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MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

\* \* \* \* \*

Robert S. Pappert,

Plaintiff,

v.

Vicki C. Zimmerman; Nolan Zimmerman; Talia  
Zimmerman

Defendants.

**DCERT-0003-WC-2020**

43B 7054-00

**Split Claim:**

**43B 30160045**

Certified From:

Montana Sixth

Judicial District Court

Cause No. DV-2020-43

**FINAL ORDER**

**I. INTRODUCTION**

This case involves a dispute over an irrigation water right from Suce Creek. Suce Creek is a tributary of the Yellowstone River located in the Paradise Valley south of Livingston, Montana. Oneita Brodrick filed claim 43B 7054-00 for irrigation of 120 acres. This order refers to claim 43B 7054-00 as the Brodrick right. Claim 43B 7054-00 is junior to other rights on Suce Creek and has a priority date of August 30, 1902.

Oneita Brodrick's successors divided her land into smaller parcels and the current owners of the two separate parcels are involved in a dispute over the Brodrick right and a pipeline constructed for its delivery. One of those owners, Robert S. Pappert, filed suit in district court against neighbors Vicki C. Zimmerman, Nolan Zimmerman, and Talia

Zimmerman. The Zimmermans are also successors to Oneita Brodrick and own land adjacent to and east of Pappert.

Pappert alleges he is the sole owner of the Brodrick right and entitled to use a pipeline crossing the Zimmerman property to receive water. The Zimmermans, who are familial descendants of Oneita Brodrick, assert the Brodrick right was abandoned through non-use. In the alternative, the Zimmermans assert the Brodrick right is jointly owned by Pappert and the Zimmermans, and that Pappert has no right to use of the pipeline on their property.

The Honorable Brenda Gilbert certified the Brodrick right to the Water Court for “a determination of the existing rights involved in the controversy, specifically as to the question of abandonment and the proper distribution system.” *Order Granting Stay and Certification of Water Distribution Controversy to Montana Water Court* (Sept. 10, 2020).

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Oneita Brodrick filed claim 43B 7054-00 on November 18, 1980. Brodrick claimed a water right decreed in a prior district court action titled *Cobb v. Carter*, Case No. 6130, Sixth Judicial District, Park County, Montana. As claimed, the Brodrick right had a flow rate of 182 miner’s inches for use on 120 acres in section 19, T3S, R10E, Park County. Brodrick diverted her water right through the Skillman Carter Ditch for flood irrigation of her land south of Suce Creek.

### *Findings Regarding Abandonment of the Brodrick Right*

The Water Resources Survey for Park County, published in 1951, shows flood irrigation of the place of use for the Brodrick right using the Skillman Carter Ditch. An aerial photograph taken in 1979 confirms irrigation through the Skillman Carter Ditch in the same area. During the mid-1980s a landslide obstructed part of the Skillman Carter Ditch and interfered with delivery of water to Oneita Brodrick’s property.

Brodrick eventually conveyed her property to her daughter, Cathleen Peters. Albert Peters, Cathleen’s husband, applied to the Soil Conservation Service for assistance with

installation of a gravity pipeline to convey water from the Skillman Carter Ditch directly to the Peters' land, and the pipeline was installed in 1994.

The pipeline inlet was located on the Skillman Carter Ditch below the headgate on Suce Creek and conveyed water to the east boundary of the Brodrick property. After installation of the pipeline, use of the Skillman Carter Ditch below the pipeline inlet was discontinued. Soil Conservation Service notes indicate the pipeline was sized for two wheel lines and aerial photographs taken in 1996 indicate usage of sprinkler systems on what is now the Pappert and Zimmerman properties.

Zimmermans contend Pappert and his predecessors, the O'Neill family, abandoned the Brodrick right. The tract now owned by Pappert was created in 2001 when the owner of the Brodrick property, Cathleen Peters, subdivided her property. She conveyed Tract B-2 of COS 1715 to REVX-208, LLC, which in turn conveyed Tract B-2 to Michael O'Neill.

In 2005, O'Neill hired a consulting firm to help with irrigation on his property. At about this time, conflict developed between the Zimmermans and O'Neill over O'Neill's use of the pipeline installed by Peters in 1994. O'Neill's attorney wrote several letters to the Zimmermans and their attorneys asserting O'Neill's right to use the pipeline to deliver water rights appurtenant to his property. These letters were written between 2005 and 2008.

