

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)  
PRELIMINARY DECREE

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CLAIMANTS: Joann M. Dale; Richard T. Dale

**CASE 41G-0553-R-2022**  
41G 24633-00

OBJECTOR: United States of America (Bureau of Land  
Management)

NOTICE OF INTENT TO APPEAR: H Double C LLC;  
Jody Sandru; Rick  
R. Sandru

**ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT**

The United States Bureau of Land Management filed a Motion for Partial Summary Judgment in this case on October 4, 2024. (Doc.<sup>1</sup> 33.00). The United States asks the Court to conclude that the point of diversion for claim 41G 24633-00 is not on federal land as a matter of law. (Doc. 33.00 at 1).

**Standard of Review**

To succeed on a Summary Judgment Motion the moving party must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* M. R. Civ. P. 56(c)(3). A material fact is one that 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.*,

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<sup>1</sup> “Doc.” numerical references correlate to case file docket numbers in the Water Court’s Full Court case management system.

2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court must view 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.

### **Discussion**

This case involves only one claim, claim 41G 24633-00, which is owned by Joann M. Dale and Richard T. Dale (the Dales). Claim 41G 24633-00 is an irrigation claim from Dry Boulder Creek. As it was decreed in the Basin 41G Preliminary Decree, claim 41G has a point of diversion in the SWNENW of Section 35, T2S, R5W (“the Section 35 point of diversion”) and a point of diversion information remark stating:

WATER DIVERTED FROM DRY BOULDER CREEK IN THE SWNENW SEC 35 TWP 02S RGE 05W MADISON CNTY IS EXCHANGED FOR WATER DIVERTED AT A SECONDARY POINT OF DIVERSION ON COAL CREEK IN THE NESWSW SEC 35 TWP 02S RGE 05W MADISON CNTY.

The place of use for claim 41G 24633-00 is decreed as the S2SE of Section 34, T2S, R5W, which is private property owned by the Dales. The Section 35 point of diversion is on property owned by the Bureau of Land Management. When the United States objected to claim 41G 24633-00, it stated:

There is no apparent diversion or conveyance in SWNENW Section 35, which is federal land managed by the Bureau of Land Management, capable of diverting water to the place of use in S2SE Section 34. The point of diversion should either be corrected, or the claim should be withdrawn or terminated due to non-perfection.

The Dales assert that the accurate historical point of diversion is in the NENWSW of Section 36, T2S, R5W (“the Section 36 point of diversion”) (Doc. 33.00, Ex. 4, p. 6). The Section 36 point of diversion is on land owned by the United States Forest Service.

The Dales admit that they do not have a special use permit for a point of diversion in the SWNENW of Section 35, T2S, R5W. (Doc. 33.00, Ex. 4, p. 16). The Dales also admit that they do not have a special use permit for the point of diversion located in the NENWSW of Section 36, T2S, R5W. (Doc. 33.00, Ex. 4, p. 17).

Accordingly, the following are undisputed facts:

1. The Dales do not use the point of diversion described in Section 35.
2. The Dales do not have a special use permit to divert from Section 35 or Section 36.

These facts are not sufficient to show, as a matter of law, that the point of diversion for claim 41G 24633-00 is not on federal land.

### Is There a Trespass?

The United States argues that it is undisputed that the Claimants may not access or divert water from Dry Boulder Creek on federal land managed by the Forest Service without the express written authorization of the Forest Service. (Doc. 33.00, p. 4). In support, the United States references Exhibit 2, a Declaration of Thor Burbach, a Hydrologist employed by the Forest Service. Burbach states:

5. Claimants need written authorization from the Forest Service to divert water from Dry Boulder Creek where it crosses federal land managed by the Forest Service. This authorization is executed through a special use permit. I have checked the Forest Service's Special Use Permit Database and confirmed that Claimants do not have this authorization. (Doc. 33.00, Ex. 2, p. 2).

The United States asserts that “[t]o access the area without a special use permit would constitute trespass. Therefore, the Section 36 POD could not lawfully have been perfected.” (Doc. 33.00, p. 6).

It is well accepted that an appropriation cannot be made in trespass. *See Warren v. Senecal*, 71 Mont. 210, 220, 228 P. 71 (1924). However, it is not clear that absence of a special use permit equates to trespass.

In discussing water rights appropriated on the public domain, the Water Court has said:

Nor did Montana law ever require an appropriator to own an interest or an easement in the land where the water right was appropriated. An appropriator was simply precluded from appropriating or exercising a water right in trespass. ... Though the Court in *Smith* stated that, “[o]ne may not acquire a water right on the land of another without

acquiring an easement in such land," it subsequently clarified that while it was necessary for an appropriator to acquire an express or implied grant to appropriate on, or conduct water across the *private* land of another, appropriators already had "by statutory grant, the privilege of appropriating [and conducting] water upon the *public domain*."

41G-190, 2006 Mont. Water LEXIS 2, \*40, quoting *Smith v. Deniff*, 24 Mont. 20, 60 P. 398 (1900).

There is a question of fact concerning whether the appropriation and use of claim 41G 24663-00 constitutes a trespass. Whether there is a trespass depends on the status of the land at the time the water was first put to use – a fact that is not clear from the current record.

Was the Section 36 Point of Diversion Used Prior to July 1, 1973?

In its Motion, the United States brings into question whether the Section 36 point of diversion was used prior to July 1, 1973. (Doc. 33.00, pp. 6-7). The United States points to the Dales' response to Interrogatory No. 14 to support its assertion that the Section 36 point of diversion was not put to use until 1992. (Doc. 33.00, Ex. 4, p. 6).

**INTERROGATORY NO. 14:** Please identify when you started diverting water from the point of diversion you identified in response to Interrogatory No. 5. for beneficial use on the place of use you identified in response to Interrogatory No. 5.

**ANSWER:** Dale first recalls diverting Dry Boulder Creek water from Coal Creek in the Fall of 1992.

The Dales did not acquire interest in claim 41G 24663-00 until 1991. (Doc. 33.00, Ex. 4, p. 15). Furthermore, when the Dales were asked to identify the exact location at which water was diverted under claim 41G 24633-00 as of July 1, 1973, they state:

**ANSWER:** The Dry Boulder Creek water for all users including the Dales' Dry Boulder Creek water was diverted in the NENSW of Section 36, Twp 2S, Rge 5W in Madison County. The associated ditch has been in existence since 1890.

(Doc. 33.00, Ex. 4, p. 6).

Whether the point of diversion in Section 36 was used as part of claim 41G 24663-00 prior to July 1, 1973 is unclear and it is a genuine issue of a material fact.

The United States did not meet its burden to establish the absence of genuine issues of material facts.

Accordingly, it is

**ORDERED** that the Motion for Partial Summary Judgment is **DENIED**.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via Electronic Mail:**

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