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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BIG HOLE RIVER BASIN (41D)

* *

CLAIMANT: Crowsfoot LLC

OBJECTOR: SRI River Holdings LLC

DCERT-0002-WC-2023
41D 4735-00

Certified From:
Department of Natural Resources and Conservation
Office of Administrative Hearings

In the Matter of Change Application No. 41D- 30155185 by Crowsfoot LLC

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Crowsfoot LLC ("Crowsfoot") applied to the Department of Natural Resources and Conservation ("DNRC") to change the point of diversion for water right claim no. 41D 4735-00. SRI River Holdings LLC ("SRI") objected to the application, arguing the water right is abandoned. DNRC certified the abandonment question to the Water Court. This Order addresses motions for summary judgment filed by each party on the abandonment question. Crowsfoot argues the undisputed facts establish lack of abandonment. SRI disagrees and argues disputed facts exist. SRI also contends that even under the undisputed facts the water right is partially abandoned. For the reasons set forth in this Order, the Court denies both motions.

UNDISPUTED FACTS

The following facts are undisputed:

1. Water right claim 41D 4735-00 describes a water right to divert water from the Big Hole River for irrigation use. Crowsfoot owns claim 41D 4735-00. The place of use is appurtenant to land Crowsfoot owns in Madison County, west of Twin Bridges in Section 1 of T4S, R7W and Section 6, T4S R6W in Madison County.

2. Crowsfoot acquired claim 41D 4735-00 and the property that includes its place of use from Wade and Jennifer Marcontell on November 5, 2019. The Marcontells previously acquired the property and the claims, from John C. Pohl and Susan W. Pohl on October 11, 2011.

3. The Water Court decreed claim 41D 4735-00 in the Temporary Preliminary Decree ("TPD") for the Big Hole River Basin (Basin 41D) issued on April 6, 2007. The Court resolved issue remarks and objections to the claim in a Master's Report filed on May 23, 2011, adopted by the Court on June 22, 2011, in Water Court case 41D-165.

4. As modified in case 41D-165, claim 41D 4735-00 is decreed with a 1.52 cfs flow rate and a June 7, 1894 priority date. The post-decree abstract of the claim describes its point of diversion and diversion means as a headgate to the Seyler-Harvey Ditch located in the NWNWSE of Section 1, Township 4 South, Range 7 West in Madison County. The point of diversion is several miles upstream from the confluence of the Big Hole River and the Beaverhead River. The confluence of the Big Hole and the Beaverhead forms the Jefferson River, one of the three forks of the Missouri River.

5. The Water Court has not issued a final decree for Basin 41D because it has not yet addressed issue remarks and objections for all claims. Specifically, the Court also has not yet issued an interlocutory decree for the basin.

6. At some point the channel of the Big Hole River migrated away from the historical point of diversion to the Seyler-Harvey Ditch. As a consequence of the channel migration, Crowsfoot and its predecessors have not been able to divert water at the location of the historical headgate. Since the channel migration occurred water only enters the Seyler-Harvey Ditch during times of high river flows.

DISPUTED FACTS

Several facts are disputed:

1. Although the parties do not dispute the river channel migrated away from the headgate at the historical point of diversion, the parties do dispute the date of the channel migration. Crowsfoot contends the migration occurred between 2002 and 2005. SRI argues the channel migration occurred sometime before 2002, possibly as early as 1993. SRI also argues the channel migration caused the diversion structure to the Seyler-Harvy Ditch to be "inoperable, unlocatable, and unrepairable."

2. The parties also dispute how Crowsfoot and its predecessors have used water diverted from the Big Hole River to the Seyler-Harvey Ditch since the time the channel migrated away from the headgate. Crowsfoot contends water from the river naturally enters the ditch during certain high flow times of the year. When water naturally enters the ditch, Crowsfoot argues the water in the ditch "is available for use to irrigate the place of use." (Br. at 3).

3. Crowsfoot and Wade Marcontell contend they have irrigated their property with water diverted from the river every year from 2012 to 2023, other than two years when Marcontell was attempting to seed the property.