Vicki Zimmerman wrote a letter to O'Neill's attorney on October 23, 2005, in which she stated, "I have no objection to Mr. O'Neil (sic) utilizing his water rights...." Pappert Ex. 28. Ms. Zimmerman's main concern was that O'Neill not modify the portion of the pipeline crossing her property. Zimmerman's acknowledgment of O'Neill's intention to use his water is inconsistent with her present assertion that O'Neill intended to abandon his right.

Jim Franck, who was farming the O'Neill property, testified he personally irrigated the O'Neill land from 2007 through 2011. Franck's testimony is corroborated by a 2009 aerial photo showing sprinkler risers on O'Neill's land in a location consistent with the alignment of the pipeline. Pappert Ex. 16.

Franck stated the pipeline from Zimmerman's land was disconnected in 2011, and that no irrigation occurred on O'Neill/Pappert land after that date. Members of the O'Neill family conveyed the O'Neill tract to Pappert in 2014. In 2016, Pappert hired an engineer and an excavation contractor to rebuild the headgate on the Skillman Carter Ditch which had been damaged and rendered inoperable by floods on Suce Creek. Pappert spent over \$22,000 on engineering and repairs to the Skillman Carter headgate and diversion structure. Pappert Ex. 29.

In summary, the Peters used the Brodrick right to irrigate what is now the Pappert property prior to conveyance of that land to O'Neill. The Peters built a pipeline for the purpose of irrigating what is now the Zimmerman and Pappert properties. The Brodrick right was appurtenant to both properties before and after subdivision of the Peters' land occurred.

After buying Tract B-2 from Peters, O'Neill retained an engineering firm and an irrigation services company, and despite some conflict, made improvements to his system and irrigated for several years. Pappert acquired the property in 2014 and undertook repairs to the Skillman Carter diversion in 2016. The foregoing pattern of conduct by multiple parties over several decades shows actual use of the Brodrick water until 2011, as well as intent to continue using it notwithstanding conflict with the Zimmermans.

Although it appears there has not been irrigation on the Pappert land for the last decade, Pappert continued to assert his ownership of the Brodrick right by repairing the headgate on the Skillman Carter Ditch and by filing a district court action against the Zimmermans in 2020. Moreover, part of the reason O'Neill and Pappert could not irrigate was that the Zimmermans or their agents prevented them from doing so.

#### *Conclusions of Law Regarding Abandonment of the Brodrick Right*

Once an appropriator abandons a water right, the right ceases. *Holmstrom Land Co. v. Meagher Cnty. Newlan Creek Water Dist.*, 185 Mont. 409, 423, 605 P.2d 1060, 1068 (1979) (citation omitted). "Abandonment of a water right is a question of fact." *79 Ranch v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983). A finding of "[a]bandonment...requires both non-use and intent to abandon." *Skelton Ranch, Inc. v.*

*Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 52, 375 Mont. 327, 328 P.3d 644 (citing *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218). “The objector bears the initial burden of showing a long period of continuous non-use of the claimed water right.” *Skelton Ranch*, ¶ 53. A showing of a long period of continuous non-use raises a “rebuttable presumption of abandonment.” *Id.* (citing *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218).

“The burden then shifts to the claimants to produce ‘[s]pecific evidence explaining or excusing the long period of non-use....’” *Skelton Ranch*, ¶ 53 (quoting *In re Musselshell River Drainage Area*, 255 Mont. 43, 51, 840 P.2d 577, 582 (1992)). To rebut the presumption of abandonment, the claimant must establish “some fact or condition excusing the long period of nonuse, not mere expressions of hope or desire reflecting a ‘gleam-in-the-eye philosophy’ regarding future use of the water.” *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992) (citing *79 Ranch*, 204 Mont. at 433-34, 666 P.2d at 219).

The length of non-use required to prove abandonment varies from case to case. Nine years of non-use is “certainly very potent evidence, if it stood alone, of an intention to abandon.” *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896). A 23-year period of non-use raised a rebuttable presumption of abandonment in *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). In *Skelton Ranch*, a period of non-use ranging from 18 to 29 years was sufficient to raise a presumption of abandonment. *Skelton Ranch*, ¶ 56. In *79 Ranch v. Pitsch*, 204 Mont. at 432-33, 666 P.2d at 218, a 40-year period raised a presumption of abandonment, and in *Holmstrom Land Co. v. Meagher County Newlan Creek Water Dist.*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1979) non-use spanned 75 years.

