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PREVIEW; LITTLE BIG WARM RANCH, LLC v. DOLL**Noah Gipson***

The Montana Supreme Court will hear oral argument in *Little Big Warm Ranch, LLC v. Doll* on Wednesday, October 18, 2023, at 9:30 a.m. in the courtroom of the Montana Supreme Court in Helena, Montana. Hertha L. Lund and Ben F. Stormes are expected to appear on behalf of the appellants. Monica J. Tranel and Ross D. Miller are expected to appear on behalf of the appellee.

I. INTRODUCTION

In *Little Big Warm Ranch, LLC v. Doll*, the Montana Supreme Court will determine whether the district court exceeded its authority when it entered an order administering water rights on Big Warm Creek. The Court will address four issues at oral argument: (1) Did the district court exceed its jurisdiction by directing the Water Commissioner to allocate percentages instead of flow rates at times of low flow? (2) Did the district court exceed its jurisdiction by re-adjudicating rights along the creek with respect to priority dates, duration, and points of diversion? (3) Did the district court err as a matter of law when it directed the water master not to divert the full stream flow at times of reduced flow into Ester Reservoir? (4) Did the district court abuse its discretion in finding Wilfred Doll (“Doll”) was not the prevailing party on Little Big Warm Ranch, LLC’s (“LBWR”) claims to enforce a 1975 Water Agreement?

II. FACTUAL AND PROCEDURAL BACKGROUND**A. Factual Background**

LBWR—a North Carolina company registered to do business in the state of Montana—owns a ranch near Malta, Montana. LBWR’s ranch contains 560 irrigable acres and receives and stores its water for irrigation in Ester Reservoir.¹ The reservoir is fed by the Ester conveyance ditch, which connects to the nearby creek. Water is diverted into the ditch and conveyed to the reservoir by use of a headgate. The headgate is not situated at the “head” of the ditch as is common practice but is instead located in the main body of the creek.²

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¹ General Abstract 40M 186463-00 (Oct. 8, 2023); General Abstract 40M 186464-00 (Oct. 8, 2023).

² Appellant’s Opening Brief at 5, *Little Big Warm Ranch, LLC, v. Wilfred Doll* (Mont. Apr. 4, 2023) (No. DA 22-0742), available at <https://perma.cc/SYH2-XALD>.

Doll owns land adjoining Big Warm Creek, located directly downstream of LBWR. Doll possesses 1,550 irrigable acres, accompanied by three separate water rights; an irrigation right co-senior with LBWR's and a stockwater right with the same priority date, and another irrigation right for diversion further down the creek.³

The water rights now owned by LBWR and Doll are part of a collection of rights once owned by B.D. Phillips. Upon the breakup of the Phillips ranch, the water rights were conveyed with the property by deed. The deeds did not provide clear direction as to the extent of the right conveyed with each property, and the water court used the language of the deed and the evidence of traditional irrigation to apportion the rights. It is the adjudication of these rights, combined with a drought year and the uncommon method of irrigation control, that brought this case to bar.

In September of 2018, the Dolls placed a lock on the headgate near the head of the Ester conveyance ditch.⁴ This caused LBWR to file a suit in the Seventeenth Judicial District alleging that Doll interfered with its water rights. Both parties stipulated the issue to the water court's Lower Missouri Division, seeking an adjudication. In September of 2019, Chief Water Judge Russ McElyea entered a final order and adjudicated the rights of users on Big Warm Creek.⁵ LBWR appealed that order to this Court, alleging that the water court erred as a matter of law in its findings. This Court affirmed the water court's judgment, and the matter was remanded to the district.

In July of 2021, as the courts continued litigation in the original matter, the Ester/Sieben headgate was closed and locked by the Water Commissioner.⁶ Doll was granted an emergency motion to open the headgate.⁷ The district court, acting under its authority to administer water rights and resolve disputes, entered an order requiring the Water Commissioner to direct water to the appropriators using the percentages specified in the water court's order.⁸ LBWR, dissatisfied with the district court's administration, appeals once again.

B. Procedural History

LBWR first brought this suit in 2018. The suit alleged that Doll had interfered with LBWR's water rights when a lock was placed on the headgate. Both parties stipulated the reappointment of a Water Commissioner for the administration of water rights on the creek, and

³ General Abstract 40M 168752-00 (Oct. 8, 2023).

