

MONTANA WATER COURT
UPPER MISSOURI DIVISION
JEFFERSON RIVER
BASIN (41G)
PRELIMINARY DECREE

CLAIMANTS: Joann M. Dale; Richard T. Dale

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

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

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND ORDER DENYING REQUEST FOR SUMMARY RULING

On October 3, 2025, notice of intent to appear parties H Double C, LLC (“HDC”) and Jody Sandru and Rick R. Sandru (“Sandrus”) each filed motions for summary judgment. (Docs. 52.00, 55.00). Claimants Joann M. Dale and Richard T. Dale (“Dales”) did not file responses. On December 8, 2025, HDC filed a request for a summary ruling based on Dales’ failure to file a response. (Doc. 64.00). This order addresses HDC and Sandrus’ motions for summary judgment and HDC’s request for summary ruling.

BACKGROUND

Claim 41G 24633-00, owned by Dales, was included in the Preliminary Decree for Jefferson River Basin 41G as a June 23, 1923 irrigation right from Dry Boulder Creek (referred to in documents as both Boulder Creek and Dry Boulder Creek). In the Preliminary Decree, the point of diversion was listed as SWNENW of Section 35, Township 2 South, Range 5 West (“the point of diversion in Section 35”).

The United States of America (Bureau of Land Management) (“BLM”) filed an Objection to claim 41G 24633-00 indicating the point of diversion is on federal land.

The BLM's Objection also raised non-perfection and abandonment issues resulting from the point of diversion issue. HDC and Sandrus filed Notices of Intent to Appear on claim 41G 24633-00.

Claim 41G 24633-00 is based on a June 23, 1923 Notice of Appropriation filed by John J. Core ("the Core NOA"). The Core NOA claims

...waters of Boulder Creek, which waters flow into Coal Canyon Creek in said County and State for irrigating and other purposes, said water to be taken for use after such water, now appropriated by one Louis Dern, flows in such a manner as to fail to reach the Dern Ranch.

(Doc. 53.00, Ex. 8 at 6). While the Core NOA identified water diverted from Dry Boulder Creek, it does not state a specific point of diversion.

The point of diversion in Section 35, as identified in the Preliminary Decree, is on federal land managed by the BLM. *See* (Doc. 41.00). On October 4, 2024, the BLM filed a Motion for Partial Summary Judgment ("the BLM's Motion") requesting the point of diversion be removed from federal land. (Doc. 33.00). According to Dales' discovery responses, Dales contend the correct location of the point of diversion is in the NENWSW of Section 36, the diversion point for "Old Sperry Ditch," on federal land managed by the United States Forest Service ("the point of diversion in Section 36"). (Doc. 33.00, Ex. 4; Doc. 41.00 at 2). The Water Master denied the BLM's Motion, determined the point of diversion in Section 35 was not a part of the claim, that there were questions of fact whether the point of diversion in Section 36 was historically used, and questions of fact whether there was a valid point of diversion in Section 36 when claimants did not have a special use permit from the United States. (Doc. 41.00). After the Order Denying Partial Summary Judgment, the BLM withdrew its Objection in this case. (Doc. 43.00).

On October 3, 2025, HDC and Sandrus filed separate motions for summary Judgment. HDC requests an order terminating claim 41G 24633-00 based on the following arguments: (1) the use of water under the Core NOA required a special use permit and would have constituted a trespass on federal land; (2) the Core NOA appropriates "imported water" diverted by a senior decreed right; and (3) the Core NOA is invalid because it required judicial approval. (Docs. 53.00 & 56.00). Sandrus request

an order terminating claim 41G 24633-00 based on the following arguments: (1) the Core NOA on which 41G 24633-00 is based is invalid; (2) Dales do not have a point of diversion in Section 35¹; (3) Dales could not have diverted water from Section 36 because they do not have a special use permit; (4) Dales cannot legally use the Old Sperry Ditch; (5) Dales have not proved they diverted water from Dry Boulder Creek; and (6) Dales cannot use water imported to Coal Creek by Sandrus. (Docs. 52.00 & 53.00).