4. SRI does not dispute that since the date the river channel migrated away from the headgate water has entered the Seyler-Harvey Ditch, but only during periods of high-spring flows. SRI also disputes the amount of irrigation that has occurred during these flows, and the timing of any such irrigation.

PROCEDURAL BACKGROUND

After receiving the certification from DNRC, the Water Court issued a scheduling order with a June 6, 2024 motion deadline. Both parties filed summary judgment motions on the deadline.[1]

Crowsfoot's summary judgment motion asks the Water Court to conclude as a matter of law that claim 41D 4735-00 is not abandoned. (Doc. 19.00). Crowsfoot supports its motion with a brief (Doc. 20.00), and a foundational affidavit that includes

[1] Crowsfoot also filed a motion in limine, which the Court addresses in a separate order.

nine exhibits. (Docs. 21.00 – 23.00). SRI opposes Crowsfoot's motion on the grounds that genuine issues of material fact exist. (Doc. 29.00).

SRI's summary judgment motion seeks an order limiting the period of diversion and period of use elements of claim 41D 4735-00 to not later than June 30 each year. (Doc. 26.00). SRI supports its motion with a brief and foundational affidavit that includes six exhibits, including subparts. (Doc. 27.00). Crowsfoot opposes SRI's motion on the grounds that undisputed facts preclude summary judgment as a matter of law. (Doc. 32.00).

The motions are fully briefed, and the Court heard oral arguments on the motions on August 20, 2024, at the Water Court in Bozeman, Montana.

DISCUSSION

A. Summary Judgment Standard.

Summary judgment is "an extreme remedy which should not be a substitute for a trial on the merits if a material factual controversy exists." *Stricker v. Blaine Cnty*., 2023 MT 209, ¶ 45, 414 Mont. 30, 538 P.3d 394; M. R. Civ. P. 56(c)(3). A material fact involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co*., 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090.

Where the moving party demonstrates there is no genuine issue as to any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co*., 2001 MT 59, ¶ 26, 304 Mont. 356, 22 P.3d 631. The non-moving party "must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255 (1990). "Where the material facts are undisputed, the court must simply identify the applicable law, apply it to the uncontroverted facts, and determine who prevails." *Perl v. Grant*, 2024 MT 13, ¶ 12, 415 Mont. 61, 542 P.3d 396 (citation omitted).

There are no special rules for applying the summary judgment standard to cases of alleged abandonment. However, none of the recent abandonment cases decided by the Montana Supreme Court arise from Water Court or District Court orders on cases

resolved on summary judgment. Rather, each of the cases was appealed following an evidentiary hearing. *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215 (1983) (appeal following District Court hearing); *In re Clark Fork River Drainage Area*, 254 Mont. 11, 833 P.2d 1120 (1992) ("*City of Deer Lodge*") (appeal following Water Court hearing); *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813 (appeal following evidentiary hearing);[2] *In re Klamert*, 2019 MT 110, 395 Mont. 420, 443 P.3d 379 (five-day evidentiary hearing); *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist*. ("*Twin Creeks I"*), 2020 MT 80, 399 Mont. 431, 461 P.3d 91 (appeal following evidentiary hearing);[3] *see also, Axtell v. M.S. Consulting,* 1998 MT 64, 288 Mont. 150, 955 1362 (reversing summary judgment order).[4]

B. Abandonment Standard.

Montana Water law is built on several core principles. First, the right to appropriate water in Montana is based on beneficial use. *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983). Second, when an "appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases." *Id*.; *see also, Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist*., 2022 MT 19, ¶ 7, 407 Mont. 278, 502 P.3d 1080 ("Montana also follows a 'use-it-or-lose-it' principle").