Although there have been periods of non-use of the Brodrick right, those periods have not been long enough to create a presumption of abandonment. Aerial photographs show use of claim 43B 7054-00 at the time of the Water Resources Survey in 1951 and again in 1979. Brodrick claimed the right in 1980 and conveyed it to the Peters, who used it to irrigate property they received from Brodrick. Albert Peters applied for and received

a grant from the Soil Conservation Service to build a pipeline to convey the Brodrick right and aerial photos confirm sprinkler irrigation in 1996.

As noted below, Cathleen Peters referenced the Brodrick right in various deeds and related real estate documents, which suggested she had no intention of abandoning that right. O'Neill retained consultants to assist with use of the Brodrick right and Jim Franck, who farmed the O'Neill land for several years, used the Brodrick right from 2007 to 2011. When conflict arose with the Zimmermans, O'Neill retained an attorney to protect his ability to divert and use the Brodrick right.

Pappert repaired the diversion structure at the head of the ditch in 2016 to permit delivery of water to his property. In addition, Pappert's inability to use the Brodrick right is attributable, at least in part, to the actions of either the Zimmermans or their agents, who are responsible for closing the pipeline to Pappert's land. Pappert filed suit in 2020 to address this issue, and his actions are not consistent with intent to abandon the water right he sought to protect.

The foregoing actions by different owners do not show a prolonged period of non-use, nor do they demonstrate intent to abandon the Brodrick right. The Zimmermans did not provide sufficient evidence to create a rebuttable presumption of abandonment. Claim 43B 7054-00 was not abandoned in whole or part.

#### *Findings of Fact Regarding Ownership of the Brodrick Right*

Both Pappert and the Zimmermans assert ownership of the Brodrick right based on chain of title and other documentary evidence.

The Pappert and Zimmerman tracts were once held in common ownership by Oneita Brodrick, and later Cathleen Peters. During this time of common ownership, the Brodrick right was used to flood irrigate approximately 82 acres out of the Skillman Carter Ditch. The 82-acre place of use for the Brodrick right was located on what is now the Pappert and Zimmerman tracts. After Albert Peters installed the pipeline with federal assistance in 1994, flood irrigation was replaced with sprinklers. Despite this change in practice, irrigation continued and the Brodrick right remained appurtenant to lands now owned by Pappert and Zimmerman. This pattern of historical irrigation occurred for

decades before subdivision of the Brodrick property and continued after conveyance of the place of use to separate owners.

Cathleen Peters subdivided the Brodrick property in 2001 and conveyed Tract B-1, now owned by the Zimmermans, to Albert Peters. The deed to Albert Peters conveyed Tract B-1, “[t]ogether with all water rights, ditch and pipeline easements appurtenant to the property...and tenements now held by the grantor.” Pappert Ex. 24. The deed from Cathleen to Albert was signed on February 25, 2002, and recorded April 9, 2002.

The Brodrick right was historically used to irrigate a portion of Tract B-1 and was therefore partially appurtenant to that property. Cathleen’s deed to Albert did not specifically mention the Brodrick right or reserve any portion of that right. Likewise, it did not specifically reference claim 43B 7053-00<sup>1</sup>.

After conveying Tract B-1 to Albert, Cathleen executed an abstract of a contract for deed referencing an agreement between her and REVX-208 LLC regarding sale of Tract B-2. The abstract of the contract for deed was dated March 27, 2002, approximately one month after her conveyance of Tract B-1 to Albert. Cathleen Peters also executed a deed to REVX-208, presumably for placement into escrow pending fulfillment of the sale contract. Although the deed was dated March 27, 2002, it was not recorded until December 19, 2002.

