DA 22-0742

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 3

LITTLE BIG WARM RANCH, LLC
and MARK FRENCH

Plaintiffs, Appellants,
and Cross-Appellees,

v.

WILFRED L. DOLL,

Defendant, Appellee,
and Cross-Appellant,

BRIAN ROBINSON,

Defendant.

APPEAL FROM: District Court of the Seventeenth Judicial District,
In and For the County of Phillips, Cause Nos. DV-2018-30
and DV-2021-34
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Hertha L. Lund (argued), Peter B. Taylor, Lund Law, PLLC, Bozeman, Montana

For Appellee:

Monica J. Tranel (argued), Ross D. Miller, Tranel Law Firm, P.C., Missoula, Montana

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Argued and Submitted: October 18, 2023
Decided: January 9, 2024

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Little Big Warm Ranch, LLC (LBWR) appeals an adverse District Court order enforcing a Water Court decree for Big Warm Creek in Phillips County. Wilfred Doll (Doll) cross-appeals an adverse ruling denying attorney fees. We affirmed the Water Court's decree, Final Order 40M-400, in *Little Big Warm Ranch, LLC v. Doll*, 2020 MT 198, 400 Mont. 536, 469 P.3d 689 (*Doll I*). We now affirm the District Court's enforcement order and denial of attorney fees.

¶2 We restate the issues on appeal as follows:

Issue One: Did the District Court erroneously enforce pro rata shares of Water Court-decreed water rights on a percent, rather than flow rate, basis?

Issue Two: Did the District Court erroneously deny Doll attorney fees?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 This case involves four of the six water rights that were at issue in *Doll I.* The contentious history between LBWR and Doll stems from a series of land sales that resulted in unique water rights that are co-equal in seniority because they share a priority date. The full history and background of the water rights are detailed in *Doll I*, thus we recount only the relevant details here.

¶4 In the late 1800s, B.D. Phillips comingled two decreed water rights from Big Warm Creek (the Creek), conveying them through a complex irrigation network on his large ranch east of the Little Rocky Mountains and Lodge Pole, Montana. Between the mid and late 1900s, the ranch was divided into three properties. As the Water Court determined in Final Order 40M-400 and we affirmed in *Doll I*, the water rights appurtenant to each property

transferred with their corresponding deeds. *Doll I*, ¶¶ 17-19, 28-37. The three properties are now owned by Doll, LBWR, and the Gilmore family (Gilmores). The Gilmores are not a party to this appeal. The water rights at issue are Doll's rights: 40M 168765 and 40M 30122575; and LBWR's rights: 40M 186463 and 40M 186464.

¶5 When Phillips comingled the two original water rights to irrigate his ranch, he created unique points of diversion, one of which has considerable bearing on this dispute. The Creek flows northeast through a headgate (Ester Headgate) that, oddly, completely crosses the stream in Section 20, T27N, R27E.[1] During certain times of year, the Ester Headgate may be partially or fully closed so that water pools behind it and flows into the Ester Ditch a short distance upstream. When water is abundant, flow in the Creek is sufficient to fill Ester Ditch without closing the Ester Headgate.

¶6 Ester Ditch conveys Big Warm Creek water into Ester Reservoir in Section 16, T27N, R27E, from which LBWR draws its full share of both water rights, and from which Doll may draw both of his irrigation rights if he chooses. Except for November through January, when the Ester Headgate is closed and Ester Reservoir is filled, some water generally remains instream. The Creek first passes LBWR's property and places of use in Sections 11, 13, 14, and 18, T27N, R27E. Northeast of LBWR's property, the Creek eventually passes by Doll's property in Sections 8, 9, and 10, T27N, R27E. Doll has a headgate in each of those three Sections that he may use for irrigation.

[1] Typically, a headgate is placed across the ditch, rather than across the mainstem channel, to regulate flows entering the ditch.

