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IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
SHIELDS RIVER BASIN 43A

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CLAIMANT: Red Dog Ranch LLC

OBJECTOR: Muddy Creek Ranch

**DCERT-0003-WC-2024**

43A 190659-00

Certified From:

Department of Natural Resources and  
Conservation

Office of Administrative Hearings

**In the Matter of Change Application No.  
43A-30158389 by Red Dog Ranch LLC**

**ORDER ON MOTION FOR SUMMARY JUDGMENT**

Red Dog Ranch LLC (“Red Dog”) applied to the Department of Natural Resources and Conservation (“DNRC”) to change the point of diversion for water right claim 43A 190659-00. Muddy Creek Ranch (“MCR”) objected to the application, arguing claim 43A 190659-00 is abandoned. DNRC certified the abandonment question to the Water Court. After the Water Court opened this case, Red Dog moved for summary judgment arguing MCR waived and is otherwise barred from raising an abandonment objection because MCR failed to object in prior Water Court proceedings. MCR disagrees and argues disputed facts exist that preclude summary judgment. For the reasons set forth in this Order, the Court grants Red Dog’s motion and returns the case to DNRC.

**UNDISPUTED FACTS**

The following facts are undisputed:

1. Water right claim 43A 190659-00 describes a water right to divert water from Muddy Creek in Park County for irrigation use. Muddy Creek is a tributary to other streams that flow to the Shields River and ultimately to the Yellowstone River.

2. Red Dog owns claim 43A 190659-00. The place of use is on land Red Dog owns northwest of Wilsall in Section 13 of Twp. 3 North, Rge. 8 East.

3. The point of diversion for the claim is a headgate for a ditch called the Kaiser Ditch. The Kaiser Ditch diversion is in the SWSEW of Section 14 of Twp. 3 North, Rge. 8 East. MCR owns the land where the point of diversion is located. Part of the Kaiser Ditch crosses MCR's land in Section 14.

4. The Water Court issued the Preliminary Decree for the Shields River Basin (Basin 43A) on February 14, 2019. The Court has not yet issued a final decree for Basin 43A.

5. The Basin 43A Preliminary Decree included an abstract for claim 43A 190659-00. The abstract included a notice-only ditch name issue remark, but no substantive remarks.

6. Issuance of the Preliminary Decree started an objection period. Red Dog filed a self-objection to claim 43A 190659-00. No one filed counterobjections to claim 43A 190659-00.

7. MCR knew of the facts regarding its assertions of Red Dog's alleged nonuse of claim 43A 190659-00 while the Basin 43A objection period was open, but did not object to the claim based on abandonment or any other basis.

8. After the counterobjection period closed, the Water Court published an objection list. The objection list included claim 43A 190659-00. No one filed a notice of intent to appear to claim 43A 190659-00 based on the objection list.

9. The Water Court consolidated claim 43A 190659-00 into case 43A-0117-R-2020 to resolve issue remarks and objections to the claim and three other claims Red Dog owned.

10. On October 23, 2020, Red Dog filed Proposed Corrections, Evidence in Support, and Notice of Objection Resolution in case 43A-0117-R-2020. Red Dog

supported the filing with several documents, including maps and a Declaration of Rick Swandal explaining historical water use.

11. Based on Red Dog's filing, the Court issued a Master's Report on November 30, 2020. The Master's Report approved certain modifications to claim 43A 190659-00. The Court adopted the Master's Report, with corrections, on December 28, 2020.

12. On December 8, 2022, Red Dog submitted to DNRC an application to change the point of diversion and the place of use for claim 43A 190659-00.

13. DNRC reviewed the application, issued a Preliminary Determination to Grant ("PDG") Red Dog's proposed change, and opened an objection period. MCR objected, contending the claim "has not been diverted through the Kaiser Ditch for beneficial use for decades." (Doc. 5.00, Ex. A, at 011). MCR later filed additional documents with DNRC to support its factual contentions about lack of use of claim 43A 190659-00. The objection was assigned to a DNRC hearing examiner.

14. The hearing examiner certified this case to the Water Court on September 12, 2024. After receiving the certification from DNRC, the Water Court issued a scheduling order. Red Dog filed its summary judgment motion on December 3, 2024. (Doc. 4.00). Red Dog also filed a supporting brief. (Doc. 5.00).

15. Red Dog's summary judgment motion asks the Water Court to conclude as a matter of law that MCR is barred from raising an abandonment challenge to claim 43A 190659-00. Red Dog supports its motion with a brief and several supporting documents.