This second deed contained more explicit language regarding water rights than Cathleen’s prior deed to Albert. It conveyed Tract B-2 “[t]ogether with Water Claim 43B-W-007054 and Reserving to the Grantor Water Right Claim No. 43B-W-007053.” Pappert Ex. 25. This deed also conveyed “all the ditch and pipeline easements appurtenant to the property...” *Id.*

Pappert asserts he owns all the Brodrick right based on language in the deed from Cathleen to REVX-208, LLC. Pappert points to a buy sell agreement and water rights

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<sup>1</sup> Claim 43B 7053-00 is also a water right from Suce Creek originally claimed by Oneita Brodrick. It was not at issue in this case and the Water Court makes no determination regarding that right in this order. It is mentioned here because it is referenced in the Cathleen Peters deed to REVX-208, LLC.

transfer certificate to support his assertion that the parties intended to convey all the Brodrick right to the purchaser of Tract B-2.

*Conclusions of Law Regarding Appurtenance of Water Rights to Land and Interpretation of Deeds*

“Generally, a water right is appurtenant to the land where it is used, ‘and, as such, passes with the conveyance of the land . . . even though the grant does not specifically mention the water right.’” *Little Big Warm Ranch, LLC v. Doll*, 2020 MT 198, ¶ 18 n.9, 400 Mont. 536, 469 P.3d 689 (citations omitted). “The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom.” § 85-2-403(1), MCA.

“Deeds are interpreted like contracts.” *Murray v. BEJ Minerals, LLC*, 2020 MT 131, ¶ 20, 400 Mont. 135, 464 P.3d 80. “Courts interpret contracts according to their plain and ordinary meaning and will not insert into the contract what has been omitted or omit what has been inserted.” *Id.* The language of a contract governs its interpretation if the language is clear and unambiguous. § 28-3-401, MCA. A court may consider extrinsic evidence of the parties’ intent, but only where the language of a deed is ambiguous. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 55, 338 Mont. 41, 164 P.3d 851. Ambiguity exists when the wording of a document is “reasonably subject to two different interpretations.” *Ophus v. Fritz*, 2000 MT 251, ¶ 23, 301 Mont. 447, 11 P.3d 1192.

The question before the court is who received title to the Brodrick water right. The Brodrick right was historically used on, and appurtenant to, a larger tract of land once owned solely by Brodrick and Peters, and now divided between Pappert and the Zimmermans. Analysis begins with review of the chain of title for the subject properties.

The first relevant deed is the conveyance of Tract B-1 from Cathleen Peters to Albert Peters. As noted in the findings above, this deed did not identify individual water rights. Instead, it simply stated that “all water rights, ditch and pipeline easements appurtenant to the property...” were granted to Albert Peters. This language is typical of many deeds used to convey land and water rights in Montana. Although it lacks precision,



it is both unremarkable and unambiguous, and no reference to extrinsic evidence is required to determine its meaning. This deed, by its plain language, conveyed water rights appurtenant to Tract B-1 from Cathleen to Albert. It also impliedly reserved water rights that were not appurtenant. *Axtell v. M.S. Consulting*, 1998 MT 64, ¶ 34, 288 Mont. 150, 955 P.2d 1362.

The Brodrick right was appurtenant to both Tract B-1 and to the land retained by Cathleen Peters. After conveyance of Tract B-1 from Cathleen to Albert, each person owned an undivided interest in the Brodrick right.

The next deed in the Brodrick chain of title was from Cathleen to REVX-208, LLC. The deed from Cathleen Peters to REVX-208, LLC conveyed Tract B-2 “[t]ogether with Water Claim 43B-W-007054 and Reserving to the Grantor Water Right Claim No. 43B-W-007053.” Pappert Ex. 25. Pappert contends this deed conveyed the entirety of the Brodrick right to his predecessor and therefore entitles him to claim the entirety of that right today. This argument is mistaken. At the time of execution of the deed to REVX-208, Cathleen had already conveyed part of the Brodrick right to Albert.

It is a fundamental rule of property law that a grantor can only convey what they own at the time of conveyance. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, 573, 39 P. 1054, 1057 (1895). Applying that rule, Cathleen Peters could only convey whatever portion of the Brodrick right she owned at the time she executed the deed to REVX-208, LLC. Because Cathleen only held a partial interest in the Brodrick right, she could only convey a partial interest to REVX-208, LLC. REVX-208, LLC received, and Pappert now owns, a partial interest in claim 43B 7054-00.