¶7 Significantly, water can trace two different paths to get to Doll's headgates in Sections 8, 9, and 10. The most direct route, as mentioned, is to pass beneath the Ester Headgate and remain instream. The more circuitous route is via Ester Ditch and Ester Reservoir. When Ester Reservoir overflows, it drains water into Spring Coulee to fill Wild Horse Reservoir, which in turn releases back into Spring Coulee and continues downstream to rejoin the Creek and pass through Sections 8, 9, and 10.

¶8 Normally, there is sufficient water in the Creek year-round to satisfy both LBWR's and Doll's rights. During periods of drought and low flow, Doll prefers to leave his share instream until it reaches his downstream points of diversion. When there is a water shortage, however, leaving water instream can have the collateral effect of draining Ester Ditch, thereby depleting Ester Reservoir and LBWR's total appropriation.

¶9 Contrary to a typical water-rights dispute, where a senior appropriator could "call" on a junior to decrease or curtail his use during periods of low flow, LBWR and Doll may not call on each other because their rights are coequal in priority.[2] LBWR maintains that, rather than leaving water instream to pass through the Ester Headgate, the headgate should remain closed, and Doll should be forced to use the non-preferred route to carry water to his downstream points of diversion.

[2] In disputes between senior and junior appropriators, the Prior Appropriation Doctrine is applied to determine priority. The Doctrine follows the fundamental precept of western water law: "first in time, first in right." *Kelly v. Teton Prairie LLC*, 2016 MT 179, ¶ 11, 384 Mont. 174, 376 P.3d 143. However, the Doctrine does not aid analysis in this case because it cannot address a dispute between users with *coequal* priority dates. Hence, the Prior Appropriation Doctrine is not incorporated into our analysis below.

¶10 This case thus arose when LBWR filed a September 2018 complaint before the District Court, Cause No. DV-18-30, alleging Doll interfered with its water rights by opening and locking the Ester Headgate. Following a September 19, 2018 hearing, the District Court reinstated Brian Robinson as Water Commissioner and certified the case to the Water Court to adjudicate the rights. Doll subsequently counterclaimed based on a 2014 Settlement Agreement, and the counterclaims were dismissed on summary judgment. The Water Court issued Final Order 40M-400 on September 17, 2019.

¶11 In Final Order 40M-400, the Water Court "used the most appropriate method available to allocate the flow rate of the [] rights, based on the amount of irrigated acreage occurring on each claimant's property." *Doll I*, ¶ 41. The Water Court established that, based on historical use and irrigated acreage, Doll, LBWR, and the Gilmores were entitled to pro rata shares of 62.17%, 22.46%, and 15.36% of the water in the Creek, respectively. The Water Court extrapolated the percent shares, finding the Dolls were entitled to a total of 12.43 cubic feet per second (CFS) for irrigation under rights 40M 168765 and 40M 30122575; and that LBWR was entitled to a total of 4.49 CFS for irrigation under rights 40M 186463 and 40M 186464. LBWR appealed Final Order 40M-400, arguing a 1975 Agreement (1975 Agreement or Agreement) between their predecessors-in-interest governed the water rights at issue in that case. We affirmed the Water Court's adjudication on August 11, 2020. *Doll I*, ¶ 1.

¶12 On July 16, 2021, LBWR filed a dissatisfied water user complaint under a new cause number, DV-21-34. LBWR again asked for declaratory judgment that Doll was bound by the 1975 Agreement, and accordingly, that Ester Reservoir must be filled before satisfying

any other water rights. Although the complaint added Robinson as a party and requested additional relief, the claim involving the 1975 Agreement was essentially the same as the claim filed under DV-18-30, which had been dismissed with prejudice as a result of our decision in *Doll I*.[3] Doll counterclaimed based on a 2014 settlement agreement entered into between Doll and a third party. The District Court dismissed Doll's counterclaims with prejudice as well.