16. MCR opposes the motion, arguing disputed facts exist. (Doc. 6.00). MCR does not object to the procedural facts Red Dog set forth in its motion. Instead, MCR claims disputed substantive facts exist as to the merits of abandonment. MCR also argues that even under the undisputed procedural facts, Red Dog is not entitled to summary judgment on the legal theories Red Dog asserts.

17. Red Dog's motion is fully briefed. Neither party requested a hearing on the motion.

## ISSUE

Should the Court grant Red Dog's motion and dismiss MCR's abandonment objection?

## 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. Rule 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, 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. *Perl v. Grant*, 2024 MT 13, ¶ 12, 415 Mont. 61, 542 P.3d 396.

### B. Abandonment Standard.

Under Montana law when an "appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases." *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983); *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 7, 407 Mont. 278, 502 P.3d 1080. The test for whether an appropriator has abandoned a water right focuses on the appropriator's intent. *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 this rebuttable presumption. *In re Klamert*, 2019 MT 110, ¶ 15, 395 Mont. 420, 443 P.3d 379. If the presumption is established by lengthy non-use, the burden shifts to the appropriator to prove a lack of intent to abandon. *In re Adjudication of Water Rights of Clark Fork River (City of Deer Lodge)*, 254 Mont. 11, 16, 833 P.2d 1120. However, lengthy non-use alone is not enough to prove abandonment. 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 usufruct of the water.” *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813.

Abandonment challenges also have procedural components that turn on several factors. The first is whether the abandonment allegation involves an existing water right that has not yet been included in a final decree. If it does, the Water Use Act states “a water judge may determine all or part of an existing water right to be abandoned based on a consideration of all admissible evidence that is relevant, including, without limitation, evidence relating to acts or intent occurring in whole or in part after July 1, 1973.” Section 85-2-227(3), MCA.<sup>1</sup>

The second factor involves how the abandonment challenge reaches the Water Court, which can occur several ways. Abandonment may be raised as a basis to object to a water right claim contained in a preliminary decree of some type issued by the Water Court. *E.g. Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, ¶ 13, 407 Mont. 278, 502 P.3d 1080. Abandonment questions also may arise out of DNRC issue remarks. *Heavirland*, ¶ 6.<sup>2</sup> Additionally, abandonment may be involved in cases certified by district court to the Water Court under § 85-2-406(2)(b). *E.g., Pappert v. Zimmerman*, DCERT-0003-WC-2020, 2023 Mont. Water LEXIS 802. The Water Use Act authorizes DNRC to certify to “district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not

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<sup>1</sup> After a water right is included in a final decree or is not an existing right, a different procedure applies. *See* § 85-2-405, MCA.

<sup>2</sup> If an abandonment issue arises out of a DNRC issue remark and no objections are filed, the Act requires the Water Court to join the State of Montana through the Attorney General as a necessary party. Section 85-2-248(7)(a), MCA.

limited to issues of *abandonment*, quantification, or relative priority dates.” Section 85-2-309(2), MCA (emphasis added). When DNRC makes such a certification, as it did here, the Act charges the Water Court with responsibility to conduct the proceedings necessary to evaluate the abandonment allegation. Section 3-7-223(2), MCA. This last procedure is how MCR’s abandonment challenges reached the Water Court in this case.

### **C. Application.**

Red Dog relies on several legal theories for its motion including: (1) waiver, (2) laches, (3) equitable estoppel, and (4) collateral estoppel. Each theory is premised on the undisputed fact that neither MCR nor any other party failed to file an objection to claim 43A 190659-00 during the objection periods.

#### *1. Waiver.*

Red Dog argues MCR waived its right to assert abandonment by not timely objecting during the Basin 43A objection period. Red Dog bases its waiver argument on the Water Use Act’s objection deadlines, and the consequences of failing to meet those deadlines. Under the Act, issuance of a preliminary decree commences an objection period. Unless extended, objections “must be filed” no later than 180 days from the date the Court enters the decree. Section 85-2-233(2), MCA. The Act only allows extensions for “good cause shown.” Even then the duration of extensions is limited to “up to two additional 90-day periods” and only if an application for an extension is filed before an objection period expires. *Id.* There is no dispute MCR failed to file a timely abandonment objection, nor did MCR ask for an extension.

MCR does not dispute that it did not file a timely objection. Instead, MCR raises three arguments to support its position that it still may object to Red Dog’s change application. First, MCR argues the abandonment objection it asserts did not arise until DNRC issued the PDG in the change process, which occurred after the Basin 43A objection period closed. Second, MCR argues the “adverse effect” standard applicable to DNRC change proceedings is sufficiently distinct from the Water Court adjudication proceedings as to allow MCR to raise an abandonment objection. Third, MCR argues Red Dog fails to prove sufficient prejudice to support a waiver argument.