⁴ Appellant's Opening Brief, *supra* note 2, at 5.

⁵ Basin 40M-Final Order at 25-26, (Mont. Sept. 24, 2019) (No. DA 22-0742).

⁶ Appellant's Opening Brief, *supra* note 2, at 7.

⁷ Emergency Order to Open Headgate, (Mont. Jul. 28, 2021) (No. DA 22-0742).

⁸ Mem. and Order Directing Admin. Of Water Rts. on Big Warm Creek at 7 (Mont. Oct. 14, 2021) (No. DA 22-0742).

further stipulated that their contested rights be certified to the water court for adjudication.⁹

The water court entered a final order in 2019 that distributed the rights along the creek.¹⁰ LBWR then appealed from the water court to the Montana Supreme Court on three issues: (1) whether the water court’s interpretation of the deeds was appropriate based on their finding of no ambiguity; (2) whether the court’s pro-rata allocation based on historic use was appropriate; and (3) whether the water court’s allocation to Doll entitled LBWR to a grant of relief under Montana law. On all three counts, the Montana Supreme Court affirmed the water court’s order.¹¹ The trial continued at the district court level on those issues still left undecided, leading to a settlement and the reservation of certain rights to appeal for both parties.¹²

In early July of 2021, LBWR filed an additional water complaint, adding the Water Commissioner as a party.¹³ The court granted Doll’s motion to consolidate the 2018 and 2021 cases. The district court then issued an order directing that the rights be administered according to the Water Court’s order and denying Doll’s claim for attorney’s fees.¹⁴ LBWR contends that this order is inconsistent with the party’s rights.¹⁵

III. SUMMARY OF THE ARGUMENTS

A. *Appellant’s argument*

LBWR seeks judicial review of the district court’s order and whether the court exceeded its jurisdiction in administering the water rights on Big Warm Creek.¹⁶ LBWR asserts that the district court’s determination of flow rates is incorrect, and that the court altered the points of diversion and duration of Doll’s water rights. Further, LBWR contends that by not allowing full collection of the flow rate specified on its abstract—a summarization of the right holder’s flow rates and points of diversion

⁹ Order Certifying Water Rt. Claim Nos. 40M 186411-00; 40M 186454-00; 49M 186459-00; 40M 186460-00; 40M 186463-00; 40 M 186464-00; 40M 186465-00; 40M 168743-00; 40M 168746-00; 40M 168747-00; 40M 768748-00; 40M 768749-00; 40M 768750-00; 40M 168752-00; 40M 168753-00; 40M 168755-00; 40M 168756-00; 40M 168763-00; 40M 168764-00; & 40M 168765-00, (Mont. Sep. 26, 2018.) (No. DA 22-0742).

¹⁰ Basin 40M–Final Order, *supra* note 5.

¹¹ *Little Big Warm Ranch, LLC v. Doll*, 469 P.3d 689 (Mont. 2020).

¹² Stipulation of Dismissal with Prejudice, Reserving Rt. Of Appeal & Att’y’s Fees Claim (Mont. Aug. 15, 2022.) (No. DA 22-0742).

¹³ Basin 40M–Final Order, *supra* note 5.

¹⁴ Verified Dissatisfied Water User Compl. & Req. for Hr’g., (Mont. Jul. 16, 2021.) (No. DA 22-0742).

¹⁵ Mem. and Order Directing Admin. Of Water Rts. on Big Warm Creek, *supra* note 8.

¹⁶ Appellant’s Opening Brief, *supra* note 2, at 8.

¹⁷ *Id.* at 12–13.

based on the water court's order—that the district court has curtailed its water right.

1. *The district court exceeded its jurisdiction by making findings that differed from the water court as to flow rates, priority dates, and diversion points.*

LBWR argues that the court exceeded its jurisdiction by ignoring the flow rates, priority dates, and points of diversion prescribed in the water user's abstracts. By adopting a pro-rata metric for flow distribution instead of directing allocation of the flow rate as specified in the abstracts as published by the Montana Department of Natural Resources and Conservation (DNRC), the district court substituted its judgment for that of the water court.¹⁷ LBWR contends that this mechanism was only used to allocate shares of the river, and that the abstract's flow rates as determined by the water court should control when administering the rights. Because the percentages are not included in the abstracts, this method of administration is a deviation from the adjudication of the water court.