¶13 Commissioner Robinson closed the headgate on July 23, 2021. In response, on July 28, 2021, Doll filed a motion in DV-18-30 requesting a District Court order directing Robinson to open the headgate. The District Court issued its Emergency Order to Open Headgate the following day, which Robinson carried out. LBWR filed a motion to quash in response.

¶14 Cases DV-18-30 and DV-21-34 were consolidated on October 14, 2021, and the District Court entered its Order Directing Administration of Water Rights on Big Warm Creek the same day, enforcing the decreed rights in Final Order 40M-400. On September 15, 2022, Doll filed a motion for attorney fees, which was subsequently denied. LBWR and Doll stipulated to dismiss the case on all but two remaining claims: LBWR reserved the right to appeal the District Court enforcement order, and Doll reserved the right to appeal the District Court's denial of attorney fees.

[3] We determined LBWR's interpretation of the 1975 Agreement conflicted with the express terms of the relevant deed. *Doll I*, ¶ 31. The terms of the deed controlled, meaning LBWR's interpretation was incorrect. *Doll I*, ¶¶ 31-32.

¶15 LBWR appeals the enforcement order here, arguing the District Court exceeded the scope of its authority when it decided to pro rate LBWR's and Doll's shares on a percent rather than flow rate basis. Doll appeals the District Court's refusal to award attorney fees, arguing the District Court abused its discretion when it determined Doll was not entitled to fees because he was not a "prevailing party" under Montana law.

STANDARD OF REVIEW

¶16 A district court's conclusions of law regarding a dissatisfied water user's complaint are reviewed for correctness. *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145, ¶ 9, 383 Mont. 523, 373 P.3d 836 (*Eldorado I*) (citation omitted).

¶17 Likewise, we review a district court's determination about whether legal authority exists to award attorney fees for correctness. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 11, 333 Mont. 331, 142 P.3d 864 (citations omitted). When legal authority to award fees exists, we review a district court decision denying them for an abuse of discretion. *Heringer v. Barnegat Dev. Grp., LCC*, 2021 MT 100, ¶ 14, 404 Mont. 89, 485 P.3d 731 (citation omitted).

DISCUSSION

¶18 *Issue One: Did the District Court erroneously enforce pro rata shares of Water Court-decreed water rights on a percent, rather than flow rate, basis?*

¶19 The District Court did not err in ordering the administration of Big Warm Creek water rights on a percent basis. The District Court correctly interpreted the Water Court Decree and patterns of historical use in ruling that a percent allocation is best suited for the rights in Big Warm Creek.

¶20 Article IX, Section 3(4), of the Montana Constitution directs the Legislature to "provide for the administration, control, and regulation of water rights" and to "establish a system of centralized records." To accomplish that directive, the Legislature created the Water Court and provided it exclusive jurisdiction to interpret and adjudicate the scope of water rights. Section 3-7-501, MCA; *Eldorado I*, ¶ 19. During the adjudication process, the Water Court makes findings of fact surrounding historical use to determine the scope of water rights for each basin, then ultimately enters them into a decree. *See, e.g., Teton Coop Canal Co. v. Teton Coop Reservoir Co.*, 2018 MT 20, ¶¶ 21-24, 390 Mont. 210, 412 P.3d 1; *see also* W. R. Adj. R. 24(a) (issuance of final decrees).[4] Prior to the issuance of the final decree the Water Court may "test the provisions of a temporary decree to determine whether they properly and fairly reflect an appropriator's rights." *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 22, 383 Mont. 205, 369 P.3d 1034 (citation omitted); *see* W. R. Adj. R. 21(3) (modification of abstract).

