

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
SWEET GRASS - BASIN (43BV)

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CLAIMANTS: CNJ Distributing Corp

OBJECTOR: United States Department of the Interior,  
Bureau of Reclamation

**CASE 43BV-0218-R-2024**

43BV 7822-00

43BV 7823-00

43BV 7824-00

**ORDER ON MOTION FOR SUMMARY JUDGMENT  
AND CLOSING CASE**

Objector United States of America, on behalf of the Department of the Interior Bureau of Reclamation (“United States”), filed a motion for summary judgment seeking an order modifying the maximum acres, place of use, and volume of claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00. Claimant CNJ Distributing Corp (“CNJ”) did not respond to the motion. For the reasons set forth below, the United States’ motion for summary judgment is granted.

**UNDISPUTED FACTS**

1. Claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 are claims for decreed rights to use water from Sweet Grass Creek for irrigation use.

2. Each of the claims describes the right to divert water through the Hart-Parker Ditch to flood irrigate 320.00 acres in the SW of Section 6 and the SE of Section 7, Township 4 North, Range 14 East, of Sweet Grass County.

3. The Water Court included claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 in the Basin 43BV Temporary Preliminary Decree issued on December 19, 1984, and the Basin 43BV Preliminary Decree issued on May 27, 2021.

4. According to the preliminary decree abstracts, claim 43BV 7822-00 has a priority date of June 1, 1898. Claim 43BV 7823-00 has a priority date of June 29, 1904. Claim 43BV 7824-00 has a priority date of June 1, 1883.

5. Gilbert M. Rodriguez filed statements of claim for each claim on January 9, 1981.

6. The claims received issue remarks in the Basin 43BV Preliminary Decree, raising issues with each claim's place of use and volume.

7. All three claims received the following issue remark:

ALTHOUGH NOT OBJECTED TO, THE PLACE OF USE HAS BEEN CHANGED TO REFLECT THE CHANGE IN ACRES IRRIGATED. THIS MAY BE HEARD AT THE PRELIMINARY DECREE STAGE.

8. Claims 43BV 7822-00 and 43BV 7823-00 received the following issue remarks:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 985.68 ACRE-FEET PER YEAR.

9. Claim 43BV 7824-00 received the following issue remarks:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 490.88 ACRE-FEET PER YEAR.

10. During the preliminary decree objection period, the United States filed objections to each claim, asserting that “aerial photographs show fewer acres irrigated than is claimed. The claimed place of use and maximum acres irrigated should be reduced.”

11. On January 8, 2024, the Water Court consolidated the claims into Water Court Case 43BV-0218-R-2024 to resolve the issue remarks and to address the United States' objections. (Doc.<sup>1</sup> 1.00).

12. On May 10, 2024, the United States filed a motion requesting a scheduling conference because it made numerous attempts to contact CNJ with limited success and received no response to its proposed resolutions to its objections. (Doc. 4.00).

13. On June 5, 2024, Notice of Intent to Appear party J Bar L Ranches LLC withdrew its NOIA and was removed from the case. (Doc. 6.00).

14. On June 6, 2024, a status conference was held. The United States appeared at the conference; CNJ did not appear. The Court placed the case on a hearing track and issued a scheduling order. (Doc. 7.00).

15. On September 30, 2024, the United States filed its Motion for Summary Judgment, asserting the place of use of the claims should be reduced to 181.00 acres and the volume changed to an informational remark based on the 1950 Water Resources Survey for Sweet Grass County ("WRS") and historical aerial photographs. (Doc. 8.00).

16. The United States supported its motion with the Declaration of Kraig S. Van Voast. Van Voast is employed by the United States Department of Interior, Bureau of Reclamation in Reservoir Operations as a Water Rights Specialist. Van Voast's declaration describes his extensive experience with the Montana water rights adjudication proceedings.

17. Among other information, Van Voast's declaration includes excerpts from the 1950 Water Resources Survey for Sweet Grass County ("WRS"), which Van Voast interprets as supporting approximately 170 acres irrigated within the SW of Section 6 and SE of Section 7 from the Hart-Parker Ditch. (Doc. 8.00, Ex. 2).

18. Van Voast also explains his interpretation of aerial photographs taken between 1977 and 2021 showing at most 181 acres irrigated within the claimed place of use, with a slight deviation between years. (Doc. 8.00, Ex. 1, Att. A-B).

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<sup>1</sup> "Doc." Numerical references correlate to case file docket numbers in the Water Court's Full Court Enterprise case management system.

19. CNJ did not respond to the United States' motion.

## DISCUSSION

### A. Summary Judgment Standard

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” 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. In determining whether a material fact exists, the Court views the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. “All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment.” *Id.*

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, 362, 22 P.3d 631, 636. Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 14, 353 Mont. 252, 255, 220 P.3d 395, 399.

The Montana rules applicable to summary judgment motions require a party opposing the motion to file a response and any opposing affidavits within 21 days after the date of the motion. M.R.Civ.P. Rule 56(c)(1)(B). The rule goes on to state that if the opposing party does not respond with “specific facts showing a genuine issue for trial,” then “summary judgment should, *if appropriate*, be entered against that party.” M.R.Civ.P. Rule 56(e)(2) (emphasis added). Thus, under the language of Rule 56, the Court must determine whether it is “appropriate” to grant the motion based upon the applicable law regardless of whether the claimants responded to the motion. *See, e.g., Nelson v. City of Billings*, 2018 MT 36, ¶11, 390 Mont. 290, 294, 412 P.3d 1058, 1063 (“failure to respond [to summary judgment motion] did not relieve the District Court of

the duty to engage in a Rule 56 analysis when presented with a motion for summary judgment”), citing *Chapman v. Maxwell*, 2014 MT 35, ¶11, 374 Mont. 12, 322 P.3d 1029.

