

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 ON MOTION IN LIMINE

I. INTRODUCTION

Kelley Anne Corey filed a motion in limine asking for rulings on several evidentiary issues. Shannon Corey opposes the motion.

II. ISSUES AND DISCUSSION

1. Should Shannon's expert be limited to testimony about irrigated acreage on Kelley's parcel?

Shannon retained Jim Gilman as an expert witness. Kelley seeks to have Mr. Gilman's testimony limited to a discussion of irrigated acreage on Kelley's parcel. Kelly's argument is that Shannon's discovery answers justify imposing such a limitation.

Shannon's answers to Kelley's Interrogatory Number 3 contain both general and specific information about the scope of Gilman's testimony. Shannon's answer to

Interrogatory 3(c) states Gilman will testify “about his interpretation of aerial photos and other relevant facts related to the water rights in this case.” This statement is broad enough to encompass a discussion of irrigated acreage on all parcels irrigated with water rights at issue in this proceeding. Shannon’s answer to Interrogatory 3(d) states Gilman will testify about specific acreage on Kelley’s parcel. Kelley contends this more specific statement should limit Gilman’s testimony to a discussion of irrigated acreage on Kelley’s parcel alone.

Shannon’s answer to Interrogatory 3(c) is sufficiently broad to put Kelley on notice that Gilman’s testimony could include irrigated acreage on Shannon’s parcels. Accordingly, Kelley’s request to limit Gilman’s testimony to a discussion of irrigated acreage on Kelley’s parcel is denied.

2. *Should Shannon be precluded from testifying about irrigated acreage because he is not an expert?*

Kelley seeks to prevent Shannon from testifying about irrigated acreage because he has not been identified as an expert witness. Kelley’s argument is premised on the notion that irrigated acreage can only be determined by experts. The Water Court has never adopted such a rule.

A witness’s ability to determine irrigated acreage depends on many factors which differ from case to case. Some witnesses may be qualified to make such a determination based on their personal knowledge and experience, while others may not. Regardless, the credibility of such testimony can be tested through cross examination. This Court declines to adopt a general rule that lay witnesses are precluded from testifying about irrigated acreage. Kelley’s request to limit Shannon’s testimony about irrigated acreage is denied.

3. *Should Shannon be prevented from creating a demonstrative exhibit showing the location of ditches and irrigation?*

Kelley seeks to prevent Shannon from creating a demonstrative exhibit showing the location of ditches and irrigation. The basis of this argument is Shannon’s refusal to

create such a document during his deposition. Shannon testified he was not comfortable creating a map because he could not remember where certain features were located.

Shannon's testimony at trial will depend on his knowledge. The credibility of his testimony can be tested through cross examination if he is asked to create a demonstrative exhibit. In the absence of citation to a rule precluding him from providing such testimony, Kelley's request to prevent Shannon from identifying features on a map is denied.

4. *Is Shannon allowed to introduce evidence of settlement discussions protected by Rule 408, M.R.E.?*

Rule 408 prevents introduction of offers of compromise or acceptance of such offers during settlement negotiations. Rule 408 does not prevent introduction of evidence otherwise discoverable merely because it was presented during settlement negotiations.

Kelley seeks to prevent introduction of information sought in Shannon's Request for Admission No. 8. That RFA asks whether Kelley, on June 22, 2021, agreed to stipulate to a Form 641 split of water right 76G 130045-00 based on historical acreage. Kelley declined to answer that RFA and Shannon filed a motion to compel. The term "agreed to stipulate" implies Corey made an offer to divide water rights in a certain way on June 22, 2021. It is not clear whether settlement negotiations occurred on June 21, 2021, or whether the offer allegedly made by Kelley was made in some other context.

Lindsay P. Ward, attorney for Kelley Anne Corey, executed an affidavit stating she made an offer to Ms. Hughes that Kelley would agree to "a Form 641 split based on what my understanding of what a standard split is, *i.e.*, historical irrigated acreage." Petitioner's Response to Respondent's Motion in Limine, Ex. D (Affidavit of Counsel in Support of Ms. Corey's Opening Brief Regarding Division of Water Rights (June 25, 2021)) (Dec. 20, 2021). Thus, the offer ostensibly made by Kelley is part of the record in another proceeding and was relied on by Kelley's attorney in that proceeding.

Whether Kelley made her offer as part of a settlement negotiation is unclear. Whether Kelley waived the right to have her offer excluded from evidence because her attorney referenced it in an affidavit is not clear. Whether that offer is admissible

depends in part on the purposes for which admission is sought, which are also unclear. Accordingly, this Court declines to rule on the admissibility of Kelley's alleged proposal until the parties produce more information on this question. Kelley is free to pose an objection to admissibility at trial.

5. *Should Shannon be precluded from introducing evidence or argument regarding division of water rights based on equitable factors?*

Kelley argues that division of water rights between the parties cannot be based on equitable factors. She asserts this Court's focus should be on historical use and that use of equitable principles to determine water right ownership is improper. Citing Rule 402, M.R.E., Kelley argues that evidence intended to support a theory of equity is not relevant and therefore inadmissible. Kelley does not identify the specific evidence she seeks to exclude. Instead, she expresses a general concern that Shannon "may argue or introduce evidence at the hearing that he is entitled to additional water from the water rights at issue based on equitable factors." Respondent's Brief in Support of Combined Pretrial Motions in Limine, 7 (Dec. 2, 2021). Kelley does not define the term "equitable factors".

Kelley's request is overbroad. She is, in effect, arguing that relevant evidence be admitted, and irrelevant evidence be excluded without identifying what evidence is in dispute. Absent such specificity, any pronouncement of this Court would amount to an advisory opinion. The parties are free to object to the introduction of evidence based on Rule 402 at trial. In the meantime, Kelley's motion in limine on the subject of equitable division is denied.

III. CONCLUSION AND ORDER

1. Jim Gilman is not barred from testifying about irrigated acreage on Shannon's property.
2. Shannon Corey is not barred from testifying about irrigated acreage.
3. Shannon Corey is not barred from creating a demonstrative exhibit showing the location of ditches and irrigation.
4. This Court declines to rule on the admissibility of Kelley's alleged proposal until the parties produce more information on this question.

5. Kelley's request that Shannon be precluded from introducing evidence or argument regarding division of water rights based on equitable factors is vague and overbroad and therefore 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