¶21 While the Water Court must determine the legal scope of a water right, district courts have complementary authority to supervise the distribution of water rights and to enforce Water Court decrees. Section 3-7-212, MCA; *In re Deadman's Basin Water Users Ass'n*, 2002 MT 15, ¶ 15, 308 Mont. 168, 40 P.3d 387. If a dispute arises in a basin that has not been fully adjudicated, a district court may certify questions of law to the Water Court for resolution. Section 85-2-406(2)(b), MCA; W. R. Adj. R. 31(e); *see also Fellows*

[4] A decree must include names and addresses of rights-holders; the amount of water included in a right, in terms of flow rate, volume, or both, depending on what is most appropriate for the water body; priority date; purpose; place of use; source; the place and means of diversion; period of use; and any other necessary information. Sections 85-2-231(4), -234, MCA.

v. Saylor, 2016 MT 45, ¶ 28, 382 Mont. 298, 367 P.3d 732 ("[T]he purpose of certification under § 85-2-406(2)(b), MCA, is to provide sufficient information to the District Court to facilitate resolution of the underlying water distribution controversy.") (citation omitted). "After determination of the matters certified, the water judge shall return the decision to the district court with a tabulation or list of the existing rights and their relative priorities." Section 85-2-406(2)(b), MCA. Any decree by a Water Court that is not a preliminary decree or final decree, as defined under §§ 85-2-231 and -234, MCA (basin-wide decrees), is "considered a temporary preliminary decree or interlocutory decree." W. R. Adj. R. 4.

¶22 Final Order 40M-400 was an interlocutory decree that resolved specific questions certified to the Water Court, and it established the legal scope of Big Warm Creek rights based primarily on patterns of historic use across the Phillips Ranch and its descendant properties. The Water Court calculated the total acreage that was historically irrigated under the rights, assigned percentages of the total historically irrigated land to each party, then quantified each party's rights in terms of a maximum flow rate. Final Order 40M-400 was then incorporated into the Preliminary Decree for Basin 40M, which further provides the maximum volume for each right at issue is "[n]ot [to] exceed the amount put to historical and beneficial use." Notably, the Preliminary Decree does not stipulate a minimum flow rate nor a method by which the District Court was to distribute or enforce the rights.

¶23 Enforcing the plain meaning of Final Order 40M-400, the District Court adopted the Water Court's calculations and held that Doll and LBWR are entitled to 62.17% and 22.46% of the water in Big Warm Creek, respectively. The District Court reasonably

determined that an allocation based on the flow rates established in the Final Order is unsuitable during periods of low flow, because at times there is simply not enough water to administer the parties' cumulative decreed rights to 12.43 CFS and 4.49 CFS. When that is the case, the headgate may be adjusted precisely to account for the decreed percent shares. The District Court thus determined that a percent allocation accurately reflects patterns of historical use across the Phillips Ranch, which was the Water Court's paramount consideration and ensures that no party is completely deprived of their right to appropriate Big Warm Creek water.

¶24 LBWR argues the District Court's order exceeds the scope of its authority to supervise and enforce decreed water rights because it mandates pro rata percent shares—which are not included in DNRC's abstracts—rather than the flow rates described in the abstracts. Further, LBWR maintains that even if Doll is entitled to 12.43 CFS and LBWR to 4.49 CFS, Doll's rights do not entitle him to leave his rights instream for downstream use. Instead, LBWR contends Doll must divert his share through Ester Ditch because the Water Court decree and DNRC abstracts do not allow Doll a point of diversion at the Ester Headgate.

¶25 Doll contends the District Court correctly interpreted the decree when it ruled that a percent allocation of Doll's and LBWR's water rights is better suited in times of shortage. Further, Doll asserts that the Water Court decree allows him to divert his share at any of his points of diversion, and that the District Court order is thus the more equitable solution overall.

¶26 Despite LBWR's insistence that the general abstracts prescribe sideboards for the discussion here, abstracts are simply interpretations of the Water Court's decrees. The Water Court's interlocutory decree, Final Order 40M-400, is thus the controlling law here.