The test to determine whether a water right is abandoned focuses on the intent of the appropriator. *E.g., Featherman v. Hennessy,* 42 Mont. 535, 113 P. 751, 753 (1911); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923). The Supreme Court has refined the abandonment standard as applied to existing (*i.e.* pre-July 1, 1973) water rights by assuming a long period of water nonuse creates a rebuttable presumption of intent to abandon the water right. *79 Ranch,* 204 Mont. at 432–33. The burden rests with the party asserting abandonment to prove a sufficiently long period of continuous nonuse to create

[2] In *Heavirland*, the water master granted partial summary judgment and shifted the burden of proof and held an evidentiary hearing.
[3] This case was appealed a second time following remand and a second Water Court order on the same evidentiary record. *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist*., 2022 MT 19.
[4] Although the Supreme Court's opinion discusses abandonment, the opinion is not entirely clear whether the lower court (in this case the District Court) ruled on abandonment in its order granting summary judgment. Regardless, the Supreme Court reversed on the basis that "genuine issues of material fact exist and that summary judgment was improper." *Axtell*, ¶ 40.

this rebuttable presumption. *In re Klamert*, 2019 MT 110, ¶ 15, 395 Mont. 420, 426, 443 P.3d 379, 384. Once the presumption is established, the burden shifts to the appropriator to prove a lack of intent to abandon. *City of Deer Lodge*, 254 Mont. at 16. Ultimately, whether a water right is abandoned is a "question of fact that depends on the conduct, acts, and intent of the parties claiming the use of the water." *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813.

As part of its response to Crowsfoot, and for its motion, SRI argues the abandonment standard now is defined by statute for basins such as 43B where objections and issue remarks are resolved following the issuance of a preliminary decree with no additional decrees anticipated. As authority, SRI cites § 85-2-404, MCA, which states in part:

> (1) If an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire.
>
> (2) If an appropriator ceases to use all or part of an appropriation right or ceases using the appropriation right according to its terms and conditions for a period of 10 successive years and there was water available for use, there is a prima facie presumption that the appropriator has abandoned the right for the part not used.

Section 85-2-404(1) and (2), MCA

The statute goes on to state that these subsections "(1) and (2) do not apply to existing rights until they have been *finally determined* in accordance with part 2 of this chapter." § 85-2-404, MCA (emphasis added).

SRI contends the Water Court has "finally determined" claim 41D 4735-00 so the abandonment question must be evaluated solely under § 85-2-404, MCA. SRI acknowledges the Water Court has not issued a final decree for Basin 41D. However, SRI argues that because issue remarks and objections to 41D 4735-00 were resolved after issuance of the Basin 41D TPD, there is nothing left for the Court to adjudicate, so the claim is "finally determined" as that term is used in § 85-2-404, MCA. SRI reasons that

the legislature did not use the term "final decree" in the abandonment statute, so a final determination is something different than a final decree.

SRI's argument is not consistent with the Water Use Act. The adjudication provisions of the Act use forms of the term "determined" in several places. For example, § 85-2-235(1), MCA describes the appeal rights following a final decree, stating, a person "whose existing rights and priorities are *determined* in a final decree may appeal the *determination*." (Emphasis added). This provision indicates "determined" describes the process the Water Court uses to adjudicate existing water rights under the procedures in the Water Use Act. While the ability to modify prior "determinations" of the Court narrows as the adjudication moves forward, a "determination" does not become "final" until it is incorporated into a final decree. *See* Rule 2(a)(26), W.R.C.E.R., incorporated by Rule 2(b), W.R.Adj.R. (defining "final decree" as "the final water court determination of existing water rights within a basin or subbasin"). The Montana Supreme Court seems to agree because it has interpreted § 85-2-404, MCA as applying "after all existing water rights have been adjudicated under part 2 of Title 85, MCA." *79 Ranch*, 204 Mont. at 434.[5]

SRI's interpretation risks injecting unnecessary confusion into an already complex process. For example, the statute SRI relies on does not expressly contain a private right of action. Instead, potential abandonment under § 85-2-404, MCA triggers the procedure set out in § 85-2-405, MCA. This procedure requires the Department of Natural Resources and Conservation ("DNRC") to "petition the district court that determined the existing rights in the source of the appropriation in question to hold a hearing to determine whether the appropriation right has been abandoned." § 85-2-405(1), MCA. The burden of proof at such a hearing is on DNRC. If the court concludes the right is abandoned, the "determination of the court must be appended to the final decree." § 85-2-405(3), MCA. This language assumes a final decree has been issued, which undercuts