Pappert points to other documents such as a buy sell agreement and a water rights transfer certificate, which he contends illustrate the parties’ intent to convey the entirety of 43B 7054-00 to the owner of Tract B-2 and reserve all of 43B 7053-00 to the owner of Tract B-1.<sup>2</sup> This argument would make logical sense if Cathleen had reserved the entirety

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<sup>2</sup> The buy sell agreement referenced by Pappert was not signed by Cathleen Peters and therefore has limited evidentiary value. In addition, the portion of the buy sell discussing water rights is itself capable of two interpretations, thereby making it ambiguous. Finally, even assuming the deed from Cathleen to Albert was

of 43B 7054-00 to herself in the deed to Albert, but she did not. Under the doctrine of merger, the deed controls conveyance of property. “Following performance of the contract, and upon execution of a deed, the provisions of the contract for sale merge into the deed and any non-collateral terms are extinguished.” *Towsley v. Stanzak*, 2022 MT 217, ¶ 19, 410 Mont. 403, 519 P.3d 817 (citing *Dobitz v. Oakland*, 172 Mont. 126, 130, 561 P.2d 441, 443 (1977)). Extraneous documents are not relevant to determine intent unless the deed is ambiguous. The deed from Cathleen to Albert was not ambiguous. Its effect was to convey water rights appurtenant to the land Albert received.

Likewise, the deed from Cathleen to REVX-208 was not ambiguous. Its language was also plain, despite its misplaced attempt to convey the entirety of the Brodrick right. The problem with this deed is not one of ambiguity. The problem is that the author of the second deed mistakenly believed Cathleen could convey all the Brodrick right to REVX-208. The conflict between the deed to Albert and the deed to REVX-208 could have been avoided by either Cathleen Peters or REVX-208 (O’Neill), who should have known through prior knowledge or basic due diligence that Cathleen no longer owned all the Brodrick right.

Pappert contends the language in the deed to REVX-208 requires revision of the prior deed to Albert. This argument effectively elevates the second deed so that its language controls the grant of water rights in a deed preceding it. Pappert cites no authority for this assertion. Likewise, he cites no authority allowing a court to rewrite a *prior* deed to harmonize it with one issued to a different party for different property at a later date. In effect, Pappert argues the mistake in the second deed should govern interpretation of both deeds, without authority to support this assertion.

#### *Estoppel by Deed*

Pappert relies on the doctrine of estoppel by deed to argue the Zimmerman family cannot assert a partial ownership interest in the Brodrick right. Pappert contends that the Zimmermans are successors in interest to Cathleen Peters and may not challenge the

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ambiguous and reference to extrinsic evidence was needed, neither of these documents are directly relevant because they pertain to the transaction with REVX-208, not the transaction with Albert.

language of the deed to REVX-208, which mistakenly attempted to convey all the Brodrick right to O'Neill through a reverse 1031 exchange.

Estoppel by deed is an equitable doctrine that prevents parties from “tak[ing] advantage of [their] own wrong.” *Dellit v. Schleder*, 2022 MT 196, ¶ 34, 410 Mont. 275, 518 P.3d 830 (citations omitted). The doctrine is intended to “prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak.” *Id.* (citations omitted).

The doctrine of estoppel by deed does not apply here. The Zimmermans were not parties to the deed between Peters and REVX-208 and are not responsible for representations made by Cathleen as part of that transaction. Moreover, the deed to REVX-208 was issued by Peters *after* Peters had already conveyed a portion of the Brodrick right to her husband Albert. The parties most able to avoid the conflict created by the REVX-208 deed were O'Neill and Cathleen Peters, both of whom knew or should have known that Cathleen could not convey the entirety of the Brodrick right to REVX-208.<sup>3</sup>

The Zimmerman family's claim of partial ownership in the Brodrick right is appropriate given the language in the deed from Cathleen to Albert. Their assertion of ownership does not amount to perpetuation of a fraud or falsehood requiring that they be prevented from asserting their rights. The Zimmermans are not claiming the entirety of the Brodrick right. They are only asserting ownership of the portion appurtenant to the land they received.

### *Equitable Estoppel*

Pappert asserts the doctrine of equitable estoppel prevents the Zimmermans from challenging Pappert's ownership of the entirety of the Brodrick right because Cathleen Peters made representations and warranties regarding the Brodrick right to O'Neill. Pappert's argument misapplies the doctrine of equitable estoppel.