¶27 Generally, we will only disturb a district court order enforcing a water rights decree if it adjudicates new rights or conflicts with the terms of the decree. *See, e.g., Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991); *In re Deadman's Basin*, ¶ 17; *Eldorado I*, ¶ 22. The District Court properly enforced the terms of the Water Court's decree here.

¶28 We have reversed district court enforcement orders, for example, when they announced rights that were not previously adjudicated. *Mildenberger*, 249 Mont. at 166, 815 P.2d at 134. In *Mildenberger*, we reversed in part because the district court determined a water user was entitled to 200 miner's inches of water, even though it was unsupported by a decree. 249 Mont. at 166, 815 P.2d at 134. Likewise, we reversed in *In re Deadman's Basin* because an enforcement order established priority between different users without any support from a decree. *In re Deadman's Basin*, ¶ 17. The District Court order here, by contrast, is firmly rooted in, and does not conflict with, the Water Court's decree in Final Order 40M-400, which was affirmed by this Court in *Doll I*.

¶29 Regardless of the fact that LBWR has decreed rights to a cumulative maximum *flow rate* of 4.49 CFS, the Water Court also articulated a maximum *volume* limited by the amount historically used to irrigate LBWR's property. By including both sets of terms, the Preliminary Decree provides the District Court and Water Commissioner flexibility to weigh the historical use of the water rights and distribute water accordingly. The Water

Court decree references compelling historical evidence supporting Doll's preference to leave water instream when there are water shortages. The District Court thus appropriately reasoned that a percent allocation better approximates historical use than flow rate when water is scarce, particularly given the unique fact that the Ester Headgate completely crosses the Creek and eliminates instream flow when it is closed.

¶30 This dispute is more akin to *Eldorado I*, where we affirmed a district court enforcement order that was squarely based on a Water Court decree. *Eldorado I*, ¶ 23. There, the controversy involved Teton River water rights, some of which had historically been administered based on a decree from 1908. *Eldorado I*, ¶ 4. Resolving objections from downstream water users, the Water Court modified the 1908 decree to include a volume quantification. *Eldorado I*, ¶ 5. Subsequently, the district court enforced that order and the Eldorado Coop Canal Co. appealed, arguing the volume quantification could not lawfully supplant its rights under the 1908 decree. *Eldorado I*, ¶¶ 7-8. We held the district court correctly applied the modified decree, which the Water Court had lawfully re-adjudicated to include a volume quantification. *Eldorado I*, ¶¶ 22-23. Here, Final Order 40M-400 similarly modified a preexisting decree, precisely adjudicating the scope of each party's cumulative share for the first time. We affirmed that decree in *Doll I*, and the District Court entered its enforcement order consistent with its terms. As discussed, we do not agree that the District Court adjudicated new terms. Rather, it made reasonable inferences from the decree because administering the rights exclusively in terms of flow rate was unworkable in low-flow years.

¶31 Finally, we are unpersuaded by LBWR's argument that Doll may not leave water instream at the Ester Headgate. Final Order 40M-400 clearly entitles him to do so. In relevant part, the Final Order's historical use analysis provides:

> Water from Big Warm Creek diverted into Ester Reservoir was used to irrigate the Gilmores' land, then LBWR's, then the Dolls' . . . . The same rights were also used to deliver water to Wild Horse Reservoir, where it was released to irrigate the Dolls' land. *Finally, the Dolls, and their predecessors all the way back to Phillips, diverted water directly from Big Warm Creek onto the Phillips home place to irrigate lands east of Highway 191*. . . .

(Emphasis added.) The Decree clearly contemplates the availability of two pathways through which Doll may divert his share of water, and its Conclusions of Law state as much expressly:

> The Dolls are entitled to use their point of diversion to divert their share of water for these rights into Wild Horse Reservoir. The Dolls are also entitled to divert their shares of these rights through points of diversion on the Doll's property east of the state highway.

