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Montana Water Court
STATE OF MONTANA
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41I-0013-R-2023
Peters, Bina
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MONTANA WATER COURT
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM
BASIN (41I)
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Darlene L. Hoppe; Jacob R. Hoppe; Robert R. Hoppe; Della Ehlke; Mark Ehlke; Bull Ridge Ranch LLC

OBJECTOR: Della Ehlke; Mark Ehlke; Darlene L. Hoppe; Robert R. Hoppe; Bull Ridge Ranch LLC

NOTICE OF INTENT APPEAR: Bull Ridge Ranch LLC

CASE 41I-0013-R-2023

41I 5493-00

41I 6227-00

41I 7076-00

~~41I 88971-00~~

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Claimant/Objectors Darlene L. Hoppes, Jacob R. Hoppe, Robert R. Hoppe, Della Ehlke, and Mark Ehlke filed a motion for summary judgment asserting claim 41I 88971-00 was abandoned by Bull Ridge Ranch LLC's predecessors in interest. (Doc. 33.00). This order addresses the motion for summary judgment filed in this case.

BACKGROUND

Claim 41I 88971-00 was included in the Preliminary Decree for the Missouri River above Holter Dam (Basin 41I), issued on June 24, 2022. Bull Ridge Ranch LLC ("Bull Ridge") owns flood irrigation claim 41I 88971-00. Bull Ridge self-objected to the maximum irrigated acres and was substituted for Sonny's Ranch LLC, the entity that filed the notice of intent to appear. The United States Bureau of Reclamation, Darlene and Robert Hoppe ("the Hoppes"), and Della and Mark Ehlke ("the Ehlkes") objected to all elements of the claim based on abandonment. The United States Bureau of Reclamation withdrew its objection during proceedings in this case. (Doc. 12.00).

Claim 41I 88971-00 is based on a portion of an 1874 right decreed in Broadwater County Case No. 465. *See* Claim file for 41I 88971-00. Claims owned by the Hoppes and the Ehlkes are based on the same 1874 decreed right and are in separate Preliminary Decree case proceedings.

Claim 41I 88971-00 was consolidated into this case with claims 41I 5493-00, 41I 6227-00, and 41I 7076-00. (Doc. 1.00). A settlement conference was held; however, the parties were unable to reach a final settlement agreement. (Doc. 32.00). On August 25, 2025, the Hoppes and the Ehlkes (collectively “the Objectors”) filed a Motion for Summary Judgment asserting claim 41I 88971-00 was abandoned. (Doc. 33.00).

UNDISPUTED FACTS

The following facts are undisputed:

1. Bull Ridge owns claim 41I 88971-00. The claim is for flood irrigation of 182 acres from the North Fork of Deep Creek via the Harvey-Hoover-Lippert Ditch. *See* Claim file for 41I 88971-00.
2. Objector Robert R. Hoppe was born in 1941 and has lived and worked on the Hoppes’ ranch his entire life. The Hoppes’ ranch property is adjacent to the property owned by the Ehlkes and the property owned by Bull Ridge. (Doc. 33.00 at 9–10).
3. Objectors the Ehlkes purchased their property in 1996. From 1999 to 2005, the Ehlkes also leased land that includes the place of use for claim 41I 88971-00. From 2005 to 2020 the Ehlkes managed that same land for Bull Ridge’s predecessor in interest. *Id.* at 10, Exh. I at 2.
4. The 1956 Broadwater County Water Resource Survey indicates irrigation within the place of use of claim 41I 88971-00. (Doc. 36.00 at 9–10).
5. A significant portion of the Harvey-Hoover-Lippert Ditch was plowed in by Bull Ridge’s predecessor in interest, Ashley Clopton (“Clopton”), before the publication of the 1956 Broadwater County Water Resources Survey and has remained plowed in since that time. *Id.*; (Doc. 33.00 at 12–13)

6. Since the Harvey-Hooper-Lippert Ditch was plowed in, neither Bull Ridge nor its predecessors helped maintain the Harvey-Hooper-Lippert Ditch to irrigate the claimed place of use. (Doc. 33.00 at 10).