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<sup>3</sup> The deed from Cathleen to Albert was recorded on April 9, 2002. The deed from Cathleen to REVX-208 was recorded December 19, 2002. REVX-208 (O'Neill) had constructive notice of the conveyance of Tract B-1 to Albert. A properly recorded deed serves as constructive notice to “subsequent purchasers and mortgagees.” § 70-21-302(1), MCA.

“Generally, ‘estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse.’” *Arthur v. Pierre Ltd.*, 2004 MT 303, ¶ 30, 323 Mont. 453, 100 P.3d 987 (citations omitted). To establish that equitable estoppel applies, Pappert must establish the following six elements by clear and convincing evidence:

- (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts;
- (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party;
- (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon;
- (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon;
- (5) the conduct must be relied upon by the other party and lead that party to act; and
- (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

*Arthur*, ¶ 30.

Pappert does not address or even acknowledge the existence of these six elements. Instead, Pappert asserts that Pappert relied on representations made by Cathleen Peters to O’Neill, and that “[j]ustice, honesty, and fair dealing are promoted by estopping the Zimmermans from claiming an ownership interest in the Water Right.” [Proposed] *Findings of Fact and Conclusions of Law*, at 12 (July 17, 2023).

Pappert did not show by clear and convincing evidence that Vicki Zimmerman, who received Tract B-1 from Albert *before* Cathleen conveyed Tract B-2 to REVX-208, engaged in any conduct that amounted to a misrepresentation or concealment of material facts to O’Neill. Pappert did not show that Vicki Zimmerman had any knowledge of the transaction between Cathleen and O’Neill or knowledge of the representations made by Cathleen to O’Neill. Pappert did not show that Vicki Zimmerman independently made representations regarding ownership of the Brodrick right that she intended for O’Neill to

act upon, or that O'Neill acted on such representations or changed his position for the worse based upon them.

Pappert cannot saddle Zimmerman with mistakes made by Cathleen and O'Neill. Not only does this effort lack evidentiary or logical support, it also overlooks the fact that the Zimmermans do not claim the entire Brodrick right, and that Pappert will receive that portion of the Brodrick right historically used to irrigate his property. According to Pappert's expert, Pappert does not need the entire flow rate of the Brodrick right to irrigate. Pappert's only injury, if it can be called that, is that he cannot claim the entirety of a water right that was never used exclusively on his property.

"Equitable estoppel is not favored...." *Bruner v. Yellowstone County*, 272 Mont. 261, 268, 900 P.2d 901, 905 (1995). Failure to establish even one of the six elements of equitable estoppel dooms the claim. *City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶ 20, 304 Mont. 346, 21 P.3d 1026. Pappert has not established by clear and convincing evidence that any of the elements of equitable estoppel apply.

#### *Laches*

Pappert asserts the doctrine of laches bars the Zimmermans from claiming partial ownership of the Brodrick right. Pappert argues the Zimmermans should have known of their potential ownership interest in 2002 and asserted it earlier.

The doctrine of laches is an equitable remedy. The doctrine "'applies when a party has been negligent in asserting a right, and where there has been an unexplained delay of such duration as to render enforcement of the asserted right inequitable.'" *Lindemulder v. Lindemulder*, 2022 MT 119, ¶ 21, 409 Mont. 69, 512 P.3d 620 (citations omitted).

The elements of laches are: "(1) the party against whom the defense is asserted lacked diligence in asserting a claim; and (2) that lack of diligence resulted in prejudice to the party asserting the defense." *Algee v. Hren*, 2016 MT 166, ¶ 8, 384 Mont. 93, 375 P.3d 386. Although elapsed time is relevant in considering laches' elements, the principal consideration is "the inequity of permitting a claim to be enforced." *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 25, 308 Mont. 265, 42 P.3d 760.

There is no evidence that water on Suce Creek was administered so that O'Neill received the entirety of the Brodrick right. Water is fungible, and during times that O'Neill received water there was no accounting system in place to distinguish the Brodrick right from others except for calls based on priority date. Vicki Zimmerman had received a deed from Cathleen Peters granting her water rights appurtenant to Tract B-1. That grant included part of the Brodrick right, which had been appurtenant to Brodrick lands for years.