This language cannot be construed to prohibit Doll from leaving water instream to reach the downstream points of diversion in Sections 8, 9, and 10. The Water Court would not have distinguished the two possibilities so clearly were that the case.[5] The DNRC abstracts for Doll's rights similarly delineate the two possibilities, describing points of diversion at

[5] On this point, LBWR directs us to Final Order 40M-400, footnote 10, which provides "The Dolls' stock claim, 40M 168752-00, is for livestock drinking directly from Big Warm Creek. Because this claim is for instream use, the Dolls are not entitled to use of Ester Reservoir, or the point of diversion in the NWSE of section 20, for this stock claim." We do not interpret this to mean Doll may not leave water instream to satisfy his other rights. Rather, it means that Doll may not divert water into Ester Reservoir in order to satisfy his stock claim. Regardless, the stock claim is not relevant to this Opinion, and we decline to consider its scope here.

the headgates in Sections 8, 9, 10, and 20, and then *secondary* points of diversion below the dam.

Based on the foregoing, we affirm the District Court's decision to enforce Final Order 40M-400 in pro rata percent shares, and rule that Doll may leave water instream so that it reaches his downstream points of diversion in Sections 8, 9, and 10.

¶32 *Issue Two: Did the District Court abuse its discretion when it denied Doll attorney fees?*

¶33 The District Court held Doll was not entitled to attorney fees, reasoning that because LBWR and Doll settled on all issues except the two before us now, there was not a final judgment from which to ascertain the prevailing party. The District Court did not abuse its discretion when it ruled Doll was not entitled to fees.

¶34 Attorney fees are generally not awarded to a party unless provided for by contract or statute. *Terra West Townhomes, L.L.C. v. Stu Henkel Realty*, 2000 MT 43, ¶ 40, 293 Mont. 344, 996 P.2d 866 (citation omitted). We recognize a narrow exception to that general rule—the "American Rule"—when an individual is effectively forced to hire an attorney to defend frivolous or meritless claims. *DeVoe v. City of Missoula*, 2012 MT 72, ¶ 25, 364 Mont. 375, 274 P.3d 752 (citing *Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978)). "No one factor is conclusive in determining the prevailing party for the purpose of awarding attorney fees." *Kenyon-Noble Lumber Co. v. Dependant Founds., Inc.*, 2018 MT 308, ¶ 24, 393 Mont. 518, 432 P.3d 133 (citation omitted). The "prevailing party" is typically the one who gains a net benefit from the principal issue in controversy.

Kenyon-Noble, ¶¶ 24-25 (citing *Rod & Rifle Inn v. Giltrap*, 273 Mont. 232, 235, 902 P.3d 38, 40 (1995)).

¶35 Doll argues the District Court abused its discretion by failing to address a contract fees provision in the 1975 Agreement. He contends that he prevailed on the main issue in the consolidated litigation because the Agreement was the principal issue in controversy there. Further, Doll asserts the Agreement entitles him to attorney fees because its contract fees provision applies when a prevailing party incurs expenses defending against enforcement of the Agreement. Additionally, Doll contends LBWR advanced the same claim regarding the 1975 Agreement a second time, under cause number DV-21-34, despite our ruling that it merged into the deed in *Doll I*, which foreclosed the claim entirely. Doll argues fees should thus be awarded because he was effectively forced to relitigate the issue.

¶36 LBWR, conversely, argues the District Court correctly decided this issue, and asserts that Doll missed his opportunity to request fees under the theory that he was forced to relitigate a meritless claim.

¶37 Doll conflates two theories for attorney fees on this appeal. Given the nuanced posture of the case, his apparent confusion about fees is reasonable. On one hand, Doll argues he is entitled to contractual fees based on the 1975 Agreement contract fees provision. On the other, he *implies* he is entitled to an equitable exception from the American Rule because LBWR relitigated its claim for declaratory judgment under the 1975 Agreement, even though we settled that issue in *Doll I*. We address the arguments in turn.