Red Dog’s first waiver response does not comport with the structure of the Water Use Act. The plain language of the Act’s objection deadlines are mandatory and do not contemplate late objections after the Court issues a preliminary decree. Nothing in the adjudication statute or the DNRC certification statute expressly or implicitly supports the argument that a certification reopens a window to object based on facts that MCR knew when it had the opportunity to object. MCR raises no fact to indicate it learned of facts supporting its abandonment contention after the objection period closed. Instead, its response brief concedes “MCR knew the Water Right was abandoned at the time the Basin 43A Preliminary Decree was issued.” (Doc. 6.00, at 7).

MCR criticizes Red Dog’s citation to *In re Erb* to support its motion, but *Erb* is directly analogous and undercuts Red Dog’s first argument. In *Erb* the Water Court refused to allow a party to raise issues in a notice of intent to appear that they failed to raise in a timely objection. *In re Erb*, Case 41B-208, 2016 Mont. Water LEXIS 2 (Order Regarding Dismissal of Notice of Intent to Appear Party and Order Remanding Matter to Water Master) (Apr. 11, 2016). In *Erb*, the Court described the statutory deadlines that apply to decree objections and concluded that a party may not use the notice of intent to appear period to cure the failure to file a timely objection. The case stands for the proposition that Water Court objection deadlines matter and they cannot be circumvented through an alternative procedural mechanism. The Court has reached a similar result in other cases. *See, e.g., In re Brewer Ranch LLC*, Case 41I-2003-R-2023, 2023 Mont. Water LEXIS 393, \*7 (rejecting motion to amend that was functionally equivalent to a late objection); *In re Windbreak Ranch LLC*, Case 43B-0572-R-2022; 2022 Mont. Water LEXIS 536, \*12 (a party “cannot use a notice of intent to appear to raise substantive issues for the first time”); *see generally, Green v. Gerber*, 2013 MT 35, ¶ 27, 369 Mont. 20, 303 P.3d 729 (“[s]tatutory and rule-based deadlines are important and must be strictly enforced”).

MCR’s second waiver response argues the DNRC change process is sufficiently distinct from the Water Court adjudication process to preserve MCR’s right to now raise an abandonment objection. MCR does not cite anything to support this argument other

than the “adverse effect” standard that forms the basis for MCR’s objection to Red Dog’s change application. MCR’s argument rests on the assumption that DNRC’s change process operates independently from the adjudication process. MCR’s assumption is incorrect. When DNRC certifies an adjudication issue to the Water Court, the Water Court applies the same substantive and procedural standards that it applies when adjudicating rights. Nothing in § 85-2-309(2)(a) provides a basis to reopen an objection period, and to do so would lead to absurd results. For example, if MCR would have timely objected, Red Dog would have had the right to counterobject to any of MCR’s claims. Section 85-2-233(3); Rule 6, W.R.Adj.R. Accepting MCR’s argument to allow new objections via the change process would have the effect of stripping Red Dog and any other similarly situated change applicant of the right to counterobject.<sup>3</sup>

MCR’s third waiver response argument asserts Red Dog has not suffered sufficient prejudice to raise a waiver argument. This argument is based on the theory that “[t]o establish a knowing waiver, the party asserting waiver must demonstrate the other party's knowledge of the existing right, acts inconsistent with that right, and resulting prejudice to the party asserting waiver.” *VanDyke Constr. Co. v. Stillwater Mining Co.*, 2003 MT 279, ¶ 15, 317 Mont. 519, 78 P.3d 844. In light of the mandatory nature of the objection deadlines, the Court is not convinced Red Dog even needs to prove prejudice. Inserting a “prejudice” element to the statutory deadline for objections suggests the Court has authority to waive the deadline for equitable reasons. Such an element would risk chaos because it suggests the Court could allow late objections if they caused no prejudice to the claimant. But even if prejudice is an element, the undisputed facts show Red Dog relied on the Water Court’s order in case 43A-0117-R-2020 and filed its change application assuming no objections to the claim. The time and expense of preparing an application, and to now potentially have to go through a Water Court hearing that could

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<sup>3</sup> The Court is cognizant that this result might seem to make the certification process futile if MCR is barred from raising abandonment following certification to the Water Court. While certain certifications might be simple based on prior Water Court proceedings, the Water Court is in a better position than DNRC to evaluate the adjudication status of claims, so the certification process has merit by confirming the status of existing rights that may be at issue in a DNRC proceeding.



have been avoided if MCR had timely objected, is sufficient prejudice to Red Dog to further support to its waiver argument. *VanDyke Constr. Co.*, ¶ 16 (cost to defend arbitration proceeding deemed prejudicial for waiver purposes).