LBWR further claims that allowing Doll to measure the river's flow at the headgate in section 20 while keeping that flow in the creek creates a "call" on LBWR's co-senior right.¹⁸ A call is a senior user's water right to claim portions of another's water rights when flow is insufficient to meet their needs. Where both Doll and LBWR possess the same priority date, their right to appropriate should also be equal. If Doll is allowed to keep their allotted amount in stream for use at a further point of diversion, LBWR asserts that this interferes with their ability to divert the full amount. LBWR argues that if Doll is diverting at a different point than the headgate, the flow should be measured there.¹⁹ By allowing Doll to measure at the headgate but divert further downstream, LBWR contends that the district court has effectively subordinated their right, rendering it no longer co-senior. The argument is further supported by the Court's instruction to the Water Commissioner that when in times of low flow, the parties are only to receive a percentage of the instream water.²⁰ LBWR argues that Doll's measurement at the headgate would curtail their co-senior rights.

LBWR construes the district court's order to keep Doll's water under the irrigation right as the creation of an in-stream flow right for Doll.²¹ LBWR argues that the only appropriate place of diversion for Doll's right

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 20–21.

¹⁹ Brown, Bryan & McElyea, MONTANA WATER LAW, 66 (2021).

²⁰ Mem. and Order Directing Admin. Of Water Rts. on Big Warm Creek, *supra* note 8, at 8.

²¹ Appellant's Opening Brief, *supra* note 2, at 22–23.

in section 20 is to divert it into the reservoir, and that Doll is not allowed to leave the water instream for their downstream use. If Doll is diverting outside of the section, LBWR argues, flow rate for the purpose of diversion should be measured there.²² This would facilitate the call LBWR claims is constructively created by allowing a downstream co-senior right to keep water instream to the disadvantage of the upstream co-senior appropriator.

2. *The district court's order is impossible and expansive.*

LBWR relies on the testimony of the Water Commissioner to establish the impossibility of the allocation ordered by the district court. LBWR also notes that Doll has conceded the difficulty of splitting the rights as specified by the district court's administration.²³

Even if it were not impossible, LBWR contends that the district court exceeded its jurisdiction when it expanded Doll's stockwater claim as to duration and point of diversion. LBWR asserts that when the district court orders that the headgate be kept open November through January so Doll and other downstream users can continue to water stock, that Doll's right has been expanded contrary to the water court's order.²⁴

3. *There is no claim to attorney's fees under the 1975 agreement.*

LBWR and the district court argue that because all other claims were settled, including the 1975 agreement issue, there can be no prevailing party. LBWR contends that because the 1975 agreement was resolved out of court, there could be no prevailing decision.²⁵ LBWR also argues that the appeal is moot, as the district court did not fail to recognize the specific outcome of awarding attorney's fees but rather found that "it need not decide the motion on the grounds" of the agreement at issue.²⁶

LBWR seeks to have the district court order overturned, and the case remanded with instructions to apply the flow rates as they appear on the abstracts.

²² *Id.* at 21.

²³ *Id.* at 23–24.

²⁴ *Id.* at 25–27.

²⁵ Reply Brief of Appellant & Answer Brief of Cross-Appellee at 18–20, *Little Big Warm Ranch, LLC, v. Wilfred Doll* (Mont. Jul. 17, 2023) (No. DA 22-0742), available at <https://perma.cc/Y3ET-HBCF>.

²⁶ *Id.* at 19.

B. Appellee's argument

Doll defends the district court's administration of the water rights in this case, asserting that the rights were not re-adjudicated and were consistent with the water court's Final Order. Doll denies that LBWR's right has been curtailed and asserts that the district court established the points of diversion correctly. Doll contends that the impossibility claim was not raised at the district court level, and that regardless of its procedural standing that difficulty of administration does not justify the deprivation of a downstream, co-senior user's right. Doll denies that the stockwater right was expanded, and instead argues that LBWR's proposed solution—diverting the whole of the creek into the reservoir via the conveyance ditch—constitutes an untenable situation that is far outside of the adjudication intended by the water court.