## **B. Abandonment Standard**

When an appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases in full or in part. *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶¶ 7 & 24, 407 Mont. 278, 502 P.3d 1080 (partial abandonment). “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 abandonment “requires both non-use and intent to abandon.” *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 52, 328 P.3d 644. The objector bears the initial burden of showing a long period of continuous non-use of the claimed water right. A showing of a long period of continuous non-use raises a rebuttable presumption of abandonment. *Skelton Ranch*, ¶ 53. “The burden then shifts to the claimants to produce specific evidence explaining or excusing the long period of non-use.” *Id* (quotation omitted). 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) (quoting *79 Ranch*, 666 P.2d at 219).

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). For instance, a 23-year period of non-use has raised a rebuttable presumption of abandonment. A period of non-use ranging from 18 to 29 years has raised a presumption of abandonment. *Skelton Ranch*, ¶ 56.

## **C. Analysis**

### *1. Place of Use*

The United States asserts that claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 were not fully perfected or have been partially abandoned. To support these

assertions, the United States supports its motion with the WRS and historical aerial photography to prove a clear and consistent area of irrigation of approximately 181 acres. Based on this evidence, the United States proved a continuous period of non-use of 70 years for the remaining 139 acres claimed. A period of this length creates a presumption of abandonment, shifting the burden to CNJ.

CNJ did not respond to the United States' motion. It failed to rebut the presumption of abandonment and excuse the long period of nonuse. The evidence supplied by the United States proves 139.00 acres of the 320.00 acres claimed have been abandoned and should be removed from claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00.

## 2. *Volume*

The United States asserts that the volume for claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 should be an informational remark used for direct-flow water rights to resolve the volume issue remarks placed on the claims. Under Rule 15(c), W.R.C.E.R., "For direct flow irrigation claims, except water spreading systems and irrigation systems involving reservoirs, a volume will not be decreed. A remark shall be added to the abstract of direct flow irrigation rights." The claims do not reflect water-spreading systems or have a reservoir.

The informational remark added to direct flow irrigation claims is as follows:

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

The above direct-flow volume informational remark is the appropriate volume quantification for the claims. The quantified flow rate on each claim will be removed and the informational remark added.

## **ORDER**

Therefore, it is

ORDERED that:

1. The United States' motion for summary judgment is GRANTED and claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 are modified as follows:

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

Maximum Acres: 181.00

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	37.00		S2SW	6	4N	14E	SWEET GRASS
<u>2</u>	<u>144.00</u>		SE	7	4N	14E	SWEET GRASS
Total: 181.00							

2. The issue remarks placed on claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 are removed as resolved; and

3. The proceedings on claims 43BV 7822-00, 43BV 7823-00, and 43BV 7824-00 and this case are CLOSED.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service Via USPS Mail:**

CNJ Distributing Corp.  
PO Box 20878  
Billings, MT 59104

**Service Via Electronic Mail:**

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***\*Service List Updated 1/7/2025\****



**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
SWEET GRASS CREEK  
BASIN 43BV**

**Water Right Number:** 43BV 7822-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** CNJ DISTRIBUTING CORP  
PO BOX 20878  
BILLINGS, MT 59104

**Priority Date:** JUNE 1, 1898

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 2.51 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:** 181.00

**Source Name:** SWEET GRASS 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		SENESE	34	5N	13E	SWEET GRASS

**\*Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** HART-PARKER DITCH

**\*Period of Use:** APRIL 1 TO OCTOBER 15

**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	37.00		S2SW	6	4N	14E	SWEET GRASS
2	144.00		SE	7	4N	14E	SWEET GRASS
<b>Total:</b>	<b>181.00</b>						

**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.

7822-00            7823-00            7824-00            7827-00            7828-00            7829-00  
7830-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
SWEET GRASS CREEK  
BASIN 43BV**

**Water Right Number:** 43BV 7823-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CNJ DISTRIBUTING CORP  
PO BOX 20878  
BILLINGS, MT 59104

**Priority Date:** JUNE 29, 1904

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 2.51 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:** 181.00

**Source Name:** SWEET GRASS 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		SENESE	34	5N	13E	SWEET GRASS

**\*Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** HART-PARKER DITCH

**\*Period of Use:** APRIL 1 TO OCTOBER 15

**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	37.00		S2SW	6	4N	14E	SWEET GRASS
2	144.00		SE	7	4N	14E	SWEET GRASS
<b>Total:</b>	181.00						

**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.

7822-00	7823-00	7824-00	7827-00	7828-00	7829-00
7830-00					

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

7798-00

7823-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
SWEET GRASS CREEK  
BASIN 43BV**

**Water Right Number:** 43BV 7824-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CNJ DISTRIBUTING CORP  
PO BOX 20878  
BILLINGS, MT 59104

**Priority Date:** JUNE 1, 1883

**Type of Historical Right:** DECREED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 1.25 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:** 181.00

**Source Name:** SWEET GRASS 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		SENESE	34	5N	13E	SWEET GRASS

**\*Period of Diversion:** APRIL 1 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Ditch Name:** HART-PARKER DITCH

**\*Period of Use:** APRIL 1 TO OCTOBER 15

**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	37.00		S2SW	6	4N	14E	SWEET GRASS
2	144.00		SE	7	4N	14E	SWEET GRASS
<b>Total:</b>	<b>181.00</b>						

**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.

7822-00            7823-00            7824-00            7827-00            7828-00            7829-00  
7830-00

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

7797-00

7824-00