ISSUES

Most of the issues raised by HDC and Sandru's summary judgment motions are not determinative of the primary issue in this case – whether the point of diversion in Sec. 36 reflects historical use. The Court will address (1) the language of the Core NOA and (2) the issue of judicial approval. To the extent the parties raised other issues, the Court will review the issues to address why they are not pertinent to and/or beyond the scope of proceedings in this case.

SUMMARY JUDGMENT STANDARD

HDC and Sandrus assert there are no genuine issues of material fact that 41G 24633-00 is invalid and should be terminated. 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 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.*, 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. All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *Id.*

¹ In the Order Denying Motion for Partial Summary Judgment (Doc. 41.00), the Water Master already determined the point of diversion for 41G 24633-00 is not in Section 35. This determination does not need to be made again.

Where the moving party is able to demonstrate that no genuine issue as to any material fact exists, 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. Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. M. R. Civ. P. 56(c); *Thornton v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

DISCUSSION

Dales did not respond to HDC and Sandrus' motions. However, Dales responded to the United States' First Discovery Requests and HDC's First Discovery Requests. Dales' responses were attached as exhibits to Sandrus' Motion for Summary Judgment (Doc. 52.00, Ex. 9 & 11) and include the following response:

Except for the point of diversion, all elements of claim 41 G 24633-00 are correct as they appeared on the Preliminary Decree Abstract for the claim in the Basin 41G Preliminary Decree. The initial point of diversion was errantly claimed by the statement of claim and should be corrected to the NENSW of Section 36, Twp 2S, Rge 5W in Madison County.

(Doc. 53.00, Ex. 11, Answer to Interrogatory No. 4). Dales maintain Dry Boulder Creek water is diverted from Coal Creek when it is available and not being used by downstream water users. *Id.* at Ex. 9, ROG 9. According to the responses, Dales have not been able to divert water since water supplies are often insufficient to fulfill 41G 24633-00, which is last in priority. *Id.* at Ex. 11, ROG 10.

1. Notice of Appropriation Language

HDC and Sandrus claim the Core NOA is invalid and, therefore, claim 41G 24633-00 is invalid. The Core NOA which formed the basis for claim 41G 24633-00 is for use of water from (Dry) Boulder Creek. The Core NOA does not reference a specific point of diversion.

HDC and Sandrus focus on a sentence in the Core NOA that states water is "taken for use after such water, now appropriated by one Louis Dern, flows in such a manner as to fail to reach the Dern Ranch." HDC and Sandrus interpret this sentence to mean Core "purported to appropriate water imported into Coal Creek under an existing water right

decreed to Louis Dern in Cause 1427.” (Doc. 56.00 at 9); *see also* (Doc. 53.00 at 8-9). Sandrus assert the Core NOA “was an unlawful attempt to subvert the doctrine of prior appropriation by piggybacking off Dern’s senior water right, which was diverted through the uppermost ditch on Dry Boulder Creek.” (Doc. 53.00 at 9). Further, HDC contends this sentence in the NOA shows Core tried to claim “imported water.”² (Doc. 56.00 at 9).

Both HDC and Sandrus’ reading of the NOA conflicts with Dales’ understanding reflected in the discovery responses filed with Sandrus’ motion. Dales contend the point of diversion for claim 41G 24633-00 is the location of the Old Sperry Ditch on Dry Boulder Creek in Section 36. *See* (Doc. 53.00, Ex. 11; Doc. 33.00, Ex. 4). According to Dales’ Discovery Responses,

Dry Boulder Creek water is diverted from Coal Creek and conveyed to the place of use identified by the Preliminary Decree abstract. The use of water under claim 41G 24633-00 is junior to all non-withdrawn claims from Dry Boulder Creek (as well as Coal Creek), so the claim is not available at Dales’ disposal for irrigation. The Dry Boulder Creek water under claim 41G 24633-00 is diverted from Coal Creek when it is available and not being used by downstream water users.