1. The district court did not re-adjudicate the water rights, nor were they curtailed.

Doll argues that because the Water Court has already adjudicated the rights and the district court's order directs the Water Commissioner to follow the Water Court's order, there was no re-adjudication.²⁷ Doll asserts that the district court correctly followed the water court's flow rates.²⁸ Doll cites the district court's assertion that at times of adequate flow, the abstracts are to be followed precisely.²⁹ At times of low flow, however, the pro-rata formulation reflecting the water court's initial allocation is used. Doll argues that this does not displace the water court's judgment, but instead reflects exactly what is ordered in the decree.³⁰ Doll argues that LBWR's intent in this case is to fill its own water allotment first, despite the consequences to co-senior right holders.³¹ Doll supports this assertion by citing LBWR's intent that they be allowed to divert first, at the headgate, regardless of whether that would leave water for their co-senior right holder or not. This issue could be dispositive: if there is no re-adjudication, the Court need not consider LBWR's other arguments.

Regarding LBWR's assertion that the district court reassigned the points of diversion, Doll cites the water court order, which provides that "[t]he Dolls are also entitled to divert their share of these rights through points of diversion on the Dolls' property east of the state highway."³² Further, Doll argues that LBWR's rights were not curtailed by the district

²⁷ Appellee's Brief at 11, *Little Big Warm Ranch, LLC, v. Wilfred Doll* (Mont. May 17, 2023) (No. DA 22-0742), available at <https://perma.cc/AFK6-NTYD>.

²⁸ *Id.*

²⁹ Mem. and Order Directing Admin. Of Water Rts. on Big Warm Creek, *supra* note 8, at 7-8.

³⁰ Basin 40M—Final Order, *supra* note 5, at 24-26.

³¹ Appellee's Brief, *supra* note 27, at 13.

³² Basin 40M—Final Order, *supra* note 5, at 25.

court order, countering that allowing LBWR to take their full flow would curtail Doll's rights in favor of LBWR at low flow. Doll cites the order itself, where the court compares LBWR's assertion that it can take its full amount, even to the disadvantage of its co-senior right holder, to an ill-advised rewriting of the century old doctrine of first-in-time, first-in-right to "first-in-diversion, first-in-right."³³

2. *Impossibility arguments are new on appeal and do not justify LBWR's proposed solution.*

Doll asserts that LBWR misquoted the Water Commissioner, and notes that the commissioner used the ratios drawn on the headgate by Doll at its construction to administer the rights, showing its possibility.

Doll responds to LBWR's argument that all the water should be diverted into the reservoir in times of low flow—supported by *Eldorado Coop Canal v. Hoge*³⁴—by noting that if the impoundment were made, not only would Doll's points of diversion downstream be removed, but Doll would be deprived of their stockwater rights.³⁵ Doll specifically notes that nothing in *Eldorado* supports a total impoundment by LBWR when Doll has co-senior rights and can still divert downstream.

3. *Doll prevailed on claims relating to the 1975 agreement.*

Doll argues that because the court declared that they were not bound by the 1975 agreement, a key claim of LBWR's initial case, that Doll prevailed and is entitled to fees under the agreement.³⁶ Both parties were equally subject to the agreement, and thus enforcement is equitable if Doll prevailed. Doll also argues that even though there are many issues at bar, and courts have found the mixed success that comes with multiple issues as a reason to deny attorney's fees, courts have also found that parties can recover attorney's fees in those settings.³⁷

Doll seeks a defense of the Water Court's percentage adjudication and a reaffirmation of their order and believes themselves entitled to attorney's fees for prevailing on the 1975 agreement.

³³ Mem. and Order Directing Admin. Of Water Rts. on Big Warm Creek, *supra* note 8, at 5.

³⁴ *Eldorado Coop Canal Co. v. Hoge*, 373 P.3d 836 (Mont. 2016).

³⁵ *Id.*

³⁶ Appellee's Brief, *supra* note 27, at 25-26.

³⁷ *Id.* at 30-31.

IV. ANALYSIS

A. *Did the district court exceed its jurisdiction by directing the Water Commissioner to allocate percentages instead of flow rates at times of low flow?*

Under Montana law, the jurisdiction to interpret and determine existing water rights belongs exclusively to the water courts.³⁸ The water court, when certifying the question of water rights, will gather evidence and produce an order adjudicating the rights in a given basin or watershed.³⁹ After the water rights are adjudicated and a final order entered, the district courts are tasked with the final administration and the resolution of subsequent disputes.⁴⁰ In the administration of water rights, district courts will appoint Water Commissioners who will manage diversion of the water according to the court's order.⁴¹

If the water court's final order did not intend for water rights to be distributed by percentage allotted because of the land's historical irrigation, then the district court would have exceeded its jurisdiction by substituting its own judgment for that of the water court. Here, the primary argument supporting the assertion that the district court exceeded its authority rests on the percentage's exclusion from the abstracts of the water rights.⁴² Abstracts serve as a summary of a water right.⁴³ In order to understand the whole of the water court's order, it is critical to assess the whole of the order and not an incomplete summary.