¶38 Regarding the contract fees argument, the District Court did not abuse its discretion when it determined there was not a prevailing party. All three of Doll's counterclaims were dismissed with prejudice under DV-18-30, and all but one of LBWR's claims was either dismissed or settled. Even though Doll prevailed on the 1975 Agreement claim, the Agreement formed the basis for just one of several claims in each of LBWR's complaints, as the District Court explained. The District Court reasonably took a holistic view of the proceeding and determined the prevailing party was impossible to identify after the parties settled and stipulated to a dismissal.

¶39 Doll directs us to *Kenyon-Noble*, where we granted attorney fees even though the defendant prevailed on just one of five counterclaims. *Kenyon-Noble*, ¶¶ 23, 25. There, the defendant was effectively forced to litigate a breach-of-contract claim even though the plaintiff, Kenyon-Noble, knew it would not recover damages from the defendant because he had lawfully rescinded his contractual obligations. *Kenyon-Noble*, ¶¶ 14-19. The defendant was successful in recovering fees because the counterclaim he prevailed on was the "principal issue in the case—breach of contract." *Kenyon-Noble*, ¶ 25. Here, Doll suggests it does not matter that he lost on all three of his own counterclaims, because ultimately, he prevailed on the main issue: whether the 1975 Agreement governed the water rights or not. It may well be true that he prevailed on that claim. Nevertheless, the District Court reasonably construed LBWR's first complaint to encompass a broader set of actions than the declaratory judgment action on the 1975 Agreement. The District Court did not abuse its discretion, therefore, when it determined it could not ascertain the prevailing party because certain other issues not involving the 1975 Agreement were settled out of court.

We agree, and find it equally plausible that the "principal issue in controversy" is whether and how to prioritize one water right over another when they are co-equal in priority, rather than the narrower question about the 1975 Agreement.

¶40 We have refused to grant attorney fees in a dispute involving the same Ester Ditch that is the source, in part, of the controversy here. *Knudsen v. Taylor*, 211 Mont. 459, 464, 685 P.2d 354, 357 (1984). In that dispute, one party prevailed on a claim for crop losses, the other prevailed on claims arising from damage to his culverts, and both parties lost on their assault claims. *Knudsen*, 211 Mont. at 461, 685 P.2d at 355. As Commissioner Robinson testified, "[w]hen there's no water, water is a problem. When there's lots of water, water ain't a problem." The District Court articulated a reasonable solution to allocating each party's rights when water is short, and it was reasonable in large part because the parties share the losses. Like *Knudsen*, the District Court's decision amounts to "a victory and a loss for both sides," and we decline to disturb its judgment here. 211 Mont. at 463, 685 P.2d at 357.

¶41 Finally, we acknowledge the impropriety of LBWR to file a second claim for relief under the 1975 Agreement even after we determined it merged into the deed in *Doll I*. Perhaps Doll would have been awarded fees if he had raised the claim that LBWR's second claim for relief was frivolous or meritless. *Devoe*, ¶ 25 (articulating the American Rule exception). However, Doll concedes that "The only question is whether the District Court abused its discretion in concluding that Doll was not the prevailing party against LBWR on LBWR's claims arising under the 1975 agreement." That question was addressed above, and it is unrelated to the availability of fees under the American Rule exception.

M. R. App. P. 12(1)(g) requires that parties cite to relevant authorities and statutes in support of their arguments on appeal. Doll failed to raise a claim that LBWR's second claim for relief was frivolous or meritless, and we therefore decline to conduct legal research for Doll, guess at his precise position, or develop legal analysis that may lend support to that position. *Johnston v. Palmer*, 2007 MT 99, ¶ 30, 337 Mont. 101, 158 P.3d 998 (citing *In re Estate of Bayers*, 1999 MT 154, ¶ 19, 295 Mont. 89, 983 P.2d 339).