7. Since the Harvey-Hooper-Lippert Ditch was plowed in, neither Bull Ridge nor its predecessors used the Harvey-Hooper-Lippert Ditch to irrigate the claimed place of use. *Id.*

8. In the early 1980s, Bull Ridge's predecessors in interest, William and Margaret Booher ("the Boohers"), constructed a pipeline to divert water from the North Fork of Deep Creek for the purpose of irrigating the place of use for claim 41I 88971-00. *Id.* at 10–11. The Boohers tried to use the pipeline for one or two irrigation seasons (Doc. 36.00 at 6–7), but the pipeline was removed no later than 1989. (Doc. 33.00, Exh. H at 3–4).

9. Since the pipeline was removed no later than 1989, neither Bull Ridge nor its predecessors have diverted water to irrigate the place of use of 41I 88971-00. *See id.*

10. From 1999 to 2020, the Ehlkes either leased or managed lands that comprise the place of use of claim 41I 88971-00, and during that time, the Ehlkes neither irrigated nor observed irrigation of place of use. (Doc. 33.00, Exh. I at 2).

ISSUE

Are the Objectors entitled to summary judgment that claim 41I 88971-00 was abandoned?

DISCUSSION

A. Applicable Standards

Summary Judgment

The Objectors assert there are no genuine issues of material fact and claim 41I 88971-00 is abandoned. (Doc. 33.00). Bull Ridge asserts that the Objectors failed to demonstrate the lack of genuine issues of material fact and misconstrue the law of abandonment. (Doc. 36.00).

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.” Rule 56(c)(3), M. R. Civ. P. A material fact “involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution” by the trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090 (citing *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137). Evidence of material facts must be “in the form of affidavits or other sworn testimony... mere denial, speculation, or conclusory statements are insufficient.” *Arnold*, ¶¶ 13-15. When determining whether genuine issues of material fact exist, the court must view evidence in the light most favorable to the non-moving party, and all reasonable references must be drawn in favor of the party opposing summary judgment. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186.

Where the moving party demonstrates no genuine issue as to any material fact exists, the burden of proof shifts to the opposing party to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 26, 304 Mont. 356, 22 P.3d 631. 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, ¶ 13, 353 Mont. 252, 220 P.3d 395.

Abandonment

Prior to the inclusion of an existing water right in a Final Decree, “[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.” Mont. Code Ann. § 85-2-227(3) (2025). A water right requires the beneficial use of water, and when an appropriator or their successor in interest abandons or ceases to beneficially use that water, the water right ceases. *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983). The court does not lightly decree an abandonment of water rights. *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923). Accordingly, the test for abandonment requires an appropriator’s intent to abandon a water right; nonuse of water alone is not enough to conclusively establish abandonment. *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218.

Whether a water right has been abandoned is a question of fact that depends on the claiming party's conduct, acts, and intent. *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813 (quoting *Power v. Switzer*, 21 Mont. 523, 529, 55 P. 32, 34 (1898)). For existing water rights, a long period of nonuse creates a rebuttable presumption of an intent to abandon the right. *79 Ranch*, at 432-33, 666 P.2d at 218. To create this rebuttable presumption, the party asserting abandonment must prove, by a preponderance of the evidence, a sufficiently long period of continuous nonuse. *Thomas*, 66 Mont. at 168, 213 P. at 600. A sufficiently long period of nonuse may be as short as nine years. *Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 54, 375 Mont. 327, 328 P.3d 644 (quoting *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896)).

Once the rebuttable presumption has been established, the appropriator bears the burden of producing specific evidence that excuses the period of nonuse. *Heavirland*, ¶ 32. This evidence must be specific to the period of nonuse in question. *Id.* "Broad claims," such as insufficient funds or a lack of cooperation needed to restore irrigation ditches, alone are insufficient to excuse a long period of nonuse. *In re Musselshell River Drainage Area*, 255 Mont. 43, 50, 840 P.2d 577, 581 (1992); *Heavirland*, ¶ 32.

B. Application

Bull Ridge argues that in summary judgment, the Court is first required to rule on the issue of a long period of nonuse before making a ruling on abandonment. (Doc. 36 at 12-13). There is no case or rule that eliminates the possibility of summary judgment on the issue of abandonment. In a determination of abandonment, if an objector proves a long period of nonuse, the burden of proof shifts to the claimant to prove there was no intent to abandon. *79 Ranch*, at 432-33, 666 P.2d at 218. For a summary judgment determination, the movant is required to show there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Where the moving party demonstrates no genuine issue as to any material fact exists, the burden of proof shifts to the opposing party to establish an issue of material fact. *Lee*, ¶ 26.