As discussed above, the Zimmermans are not seeking ownership of the entire Brodrick right. They are only claiming the portion appurtenant to their land. That leaves Pappert with the water appurtenant to his land and undercuts his claim of prejudice. Absent prejudice, the doctrine of laches does not apply.

*Abandonment of the Brodrick Right by the Zimmermans*

Pappert asserted prior to and during trial that the Zimmermans never owned the Brodrick right. In post-trial briefing, Pappert asserted for the first time that Zimmermans abandoned the Brodrick right. This court will not consider arguments made for the first time after trial.

*Findings of Fact Regarding Place of Use and Flow Rate for the Brodrick Right*

The claimed place of use for the Brodrick right is 120 acres, but the record shows between 80 and 82 acres of historical irrigation. The question is how to divide that acreage between Pappert and the Zimmermans. Aerial photos show a roughly equal amount of irrigation on the Zimmerman and Pappert properties. In his proposed findings, Pappert referenced 40 acres of irrigation on his land.

The record supports allocation of 40 irrigated acres to Pappert and 40 acres to the Zimmermans. Pappert's 40 acres is located on parcels 1 and 2 of COS 1927 in Park County. Zimmermans' portion is appurtenant to Tract A-1 of COS 1741 in Park County<sup>4</sup>.

Jim Franck irrigated the Pappert property when it was owned by O'Neill. Franck testified that he needed 40 miner's inches of water at the headgate for the Skillman Carter

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<sup>4</sup> Zimmermans' property was formerly described as Tract B-1 of COS 1715, but Zimmermans now apparently own Tract A-1 of COS 1741.

Ditch on Suce Creek to irrigate the O'Neill/Pappert land. Accordingly, Pappert's share of the Brodrick right is 40 miner's inches.

### III. CONCLUSION AND ORDER

Pappert and the Zimmermans each own a portion of the Brodrick right based on use of that right to irrigate their respective properties. Abstracts allocating the Brodrick right to the parties are attached to this order. Those abstracts represent the judgment of this court regarding the ownership and historical use of the Brodrick right.

### **ELECTRONICALLY SIGNED AND DATED BELOW.**

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**Hon. Brenda R. Gilbert**  
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**Note: Caption and Service List Updated 9/26/2023**

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**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 7054-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** ROBERT S PAPPERT  
7201 PIPER POINT W  
CHARLOTTE, NC 28277

**Priority Date:** AUGUST 30, 1902

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**\*Flow Rate:** 1.00 CFS

**\*Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 40.00

**\*Source Name:** SUCE CREEK

**Source Type:** SURFACE WATER

**\*Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENE SW	17	3S	10E	PARK

**Period of Diversion:** MARCH 1 TO DECEMBER 1

**Diversion Means:** HEADGATE

**Ditch Name:** SKILLMAN-CARTER DITCH

**Period of Use:** MARCH 1 TO DECEMBER 1

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	30.00		SWNW	19	3S	10E	PARK
2	10.00		NWSW	19	3S	10E	PARK
<b>Total:</b>	40.00						

THE PLACE OF USE IS LOCATED IN PARCELS 1 AND 2 OF COS 1927 IN PARK COUNTY.

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**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

7053-00

7054-00



**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 30160045 STATEMENT OF CLAIM

**Version:** 1 -- ORIGINAL RIGHT

**Status:** ACTIVE

**Owners:**

VICKI C ZIMMERMAN  
35 SUNRISE DR  
KALISPELL, MT 59901 7772

NOLAN ZIMMERMAN  
35 SUNRISE DR  
KALISPELL, MT 59901 7772

TALIA ZIMMERMAN  
35 SUNRISE DR  
KALISPELL, MT 59901 7772

**Priority Date:** AUGUST 30, 1902

**Type of Historical Right:** DECREED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.27 CFS

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 40.00

**Source Name:** SUCE CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SENE SW	17	3S	10E	PARK

**Period of Diversion:** MARCH 1 TO DECEMBER 1

**Diversion Means:** HEADGATE

**Ditch Name:** SKILLMAN-CARTER DITCH

**Period of Use:** MARCH 1 TO DECEMBER 1

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	36.00		SENE W	19	3S	10E	PARK
2	4.00		NES W	19	3S	10E	PARK

**Total:** 40.00

THE PLACE OF USE IS LOCATED IN TRACT A-1 OF COS 1741 IN PARK COUNTY.