterclaim as well.

The District Court’s grant of summary judgment in Martinell/Kenison’s favor on its trespass counterclaim should be AFFIRMED.

**III. THE DISTRICT COURT CORRECTLY AWARDED
MARTINELL/KENISON’S “PREVAILING PARTY” ATTORNEY FEES
AND COSTS PURSUANT TO MCA § 70-17-112(5).**

On an appeal for an order on attorney fees, the Court must (1) establish whether there is legal authority to award attorney fees, and (2) if legal authority exists, whether the district court abused its discretion in awarding attorney fees. *Upper Missouri Waterkeeper*, 2025 MT 137, ¶8.

Here there is no question as to the legal authority for awarding Martinell/Kenison prevailing party attorney fees. Peters brought a ditch interference claim under Section 70-17-112(2), MCA, which prohibits a servient estate holder from encroaching or impairing the asserted ditch easement. That statute further provides that if legal action is brought to

“enforce the provisions of this section, the prevailing party is entitled to costs and reasonable attorney fees.” MCA § 70-17-112(5). The District Court’s *Order on MSJ*, correctly cites and applies these statutes to the present case. Doc.64, 18:22 – 19:2.

In turn, the question for this Court becomes whether the District Court abused its discretion in determining the amount awarded. Peters first contend that once the District Court dismissed Peters’ ditch interference claim for lack subject matter jurisdiction, the District Court’s only option was to dismiss the entire case as if there were no prevailing party and ignore the reality that Martinell/Kenison prevailed on all claims asserted pursuant to MCA § 70-17-112(5). Peters have concocted a damned-if-you-do, damned-if-you don’t argument which must fail. As the District Court recognized in its March 10, 2025 *Order* refuting this argument:

[T]here is a critical distinction necessary here to distinguish this situation from the Plaintiffs’ general assertions. The dismissal was not granted solely on the black and white determination of a lack of jurisdiction but focused on the attempt to assert a claim by side stepping the Water Court to create a controversy. ***The Plaintiffs’ claims were ultimately dismissed because for them to prevail this Court would have had to create a water right and ditch easement to then enforce.***

Doc.70, p.3 (emphasis added). As the District Court went on to correctly hold, the lack of subject matter jurisdiction was not in the ditch interference claim, *per se*, but was instead in Peters' requested remedy under that claim.

Moreover, as explained in the previous section, Peters' ditch interference claim was not denied solely on subject matter jurisdiction grounds, but was instead dismissed because Peters wholly failed to assert or prove the existence of their claimed ditch easement.

Lastly, the authority relied on by Peters in their effort to defeat subject matter jurisdiction over the Court's award of attorney fees avails them nothing. None of those cases, nor any other reported Montana case, has ever held that a court's determination that it lacks subject matter jurisdiction deprives the court of authority to award attorney fees where there is a statutory or contractual basis for doing so. For all of these reasons, it was entirely proper for the District Court to grant Martinell/Kenison their statutory prevailing party attorney fees in defending themselves against Peters' statutory ditch interference claim.

Next, Peters argue that Martinell/Kenison were not prevailing parties because they did not prevail on one of their counterclaims (a counterclaim asserting ditch interference by Peters). This is another false argument. In its *Order on Defendant's Motions for Summary Judgment and to Dismiss*, after

dismissing Peters' *Verified Complaint* in its entirety, and granting summary judgment to Martinell/Kenison and awarding them injunctive relief on their trespass counterclaims, the District Court then dismissed Martinell/Kenison's ditch interference claim not on its merits but for mootness. Doc.64, at p. 20. And when Peters raised their "prevailing party" objections below, the District Court correctly rejected that, holding that "Defendants were successful in defending themselves from a ditch interference claim, regardless of the way in which they ultimately prevailed." *See* March 10, 2025 *Order*, Doc.70, p. 3 [unnumbered].

Moreover, that counterclaim has nothing to do with Martinell/Kenison's status as prevailing parties under Peters' claim of ditch interference. As this Court has repeatedly held, prevailing party status is determined based on the success of the claims that directly pertain to the award of prevailing party attorney fees. In *Musselshell Ranch Co. v. Seidel-Joukova*, ("Musselshell Ranch II"), five ditch interference claims were brought and litigated. Of those five, one party prevailed on four, and was thus the prevailing party as to those four claims, but was precluded recovery of attorney fees due to that party's failure to prevail on the fifth claim. *Musselshell Ranch II*, 2012 MT 222, ¶¶17-19, 366 Mont. 337, 286 P.3d 1212; *Id.* at ¶29. Here, Peters have not prevailed on a single claim litigated in the District Court, and Martinell/Kenison have

prevailed on all of the claims litigated. It was for precisely these reasons that the District Court correctly rejected Peter's prevailing party arguments in the District Court's March 10, 2025 *Order*. Doc.70, p.3-4.