The water court's order concludes that not only are the parties each entitled to a pro-rata share of the water in the Ester reservoir, but also that each party was entitled to a pro-rata division of flow rates.⁴⁴ The Montana Supreme Court has already validated this approach to apportioning water rights in its previous affirmance of the water court's order. Doll's argument that no user of water receives the full benefit of their right will likely bolster this point. In Montana, the doctrine of "first-in-time, first-in-right" governs which user has the better claim to the water in a stream: "each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water."⁴⁵ When a clear hierarchy of priority dates exists, the senior right holder is able to make calls on the junior holders on the river in order to make its total flow allotment. However, when two diverters hold a portion of the same right, they are

³⁸ *Mildenberger v. Galbraith*, 815 P.2d 130, 134 (Mont. 1991).

³⁹ Mont. Code Ann. § 85-2-309 (2021).

⁴⁰ *Baker Ditch Co. v. Dist. Ct. of Eighteenth Jud. Dist., In and For Cnty. of Gallatin*, 824 P.2d 260, 262–63 (Mont. 1992).

⁴¹ Mont. Code Ann. § 85-5-101(2) (2021).

⁴² General Abstract 40M 186463-00 (Oct. 8, 2023); General Abstract 40M 186464-00 (Oct. 8, 2023).

⁴³ W.R.C.E.R. Rule 2(a)(1).

⁴⁴ Basin 40M–Final Order, *supra* note 5, at 25.

⁴⁵ 78 Am. Jur. 2d Waters § 372.

unable to make a call on the other regardless of their geographical location, because the system privileges date of diversion not location on the watershed.⁴⁶ Both must share the right, and the only equitable way to do this—as noted by Doll—would be to share in the percentage of the right the users hold, as though it were one right. The Court will likely find that the district court did not exceed its jurisdiction.

B. Did the district court exceed its jurisdiction by re-adjudicating rights along the creek with respect to priority dates, duration, and points of diversion?

The water court possesses exclusive jurisdiction to make determinations regarding the priority dates and points of diversion regarding existing water rights.⁴⁷

Provided that the points of diversion, duration, and priority dates specified in the district court’s order are identical with those of the water court, then the district court will not have exceeded its jurisdiction to administer the water rights.

The water court determined the priority dates of each user currently diverting on Big Warm Creek by connecting the rights of the original appropriators to the lands on which they historically would have been used.⁴⁸ LBWR’s argument rests on the idea that by not allowing LBWR to keep the whole of its right in times of low flow, and by allowing Doll to take their allotted percentage downriver at the same time, that the district court reduced LBWR’s to that of a junior appropriator, thus negating the priority date.⁴⁹ In order for this to function as a call, and thus a subordination of right, Doll would have to be a senior user denying a junior user of their right. Instead, Doll and LBWR have co-senior rights, and thus have equal right to their share of the water, regardless of position of diversion. This theory is further supported by the water court’s own recognition that Doll is “entitled to divert their share of these rights through points of diversion on the Dolls’ property east of the state highway.”⁵⁰

As to the expansion of duration of rights, the district court’s order does increase the duration of Doll’s stockwater date beyond the time in the water court’s order and abstracts.⁵¹ Because of the water court’s exclusive jurisdiction in this matter, the Court may conclude that the district court exceeded its authority as to this narrow point.

⁴⁶ *Id.*

⁴⁷ *Mildenberger v. Galbraith*, 815 P.2d 130, 134 (Mont. 1991).

⁴⁸ Basin 40M–Final Order, *supra* note 5, at 15-16.

⁴⁹ Appellant’s Opening Brief, *supra* note 2, at 2.

⁵⁰ Basin 40M–Final Order, *supra* note 5, at 25.

⁵¹ General Abstract 40M 168752-00 (Oct. 8, 2023).