[5] The Court acknowledges that the Supreme Court sometimes cites § 85-2-404, MCA in conjunction with the common law cases when setting out the abandonment standard. *See, e.g., Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist*., 2022 MT 19, ¶ 19, 407 Mont. 278, 502 P.3d 1080 ("*Twin Creeks II*); *Klamert*, ¶ 14; *Matter of Musselshell River Drainage Area*, 255 Mont. 43, 840 P.2d 577 (1992) However, none of these cases rely on § 85-2-404, MCA exclusively, nor do they suggest the statutory procedure is triggered by anything short of a final decree.

SRI's position that the §§ 404-405 procedure can be used before final decree. SRI's argument also conflicts with the permit statute, which states that a "permit issued prior to a final determination of existing water rights is provisional and is subject to that final determination." Section 85-2-313, MCA. This statute only makes sense if a "final determination" is the point at which the Court issues a final decree. Under SRI's reading, provisional permits in Basin 41D would lose their provisional status even though not all claims in the basin have yet to be adjudicated. Finally, and perhaps most tellingly, SRI cites no case where a court has solely relied on or followed the §§ 404-405 abandonment procedure before the Water Court issuing a final decree.

The Court concludes § 85-2-404 and -405 do not apply to the Court's analysis of whether claim 41D 4735-00 is abandoned. Instead, the abandonment question is guided by the two-step inquiry that has been applied for many years to issues of whether an existing right is abandoned.

C. Crowsfoot's Motion.

Crowsfoot contends summary judgment is proper on its motion because SRI has not met its burden to show a sufficient period of nonuse to establish the presumption of abandonment. Without proof of sufficient continuous nonuse, Crowsfoot argues the burden to prove lack of intent never shifted to Crowsfoot and so there is nothing for it to rebut. Without anything to rebut, Crowsfoot asserts the Court need not address part two of the abandonment test and SRI's abandonment contention fails as a matter of law.

Crowsfoot uses two lines of reasoning to support its argument. First, Crowsfoot maintains the undisputed shift in river channel caused water to be "unavailable." Crowsfoot cites several cases holding that water unavailability is not counted against an appropriator for purposes of calculating the length of the nonuse period for purposes of determining presumptive abandonment.

Crowsfoot first cites prior Water Court case for the proposition that lack of water availability "is an *absolute* defense to a claim of abandonment." Br. at 5, citing *In re Haskell*, Case 41G-150, 1999 Mont. Water LEXIS 7 (emphasis added).[6] Crowsfoot's

[6] Westlaw and Lexis title this case generically as "*In re Adjudication of the Existing Rights to the Use of All the Water*," 1999 Mont. Water LEXIS 7; 1999 WL 35240703.

citation to this case is not entirely accurate because *In re Haskell* does not describe lack of availability as an "absolute" defense. Instead, the Court dismissed a claim to a spring water source when an earthquake decades earlier had caused the source to no longer exist. The Court did not base its decision on lack of availability; rather it based the decision on the lack of any source at all. The Court also did not ever describe the availability defense as "absolute."

Other cases evaluating lack of water availability in the abandonment context focus on the quantity of water in a stream, not the stream's location in relation to a point of diversion. For example, in *In re Musselshell River Drainage Area*, 255 Mont. 43, 51, 840 P.2d 577, the Court analyzed alleged abandonment of a right to use water from Big Coulee Creek (a Musselshell River tributary) in Basin 40A. The Court stated that "a person cannot put water to beneficial use when there is no water available." *Id*. The Court made this reference in the context of evidence that included "lack of water," not channel migration. *Id.*, 255 Mont. at 50.