Therefore, it was entirely appropriate for the District Court to determine that Martinell/Kenison were prevailing parties pursuant to MCA § 70-17-112(5), and to hold that "Defendants' Motion for Summary Judgment on attorney fees ... will be granted," Doc.64, 19:23-24. In summary, the District Court correctly determined to dismiss Peters' *Verified Complaint* in its entirety; then correctly proceeded to find in Martinell/Kenison's favor on their Trespass counterclaim based on Plaintiffs' own admissions that they had trespassed multiple times into the ditch on Martinell/Kenison's property, thus resolving all claims brought in the case pursuant to MCA § 70-17-112; and correctly determined that this made Martinell/Kenison prevailing parties entitled to recovery of their attorney fees and costs pursuant to MCA § 70-17-112(5).

As to Peters' third objection contesting the amount of attorney fees and costs sought by Martinell/Kenison, the District Court disposed of those two issues in its June 18, 2025 *Order on Motion for Attorney Fees* by which it reduced Martinell/Kenison's requested amount of fees by 40% -- from \$289,320.00 to \$173,592.00 -- and awarded them costs in their requested

amount of \$23,175.22. Although disappointed with the District Court's 40% reduction in their requested attorney fees, Martinell/Kenison elected not to appeal in this case. That said, any further reduction in the District Court's fee award would be excessive and inappropriate. There is no abuse of discretion by the District Court in the amount of attorney fees and costs it awarded.

The District Court's award to Martinell/Kenison of attorney fees totaling \$173,592.00 and costs totaling \$23,175.22 grant of summary judgment in Martinell/Kenison's favor on its Trespass counterclaim should be AFFIRMED.

Pursuant to MCA § 70-17-112(5), Martinell/Kenison should also be awarded their attorney fees and costs incurred on appeal, e.g., *Griz One Firefighting v. State*, 2020 MT 285, ¶38, 402 Mont. 115, 475 P.3d 739, and this case should be remanded to the District Court to make that determination.

IV. THE DISTRICT COURT CORRECTLY DENIED PETERS' PETITION SEEKING CERTIFICATION TO THE MONTANA WATER COURT UNDER MCA § 85-2-406(2)(b).

On April 25, 2025, four months after all of Peters claims had been dismissed in this case, and with a hearing already scheduled on Defendants' requested prevailing party attorney fees – Peters' filed a *Petition for Certification of Water Distribution Controversy to the Montana Water Court under Mont. Code Ann. § 85-2-406; Motion to Stay and Brief in Support*. Doc.72. Peters' *Petition* requested certification of the case to the Montana

Water Court to determine “whether Peters or Martinell are entitled to the waters in the collection area and the wooden control structure area [on Martinell/Kenison property], . . . and whether an informational remark is needed on Peters’ waste and seepage claims to further clarify distribution of these rights.” Doc.72, p.13-14.

Peters now contend on appeal that the District Court erroneously failed to certify this case to the Montana Water Court. Before addressing the infirmities of this argument, it is important to review the language of Section 85-2-406(2)(b), MCA, which in pertinent part provides:

“When a water distribution controversy arises upon a source of water ***in which not all existing rights have been conclusively determined*** according to part 2 of this chapter [Adjudication of Water Rights], any party to the controversy may petition the district court to certify the matter to the chief water judge. If the certification 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 [Adjudication of Water Rights]. The district court from which relief is sought shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the water judge.

MCA § 85-2-406(2)(b).

There are two fatal flaws with Peters’ petition for certification of this case to the Water Court. First, per MCA § 85-2-406(2)(b), a motion for certification to the Water Court can only be made in a controversy arising

“upon a source of water *in which not all existing water rights have been conclusively determined* according to part 2 of this chapter [Adjudication of Water Rights].” Here all of the existing water rights identified in Peters’ petition have been conclusively determined by final orders already issued by the Water Court adjudicating Peters’ water rights 41A 25430-00 and 41A-25433-00, and those water rights were adjudicated exactly as Peters requested. *Compare* Doc.51, Ex.I, Ex.J, Ex.K, Ex.L; *to* Doc.51, Ex.G. In discovery, Peters even admitted that their water rights had been fully and accurately adjudicated. Doc.51, Ex.M (Requests for Admission No. 2 & 3).