## 2. *Laches.*

Red Dog next argues MCR's abandonment objection should be dismissed under the doctrine of laches. Laches is an equitable judicial remedy that applies when someone is negligent in asserting a right. For laches to apply, there must be "an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable, and is appropriate when a party is actually or presumptively aware of his rights but fails to act." *Matter of Est. of Johnson*, 2024 MT 224, ¶ 35, 418 Mont. 198, 557 P.3d 36 (quotation omitted). "Equity is the primary consideration in laches." *Johnson*, ¶ 37. In the water context, laches has been applied when a party failed to assert a senior priority date for many years. *Teton Coop. Reservoir Co.*, 2018 MT 66, ¶ 33, 391 Mont. 66, 77, 414 P.3d 1249, 1258. The Water Court also has declined to find laches when the party asserting it was not prejudiced in the manner water was being administered. *Pappert v. Zimmerman*, Case DCERT-0003-WC-2020, 2023 Mont. Water LEXIS 802

MCR argues it was diligent in asserting abandonment because it timely objected in the DNRC change process. MCR also argues Red Dog suffers no prejudice because Water Court proceedings are interlocutory until a final decree, so abandonment can be asserted at any time.

The Court questions whether a laches argument is necessary here because the MCR's failure to object within the statutory timeframes resolves the question. However, MCR is correct that abandonment arguments can be raised in proceedings properly before the Water Court at any time prior to a final decree. But as previously explained, MCR cites no facts about Red Dog's water use that MCR did not know during the decree objection period. MCR's argument that it could retain an abandonment argument until such time – if ever – that Red Dog filed a change application does not mesh with the Water Use Act's structure. Moreover, as explained in the prior section, MCR's delay did cause Red Dog prejudice because it has been forced to delay the processing of its change

and incur the expense of litigating the abandonment issue in a new proceeding before the Water Court. To the extent laches applies, Red Dog satisfies its elements.

3. *Equitable Estoppel.*

Red Dog's third basis for summary judgment is the equitable doctrine of equitable estoppel. Equitable estoppel "operates to prevent a party from unconscionably taking advantage of a wrong while asserting a strict legal right." *Arthur v. Pierre Ltd.*, 2004 MT 303, ¶ 30, 323 Mont. 453, 100 P.3d 987. To prevail on an equitable estoppel argument, Red Dog must establish 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.

While equitable estoppel can be considered on summary judgment, equitable estoppel "is not favored." *Id.*

In this case the Court declines to find Red Dog's motion meets the high bar for equitable estoppel. MCR may or may not have made a tactical decision not to object during the preliminary objection period. But Red Dog has the clear and convincing evidence burden of proof as to this argument and fails to show MCR deliberately concealed any facts in a manner that enticed Red Dog to act.

4. *Collateral Estoppel.*

Red Dog argues the doctrine of collateral estoppel bars MCR's abandonment challenge. Collateral estoppel, or issue preclusion, applies when (1) the issue decided in the prior adjudication is identical to the issue raised in the action in question; (2) there

was a final judgment on the merits in the prior adjudication; (3) the party against whom preclusion is now asserted a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is now asserted afforded a full and fair opportunity to litigate the issue which may be barred. *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2016 MT 9, ¶ 17, 382 Mont. 102, 365 P.3d 454.

Red Dog's collateral estoppel argument is not persuasive because the issue of abandonment was not decided in a prior Water Court case. Additionally, as no final decree has been issued in Basin 42A, there has not been a final judgment on the merits. Ultimately none of this matters though because of the Court's conclusion that MCR waived the right to assert abandonment by not timely objecting.

In conclusion, Red Dog's motion proves MCR waived its right to raise an abandonment argument by not raising the argument when it could have during the objection period. The undisputed facts show MCR had the requisite knowledge of facts to support such an argument and MCR identifies no new facts that have come to light after the objection period closed. To the extent waiver is not enough, Red Dog also proves MCR's abandonment assertion is barred by laches. Either theory is enough to grant Red Dog's motion without having to prove either equitable estoppel or collateral estoppel.

The Court's ruling is limited to the issue of abandonment. The Court expresses no opinion as to matters of adverse effect, which remains an issue for the DNRC proceeding.

### **ORDER**

Therefore, it is ORDERED that Red Dog's Motion for Summary Judgment is GRANTED, and MCR's abandonment objection to claim 43A 190659-00 is DISMISSED. This case is CLOSED before the Water Court and the matter is returned to DNRC for further proceedings.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

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***\*Service List Updated 1/30/2025\****