

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

DCERT-0002-WC-2021

December 30, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
CLARK FORK RIVER BASIN ABOVE THE BLACKFOOT RIVER (76G)

IN RE THE MARRIAGE OF:

Shannon Lyle Corey,

Petitioner,

and

Kelley Anne Corey

Respondent.

DCERT-0002-WC-2021
76G 130045-00

Certified From:
Montana First
Judicial District Court
Cause No. DDR-2020-141

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Kelley Anne Corey moved for partial summary judgment. She seeks a ruling that marshaling of the two rights in this case occurred historically. Shannon Corey opposes the motion.

II. APPLICABLE LAW

“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.*

III. ANALYSIS

Shannon and Kelley Ann Corey are in the midst of a divorce. They agreed to a division of real estate, but not to a division of the water rights used on that real estate. The real property divided between the parties was originally part of the same ranch and operated as a single unit. That original property is referenced to as the Avon Ranch in this order. Kelley asserts the two water rights at issue in this proceeding were combined to irrigate the Avon Ranch.

The water rights in this case were based on Notices of Appropriation by different parties for irrigation of separately owned parcels. Eventually those parcels were combined into the Avon Ranch, which was operated by the Knight family as a single unit. Earl and Gladys Knight filed claims 76G 130045-00 and 76G 130046-00. The Knights identified a common point of diversion but claimed different places of use for each right.

The Knights objected to their own rights to correct flow rate and volume after issuance of the Temporary Preliminary Decree in Basin 76G. They did not object to the places of use for these rights, nor did they assert that their rights were marshaled. The

Water Court modified these rights in a Master's Report issued on July 5, 1990 but did not change the place of use to reflect marshaling.

The term marshaling describes the consolidation of water rights to achieve more efficient irrigation. Kelley's motion for summary judgment asks the Court to find that these water rights were marshaled, and therefore have identical places of use.

A federal court described marshaling as follows:

The district court noted that the Article XI of the Decree allows "stacking" of water by permitting all water allocated to several fields to be stacked together and applied to one field at a time, in order to obtain an adequate head of water for efficient irrigation, so long as the users are in fact entitled to that water.

United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1440 (9th Cir. 1994).

Marshaling of water rights involves a change in historical use that arises when water rights originally appropriated for different properties are combined. Marshaling may occur when those properties are consolidated into single ownership and operated for the first time as an integrated unit.

Marshaling may involve combination of multiple water rights from different ditches into a single ditch; combination of water rights from different places of use on a single place of use; or use of multiple rights with formerly distinct places of use on the combined places of use for all those rights.

Open A Ranch Inc. v. Clark Canyon Water Supply Co., 2020 Mont. Water LEXIS 356, 39.

The combination of water rights to irrigate areas outside their original boundaries necessarily involves a change in the pattern of historical use. The legislature modified the law on changes in use as part of Montana's Water Use Act. Prior to July 1, 1973, a water user did not need to seek permission in advance to modify a water right, and a party claiming injury from the change had the burden of proving such injury. § 89-803, R.C.M.; *Hansen v. Larsen*, 44 Mont. 350, 353, 120 P. 229 (1911). Post-July 1, 1973, changes to water rights fall under different statutes, and the DNRC has jurisdiction over

such changes. § 85-2-302, MCA. The Water Court has exclusive jurisdiction over adjudication of existing rights which are defined as rights “to the use of water that would be protected under the law as it existed prior to July 1, 1973.” § 85-2-102(13), M.C.A.

Under the legislative framework referenced above, the marshaling of water rights before July 1, 1973 falls within the Water Court’s responsibilities, while evaluation of post-July 1, 1973 changes is the DNRC’s responsibility. This means the threshold question when assessing a claim of marshaling in the Water Court is whether the changes to water usage occurred before July 1, 1973.

Kelley Anne Corey provided parts of deposition transcripts to support her assertions regarding historical marshaling. A review of these excerpts shows that the only witness with personal knowledge of pre-July 1, 1973 irrigation practices on the Avon Ranch is Kelley’s father Hank Knight. Mr. Knight was born in 1958 and would have been about fifteen years old in 1973. Mr. Knight testified he did not initially know there were two water rights used on the Avon Ranch. Mr. Knight was also unclear on the flow rates for these rights, or the capacities of the ditches used to carry them, although he stated the capacity of one ditch was 350 inches.

Both rights are initially diverted at the same headgate and initially carried through the same ditch, but that ditch splits behind the old Avon School. According to Mr. Knight, the smaller of the two ditches was not capable of carrying all the water diverted into the main ditch above the junction. In other words, the smaller ditch could not handle the combined flow of both rights. Mr. Knight did not provide specific information regarding the carrying capacity of the two ditches below the junction, although part of his testimony inferred that the 3.75 CFS right was carried down the ditch leading to what is now Kelley’s parcel. The latter assertion, if accurate, suggests the two rights were not marshaled.

Ultimately, determining whether the two rights were marshaled as Kelley suggests depends in part on proof that the ditches below the junction were capable of carrying the combined flow of both rights. No such proof was provided as part of the summary judgment motion.

The remaining portions of deposition transcripts provided by Kelley to support her assertion these rights were marshaled were from witnesses who did not have personal knowledge of pre-July 1, 1973 irrigation on the Avon Ranch.

IV. CONCLUSION AND ORDER.

The initial question when considering a motion for summary judgment is whether the moving party has demonstrated the absence of a genuine issue of material fact. Kelley Anne Corey has failed to meet that initial burden on the question of marshaling and her motion for partial summary judgment is denied.

Russ McElyea
Chief Water Judge

Service Via Email:

William C. Fanning Esq.
Fanning Law PLLC
300 N Willson, Suite 3007
Bozeman, MT 59715
(406) 220-2805
william@fanninglawpllc.com
becki@fanninglawpllc.com
accounts@fanninglawpllc.com

Jack G. Connors
Samuel J. King
Doney Crowley P.C.
PO Box 1185
Helena, MT 59624
(406) 443-2211
jconnors@doneylaw.com
sking@doneylaw.com
ljoiner@doneylaw.com
legalsec@doneylaw.com
jhoffman@doneylaw.com

Service Via USPS Mail:

Jill A. Hughes
Matrium Law Group
317 E Spruce St
Missoula, MT 59802
(406) 552-7814
jill@matriumlaw.com

Lindsay P. Ward
Wall, McLean & Gallagher, PLLC
1 N Last Chance Gulch, Ste 4
Helena, MT 59601
(406) 442-1054
lindsay@mlfpllc.com