LBWR asserts that, by allowing Doll's full flow as calculated at the headgate to continue downstream to the other points of diversion, that the district court has contravened the water court's order by failing to calculate Doll's flow rate at the point at which the water is removed from the creek. The district court, echoing the language of the water court, has allowed that Doll's irrigation right—with its point of diversion in section 20—may “divert their share of these rights through points of diversion on the Doll's property east of the state highway.”⁵² Because of the earlier affirmation of the water court's order as entered, and the district court's close adherence to the points of diversion as specified in the order, it is unlikely that this Court will conclude that the district court exceeded its authority.

C. Did the district court err as a matter of law when it directed the water master not to divert the full stream flow at times of reduced flow into Ester Reservoir?

Under Montana Law, the district court is tasked with the administration of water rights after the water court's final adjudication is entered.⁵³ The district court is tasked with settling the disputes in a way that does not alter the existing rights of the users as set out in the water court's final adjudication.⁵⁴

Here, LBWR's argument that the water should have been diverted into the reservoir rests on the aforementioned argument that Doll has no right keep their water instream for use further down the creek. Under *Eldorado*, LBWR concludes that the Water Commissioner must administer the water in their given jurisdiction so that every user receives their appropriate share of the water.⁵⁵ Based on the water court's order, the Water Commissioner would be acting outside of the authority of their position were they to impound the flow of the creek in the reservoir for LBWR's specific benefit, as both Doll and LBWR's percentages can be administered without stopping flow of the creek.

D. Did the district court abuse its discretion in finding that Doll was not the prevailing party in the 1975 water agreement claims for the purposes of attorney's fees?

Under Montana law, whether legal authority exists entitling a party to recover attorney fees is reviewed for correctness.⁵⁶ If authority exists to

⁵² Basin 40M—Final Order, *supra* note 5, at 25.

⁵³ *Baker Ditch Co. v. Dist. Ct. of Eighteenth Jud. Dist., In and For Cnty. of Gallatin*, 824 P.2d 260, 262–63 (Mont. 1992).

⁵⁴ Mont. Code Ann. § 85-2-406 (2021).

⁵⁵ Mont. Code Ann § 85-5-101(2) (2021).

⁵⁶ *Heringer as Tr. of Charles J. Heringer, III, Tr.*, dated May 20, 1999 v. *Barnegat Dev. Group, LLC*, 485 P.3d 731, 735 (Mont. 2021).

award attorney fees, the court reviews the district court's order granting or denying attorney fees for an abuse of discretion.⁵⁷ A district court's determination of “prevailing” or “losing” parties is also reviewed for an abuse of discretion.⁵⁸ No one factor is conclusive in determining the prevailing party for the purpose of awarding attorney fees.⁵⁹ There is no prevailing party where both parties gain a victory but also suffer a loss.⁶⁰

Here, Doll asserts that the authority to sue for attorney’s fees comes from the contractual cost-shifting clause under the 1975 agreement.⁶¹ Based on the fact that the 1975 claim was never fully adjudicated but was instead settled with the remainder of claims that did not appear at trial, it seems unlikely that the court would grant relief under these circumstances. This is reinforced by the Court’s historical reluctance to disturb a district court’s ruling absent a glaring abuse of discretion.⁶² Though LBWR discredits the argument’s centrality, the use of the 1975 agreement as a justification for the 2018 suit seeking an adjudication of water rights was noted in the water court’s order as a central piece of evidence submitted by LBWR.⁶³ When the water court finally did adjudicate the rights, it found that the agreement was not binding in a way that impacted the rights of the parties, and thus a non-binding judgment for Doll could be construed as an affirmative judgment, entitling them to an award of attorney’s fees.⁶⁴

⁵⁷ *Whipps, L.L.C. v. Kaufman, Vidal, Hileman & Ramlow, P.C.*, 156 P.3d 11, 13 (Mont. 2007).

⁵⁸ *Id.* at 13.

⁵⁹ *Doig v. Cascaddan*, 935 P.2d 268, 272 (Mont. 1997).

⁶⁰ *Whipps*, 156 P.3d at 13.

⁶¹ Appellee’s Brief, *supra* note 27, at 28.

⁶² *Heringer*, 485 P.3d at 739.

⁶³ Basin 40M–Final Order, *supra* note 5, at 12–13.

⁶⁴ *Id.*