CONCLUSION

¶42 The District Court correctly allocated the parties' rights on a percent basis. The enforcement order conformed to the Water Court decree under Final Order 40M-400. Likewise, the District Court correctly determined that Doll may leave water instream at the Ester Headgate to use his share of water at downstream points of diversion.

¶43 Further, the District Court did not abuse its discretion when it refused to award Doll attorney fees. The District Court's conclusion that there was no prevailing party in the underlying dispute was reasonable. We decline to consider Doll's argument for fees under the American Rule exception because he failed to raise that claim.

¶44 We affirm.

/S/ MIKE McGRATH

We Concur:

/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Jim Rice, concurring.

¶45 LBWR argues for application of traditional water right principles that would inure to its benefit as the most upstream user, entitling it to divert flowing water at its Ester Headgate diversion point in the amount of the flowrate assigned to its claims, while being shielded from any call because there are no users on the creek with seniority, rather only a user with equal priority, the Dolls. I agree with the Court that the Water Court's adjudication of the water rights here was unique in a way that renders these usually governing principles inapplicable for purposes of this particular dispute.

¶46 The history of the claims has been well discussed by the Court, both here and in *Doll I*. I would simply note the evidence credited by the Water Court that B.D. Phillips' original diversion system, which commingled the water covering the subject lands, "was so well constructed and planned that it was virtually possible to utilize water from all the main streams . . . on virtually all the lands . . . which are now irrigated or which have been irrigated in the past," and, specifically, enabled Phillips to "move water from Big Warm Creek for long distances to irrigate much of his ranch, including land now owned by LBWR, the Gilmores, and the Dolls." We described this system in *Doll I* as "a complex and impressive network." *Doll I*, ¶ 6. However, the commingled and unitary nature of Phillips' water system left unclear how those rights would be divided and allocated when the parts of his ranch were sold and transferred, a problem the succeeding owners understood and attempted to address through agreements and deeds, but which nonetheless persisted until ultimately resolved by litigation. In its 2019 Final Order, the Water Court held that none of the parties had submitted sufficient evidence to prove their claims

numerically, and thus, "[i]n the absence of actual water measurement records, the most equitable way to allocate the flow rate for those rights is based on the amount of irrigated acreage occurring on each claimant's property," each receiving "a pro-rata share." The Water Court continued, "[i]n addition to a pro-rata division of flow rates, each party is entitled to a pro-rata division of water stored in Ester Reservoir."

¶47 Thus, instead of a traditional adjudication of individual rights based strictly upon numerical flow rates, points of diversion, and dates of priority, the Final Order distributed the former Phillips' rights to all the parties in a water-sharing arrangement that allocated the water by percentages, with LBWR and Doll in equal priority. *See Final Order*, p. 24, n.9 ("The [Water] Court calculated the pro-rata share based on 2,493 total acres among the parties and rounded each party's percentage to the nearest hundredth to determine the appropriate allocation of flow rates. The Gilmores' percentage is 15.36%; the Dolls' percentage is 62.17%; and LBWR's percentage is 22.46%"). As the Court notes, we affirmed this unique allocation in *Doll I*, noting the Water Court had utilized "the most appropriate method available" under the unique circumstances of the case. *Doll I*, ¶ 41. Consequently, our decision, and the Water Court's water-sharing allocation, became law of the case, and the District Court was obligated to rule as it did, reasoning "[a]ny other conclusion subverts the stated rationale behind the Water Court's ruling." *See State v. Gilder*, 2001 MT 121, ¶ 12, 305 Mont. 362, 28 P.3d 488 ("[W]here, upon an appeal, the supreme court in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent

appeal."). While LBWR is correct that the Final Order included a Table providing numerically quantified flow rates, and corresponding abstracts were so issued, these clearly reflected, and were calculated from, the initial water-sharing percentages determined by the Water Court. Assuming sufficient water, the numerical flow rates correctly state the parties' volume entitlement; when water is insufficient, the percentages still control.

¶48 I concur in affirming the District Court.

/S/ JIM RICE