Second, also per MCA § 85-2-406(2)(b), a petition for certification to the Water Court may be made “[*w*]hen a water distribution controversy *arises*” – not as here, after the controversy has already been determined.” Filing the *Petition after* all of Peters’ claims have already been dismissed by the District Court begs the question: What claims exist to certify?

Peters wholly ignore the first portions of Section -406(2)(b) which explain that this statute only applies to water controversies (A) *when* they arise, and (B) for water rights claims that have *not* been conclusively adjudicated. Having omitted any analysis of significant portions of this statute, Peters allege simply that the District Court committed reversible error because it did not certify the matter, and the statute indicates the court “shall”

certify. This puts the cart in front of the horse. The statute does not even apply if the water rights have already been adjudicated, and it certainly does not apply after the matter has been litigated and the District Court has dismissed the operative claims.

Peters admit that they initially filed a dissatisfied water user complaint regarding this controversy. *Opening Br.*, p.17-18; *see also* Doc.72, Ex. O. Peters then attempt to mislead this Court by inferring that the District Court unilaterally dismissed the complaint. *Id.* (“[A]fter briefing by Martinell and Peters, the District Court dismissed the dissatisfied water user complaint....”). This implication is deceptively misleading, because in actuality it was Peters that quickly withdrew its dissatisfied water user complaint and replaced it with their *Verified Complaint* asserting ditch interference claims in this case. Doc.72, Ex. O. In fact, the very *Order* issued by District Court illustrates that Peters unilaterally withdrew its water distribution complaint, stating:

On August 8, 2022, by and through counsel, Peters filed a Combined Response in Opposition to Motion for Summary Judgment; Motion to Dismiss Dissatisfied Water User’s Complaint and Brief in Support. ***Peters Motion to Dismiss was filed pursuant to Rule 41(a)(2) which allows the Court to dismiss an action at the Plaintiff’s request by court order, on terms that the court considers proper.***

Doc.72, Ex. O, p.1 (emphasis added).

Thus, Peters initially filed a dissatisfied water user complaint in the District Court claiming a water distribution controversy in July of 2022, and *did not seek* certification of the water rights to the Water Court. Peters then unilaterally withdrew the water distribution controversy in August of 2022, and instead elected to institute this litigation in the District Court. Over two years later, Peters have lost this case in its entirety, with all of Peters' claims being dismissed. Doc.64.

Then, four months after Peters' *Verified Complaint* in this case was dismissed in its entirety, and almost three years after Peters unilaterally withdrew its dissatisfied water user complaint, Peters filed a petition requesting the District Court to certify the "water controversy" to the Water Court. Now, Peters asks that its litigation gamesmanship should be ignored, the District Court overruled, and the water rights that have already been adjudicated by the Water Court should be certified back to the Water Court, all under a controversy that was already dismissed by the District Court in its entirety. This fact pattern undercuts any claim that Peters was simply trying to navigate the process; particularly considering that Peters is represented by knowledgeable water law counsel.

For the foregoing reasons, the District Court committed no reversible error. The plain language of Section 85-2-406(2)(b), MCA does not apply to

Peters' already-adjudicated water rights, nor does the statute act to wholly resurrect a complaint which has already been dismissed. The District Court's *Judgment*, Doc.88, by which Peters' petition for certification to the Water Court was "deemed Denied by this Court as a result of the Court's Orders issued on December 17, 2024 and June 18, 2025" should be AFFIRMED.

CONCLUSION

WHEREFORE, Martinell/Kenison request this Court to fully affirm the District Court's disposition of all issues in this case as addressed hereinabove, and to remand this case to the District Court to award Martinell/Kenison their attorney fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED: November 24, 2025.

/s/ William P. Driscoll
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count, calculated by Microsoft Word, is 9,999, excluding the table of contents, table of authorities, certificate of service, and certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED: November 24, 2025.

/s/ William P. Driscoll
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CERTIFICATE OF SERVICE

I, William P. Driscoll, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-24-2025:

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