

Montana Water Court  
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43A-0284-R-2021

December 22, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
SHIELDS RIVER BASIN 43A  
PRELIMINARY DECREE

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CLAIMANT: 505 Ventures LLC

CASE: 43A-0284-R-2021

43A 185827-00

OBJECTOR: Westering Home LLC

**ORDER ASSUMING CASE AND  
ORDER DENYING MOTION FOR SUMMARY JUDGMENT**

**Order Assuming Case**

For judicial efficiency, Chief Water Judge McElyea is assuming this case.

**Order Denying Motion for Summary Judgment**

I. INTRODUCTION

505 Ventures LLC is the owner of claim 43A 185827-00. Westering Home LLC objected to 43A 185827-00 and filed a motion for summary judgment asking to have the claim terminated.

Pehr and Gail Anderson filed 43A 185827-00 on behalf of Hayhook Ranch. The Andersons claimed an irrigation right from Miles Creek which was originally recognized in a district court decree.

Westering Home asserts in its motion for summary judgment that there is no evidence of a ditch conveying water from Miles Creek at the location identified for claim 43A 185827-00, and no evidence of irrigation at the claimed place of use. In support of this assertion Westering Home offers an affidavit from consultant Kyle Mace, a copy of

the Water Resources Survey from Park County, and a 1977 aerial photograph. Mr. Mace testified through his affidavit that the materials he reviewed, which included aerial photos not attached to his affidavit, showed no evidence of a point of diversion or ditch capable of irrigating the place of use and no evidence of irrigation on the claimed place of use. The WRS and aerial photo attached to his affidavit support his conclusion. Based on this information, Westering Home argues claim 43A 185827-00 has not been used and should be terminated.

505 Ventures LLC, the current owner of claim 43A 185827-00 responded to the motion for summary judgment by asserting that its claim has prima facie status, and that the claim itself, along with a copy of the district court decree recognizing the claim, are enough evidence to create a genuine issue of material fact which precludes summary judgment.

## II. ISSUE

Did Westering Home meet its burden of showing no genuine issue of material fact regarding historical fact regarding claim 43A 185827-00?

## III. APPLICABLE LAW

Summary Judgment Standard:

“Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.” *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620 (citing Rule 56(c), M. R. Civ. P.). To determine whether genuine issues of material fact exist, courts look to the “pleadings, depositions, answers to interrogatories, admissions on file, and affidavits...” *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 24, 304 Mont. 356, 22 P.3d 631. All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 25.

The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues and entitlement to summary judgment as a matter of law. *Id.* “[P]roof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel.” *Montana Metal Bldgs., Inc. v. Shapiro*, 283

Mont. 471, 476, 942 P.2d 694, 697 (1997). Once the moving party has demonstrated that no genuine issues of material fact remain, the burden shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the opposing party must “present material and substantial evidence, rather than merely conclusory or speculative statements....” *Id.*

#### IV. DISCUSSION

In 2007, the water court divided claim 43A 185827-00 at the request of its owners. The claim was split into two separate water rights with ownership of claim 43A 185827-00 held by the Gregory and Anne R. Avis Trust. 505 Ventures LLC is presumably a successor to the Avis Trust. The Andersons, who retained ownership of a portion of the original right, received a new claim number for their share. The Water Master who issued the report splitting ownership referenced 35 acres of irrigation on the place of use connected to claim 43A 185827-00 but recommended leaving the issue remarks concerning use of the ditch from Miles Creek on both the Anderson and Avis rights. That remark states: “USE OF THE DITCH FROM MILES CREEK TO THE PLACE OF USE IS IN QUESTION.” This remark, placed on the abstract by the DNRC after its claim examination review, suggests concerns about the existence of a ditch connecting Miles Creek to the place of use. This is the same concern raised by Westering Home in its motion for summary judgment, and in Kyle Mace’s affidavit.

Counterbalancing this concern is recognition of a 35-acre place of use for this right in the N2 of Section 9, T1N, R8E, and claim maps filed by the Andersons to support their claim showing irrigation in the same vicinity. In sum, part of the evidence before the Court suggests irrigation in the N2 of Section 9 and some does not. Some evidence implies that a ditch from Miles Creek exists, while some does not. Determining whether a ditch exists, and if so, whether irrigation occurred are questions of fact. Resolving these issues now would require this Court to weigh conflicting evidence and choose an outcome. Keeping in mind that inferences must be made in favor of the non-moving party, and that genuine issues of material fact remain, this Court concludes summary judgment is not appropriate.

V. CONCLUSION AND ORDER

Westering Home's motion for summary judgment is denied.

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Russ McElyea  
Chief Water Judge

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