Here, the Objectors' Motion for Summary Judgment asks this Court to declare claim 41I 88971-00 abandoned. (Doc. 33.00). The Objectors assert a long period of

nonuse during which neither Bull Ridge nor its predecessors demonstrated an intent to use the claim. (Docs. 33.00 & 37.00). Ultimately, the Objectors assert both elements of abandonment have been met. *Id.* In the context of summary judgment, to prove their motion, the Objectors bear the burden of demonstrating no genuine issue of material fact as to both the elements of nonuse and an intent to abandon. *See Thomas*, 66 Mont. at 167, 213 P. at 599. If no genuine issues of material fact are demonstrated, it is Bull Ridge's burden to show the existence of a genuine issue of material fact. *Lee*, ¶ 26; *see YC Props. LLC v. Connolly*, 2025 Mont. Water LEXIS 369, *8-10.

Abandonment Analysis

1. Long Period of Nonuse

The Objectors ask this Court to find claim 41I 88971-00 abandoned based on: (1) a period of nonuse from 1955 to the present; or alternatively, (2) a period of continuous nonuse beginning no later than 1989 and lasting to the present day. (Doc. 33.00 at 2-3). First, the Objectors argue the claim was abandoned in 1955 when Clopton, then owner of the claim, evinced an intent to cease using the Harvey-Hoover-Lippert Ditch and plowed in the portions of the ditch located on his property. *Id.* at 12. Alternatively, the Objectors argue the claim was abandoned no later than 1989, once the Boohers removed the irrigation pipeline infrastructure. *Id.* at 14–15.

As to the first period of nonuse beginning in 1955, Bull Ridge argues there are issues of material fact. (Doc. 36.00). Both parties agree that the Boohers attempted to irrigate the place of use for claim 41I 88971-00 sometime in the early 1980s. By this time, a portion of the Harvey-Hoover-Lippert Ditch was filled in. Instead of the ditch, the Boohers utilized a pipeline and sprinklers for irrigation. It is unclear when exactly between 1981 and 1989 the use of the pipeline for irrigation ceased. *See id.* at 10-11, 14-15. The pipeline was removed sometime between 1981 and 1989, leaving only an unused diversion box. *Id.* at 15, Exh. H at 3.

As to the alternative period of nonuse from 1989 to the present, the Objectors produced affidavits of Robert H. Hoppe, Darlene, L. Hoppe, Mark Ehlke, and Della Ehlke. (Doc. 33.00, Exhs. G–J). Robert H. Hoppe states that in 1955 the portion of the Harvey-Hoover-Lippert Ditch, on what is now Bull Ridge's property, was plowed in. *Id.*,

Exh. G at 2-3. Hoppe's statement is supported by the 1956 Broadwater County Water Resource Survey and aerial photographs taken in 1971 and 1979. *See* claim file for 41I 88971-00. The Hoppes also state that neither Clopton nor any of his successors in interest ever used, paid for, or helped to maintain the shared irrigation ditch. (Doc. 33.00, Exhs. G–H). Furthermore, as owners of the adjacent property, the Hoppes state that since the 1980s when the pipeline was removed, they observed no irrigation occurring on the place of use for claim 41I 88971-00. *Id.*

Similarly, the Ehlkes state that they never witnessed irrigation of the place of use. (Doc. 33.00, Exhs. I–J). The Ehlkes purchased their property adjacent to the now Bull Ridge property in 1996. From 1999 to 2005, when the Ehlkes were lessees of property comprising the place of use, and from 2005 to 2020, when the Ehlkes were managers of property comprising the place of use, no irrigation or discussion of irrigation took place. *Id.* Further, the Ehlkes confirmed that it has been impossible to irrigate the place of use with the Harvey-Hoover-Lippert Ditch. *Id.*

The Hoppes and the Ehlkes provide firsthand knowledge that since the Harvey-Hoover-Lippert Ditch was plowed in and the irrigation pipeline was removed, no irrigation occurred. They establish that since 1989, at the latest, there has been no conveyance to the place of use.