In *Federal Land Bank v. Morris*, 112 Mont. 445, 453, 116 P.2d 1007 (1941), the Court found the evidence did not support abandonment when during certain years Hay Coulee in Blaine County lacked sufficient water for storage for irrigation even though there was enough water for stock water. The Court did not face the situation of this case where water became unavailable as a result of channel migration. Similarly, in *McCauley v. McKeig*, 8 Mont. 389, 393, 21 P. 22 (1889), the Court declined to find abandonment when failure to use water from a stream in Silver Bow County for placer mining was explained by "not water enough to work mines during certain of the years mentioned."

The Supreme Court also mentioned lack of available water in *Heavirland v. State, 2013 MT 313, ¶ 5, 372 Mont. 300, 311 P.3d 813*. After the Heavirlands purchased the property, they irrigated every year except for one, when water was not available. Although the Court did not detail why water was unavailable for the one year, nothing in the opinion suggests the stream channel migrated away from the established point of diversion for the one year.

These cases indicate that availability is determined based whether there is water flowing in the stream that forms the source of supply. Absent authority equating lack of

water in a stream with a stream migrating away from an established point of diversion, the Court declines to accept Crowsfoot's argument that stream migration somehow tolls the running of the period of nonuse.

For its second argument, Crowsfoot contends the longest period of nonuse is between 2005 and 2011, which is insufficient to create a presumption of abandonment and shift the burden. Crowsfoot argues that during certain times in other years, the Big Hole River flowed with sufficient volume to reach the Seyler-Harvey Ditch and allow water to be conveyed to the place of use. Crowsfoot relies on expert testimony, which includes aerial photograph interpretation, to support this argument.

SRI disputes these facts. SRI offers testimony of David Ashcraft, a neighboring property owner to the effect that the place of use has not been irrigated through the Seyler-Harvey Ditch since the time that Bob Seyler owned the property.

Summary judgment is not the place to resolve this dispute. Rather, determination of the period of nonuse, and whether the period is sufficiently lengthy to shift the burden to Crowfoot requires a more developed evidentiary record at an evidentiary hearing. Based on the disputed facts, there is not a sufficient basis to grant Crowsfoot's motion.

D. SRI's Motion

For its motion, SRI contends Crowsfoot partially abandoned claim 41D 4735-00 as to the periods of diversion and use extending past June 30 of each year. SRI argues that since at least 2005, the owners of the claim never have used the claim for its full period of use, which as decreed extends to September 30. As factual support for its argument, SRI relies on opinions of its expert witness Russ Radliff of HydroSolutions, Inc. regarding the channel migration. SRI also relies on deposition testimony from Crowsfoot's representative and former owner to the extent of a lack of intent to fix the headgate and diversion, so it functions after high water recedes. Essentially, SRI argues the right should be converted to what sometimes is referred to colloquially as a high water right, exercisable only until the end of the spring freshet.

Crowsfoot responds by disputing the test SRI seeks to apply – the same statutory test discussed and rejected previously – and by disputing the factual underpinnings, both as to timing of channel migration and fluvial geomorphologic changes to the river, and as

to the intent of the owners of the claim. Crowsfoot also repeats its assertion that water has been used even without a functioning headgate.

Crowsfoot does not dispute the underlying premise of SRI's motion: a water right can be abandoned partially. Partial abandonment means one of the elements of a right is reduced through application of the abandonment test, but the water right itself remains valid. *Twin Creeks II*, at ¶ 24 (citing prior cases). SRI still may be able to prove partial abandonment as to the period of use once the facts are better developed. However, as with Crowsfoot's motion, too many facts remain in dispute to find partial abandonment under the correct legal standard the Court will apply to this proceeding.

ORDER

Therefore, it is ORDERED that (1) Crowsfoot's Motion for Summary Judgment is DENIED on the basis of the existence of issues of material fact; and (2) SRI's Motion for Partial Summary Judgment is DENIED on the basis that it relies on an incorrect standard, and because even under the correct standard, issues of material fact exist.

ELECTRONICALLY SIGNED AND DATED BELOW.

Electronically Signed By:
Hon. Judge Stephen R Brown
Fri, Sep 27 2024 01:29:42 PM

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