Bull Ridge has not responded with any facts to show irrigation of the place of use of claim 41I 88971-00 after 1989. The period of nonuse exceeds thirty-five years and is sufficient to prove a long period of nonuse, necessary for a showing of abandonment. Therefore, the Objectors have established a long period of nonuse.

2. Intent to Abandon.

The Objectors requested summary judgment that 41I 88971-00 was abandoned. (Doc. 33.00). A long period of nonuse has been established, and no facts were presented that excuse or explain the nonuse. *See 79 Ranch*, 204 Mont at 432-433, 666 P.2d at 218.

Bull Ridge cites the Objectors' motion that "the work and effort required for the owners of Bull Ridge's right to get water to the place of use was not worth the result achieved and that the North Fork of Deep Creek frequently lacked sufficient water to provide water for the claim because of the location of the place of use." (Doc. 36, citing

Motion Ex. G at 2-3). Bull Ridge asserts the characteristics of the place of use “would justify” the installation of a pipeline and sprinklers in the 1980’s. (Doc. 36, citing 33.00 at 6). However, after the pipeline was removed there are no facts to show any planning or discussion concerning irrigation.

Bull Ridge speculates that the Objectors’ prior actions “may have impaired Bull Ridge and its predecessors from attaining the water available to them.” *Id.* at 11. It is unclear what actions Bull Ridge is referring to or what Bull Ridge is asserting. The assertions are not specific but are merely speculative, “broad statements” insufficient to excuse a long period of nonuse. *See In re Musselshell River Drainage Area*, 255 Mont. at 50-51, 840 P.2d at 581-82.

Bull Ridge also argues that the Court cannot issue a ruling on abandonment but is limited to first ruling on nonuse. Bull Ridge was aware that the Objectors were requesting a final determination of abandonment, not just a determination of a long period of nonuse. To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not merely expressions of desire or hope. *79 Ranch*, 204 Mont at 432-433, 666 P.2d at 218. Bull Ridge has not provided any facts concerning intent.

Beyond “mere denial, speculation, or conclusory statements,” Bull Ridge has not shown there are any genuine issues of material fact as to an intent to irrigate. There are no genuine issues of material fact to show there was any intent to use claim 41I 88971-00 between 1989 and present. Moreover, there is no evidence to excuse the long period of nonuse or rebut the presumption of abandonment. *See Arnold*, ¶¶ 13-15; *Heavirland*, ¶ 32. Both elements of abandonment have been established.

Waiver and Laches

Bull Ridge argues the Objectors waived their right to assert abandonment based on laches. (Doc. 36.00 at 7–9). In support, Bull Ridge notes that the Objectors were aware of the facts used in their motion at the time of the issuance of the Temporary Preliminary Decree. *Id.*

Laches requires that “(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. Bull Ridge has not provided evidence of either element of laches. Further, the Temporary Preliminary Decree was issued in 1995, and “[a] person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree issued before March 28, 1997.” § 85-2-233(1)(c), MCA. The Objectors have not waived their right to object. There is no evidence that either waiver or laches applies to an assertion of abandonment beginning after the objection period for the Temporary Preliminary Decree had ended.

CONCLUSION

Both elements of abandonment are satisfied. There are no genuine issues of material fact that claim 41I 88971-00 has not been used for the last thirty-five years. There are no genuine issues of material fact to show there was any intent to use claim 41I 88971-00 between 1989 and present. Therefore, pursuant to Rule 56, M.R.Civ.P., the Objectors are entitled to summary judgment that, as a matter of law, claim 41I 88971-00 is abandoned. Waiver and Laches do not apply.

ORDER

Therefore, it is

ORDERED that Motion for Summary Judgment is GRANTED that claim 41I 88971-00 is abandoned. An abstract is provided with this Order to confirm the claim has been dismissed.

ELECTRONICALLY SIGNED AND DATED BELOW.

SERVICE VIA ELECTRONIC MAIL

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MISSOURI RIVER, ABOVE HOLTER DAM
BASIN 41I**

Water Right Number: 41I 88971-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: DISMISSED

Owners: BULL RIDGE RANCH LLC
PO BOX 100
MARATHON, WI 54448

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: DEEP CREEK, NORTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.