(Doc. 53.00, Ex. 9, ROG 9). In Dales’ view, 41G 24633-00 is the most junior claim and the Core NOA appropriated junior water from Dry Boulder Creek after it was imported to Coal Creek and used by Sandrus. *Id.* While Sandrus and HDC interpret the NOA as “piggybacking” off the senior right now owned by Sandrus, Dales interpret the Core NOA as a junior right used after water is not in use by senior water users.

This Court has determined “there is no reason to make notices automatically inadmissible in the absence of significant historic conflict over use of the water right at issue.” *In re Foss*, 2013 Mont. Water LEXIS 17, *21-22. Sandrus and HDC’s reading of the Core NOA is an interpretation of a document that is now over a century old. Pursuant to Section 85-2-227, MCA, the Water Court “may consider all relevant evidence in the determination and interpretation of existing rights.” *See also Foss*, *22-23. While the Core NOA may have evidentiary value for or against claim 41G 24633-00, the validity of

² HDC’s assertions regarding imported water are misleading. The case law cited by HDC indicates after water leaves the control of another water user, it is subject to appropriation by another. *State ex rel. Mungas v. Dist. Court*, 102 Mont. 533, 539, 59 P.2d 71, 74 (1936) (quoting *Rock Creek Ditch and Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074 (1936)).

claim 41G 24633-00 does not hinge on a phrase in the Core NOA. The validity of claim 41G 24633-00 hinges on actual historical, beneficial use from the point of diversion in Section 36.

HDC and Sandrus request an order granting summary judgment terminating claim 41G 24633-00 as an invalid appropriation. (Docs. 52.00, 53.00, 55.00, & 56.00). Sandrus and HDC's interpretation of the Core NOA does not provide a sufficient basis to terminate claim 41G 24633-00 in summary judgment. Moreover, there is a genuine issue of material fact whether a point of diversion in Section 36 reflects historical use.

2. Prior Judicial Approval

In 1916, the Madison County District Court decreed water rights on Dry Boulder Creek based on a stipulation and agreement between parties in *Dern v. Weathers*, Cause 1427 (June 30, 1916). Based on the 1916 case, HDC argues that claim 41G 24633-00 is invalid because it required judicial approval. (Doc. 56.00 at 11-12). However, HDC's argument fails to account for Section 89-839, Mont. Rev. Code Ann. (1947) and previous rulings of this Court.

Prior to the Water Use Act, Section 89-829, RCM (1947), set forth a procedure for appropriating water from "adjudicated streams." The code states that appropriations of water from a previously adjudicated source were required to file a petition with the court that issued the prior decree. *Id.* Failure to follow the petition process deprived the appropriator of the right to use water against any subsequent appropriator mentioned in or bound by a decree of the court. § 89-837, RCM (1947). Yet § 89-839, RCM (1947) provided that only decrees "prosecuted in good faith" and "based upon evidence introduced and not upon stipulations or admissions of the parties," as was the case here, could be considered as prima facie evidence against subsequent appropriators. *State ex rel. McKnight v. Dist. Court*, 111 Mont 520, 527, 111 P.2d 292, 295 (1941).

The Water Use Act replaced the Montana Revised Codes. Actual historical beneficial use defines a water right under the Water Use Act no matter what is contained in a prior decree. *McDonald v. State*, 220 Mont. 519, 529, 722 P.2d 598, 604 (1986); *In re Danreuther Ranches*, 2013 Mont. Water LEXIS 5; *Vidal v. Kensler*, 100 Mont. 592, 594-95, 51 P.2d 235, 236-37 (1935); *Sweetland v. Olsen*, 11 Mont. 27, 27 P.339 (1981).

HDC's argument misinterprets the law and does not prove there is no genuine issue of material fact concerning the point of diversion in Section 36.

3. Other Issues Raised by HDC and Sandrus

a. Permitting and Trespass

Despite the United States no longer participating in this case, HDC and Sandrus argue no point of diversion in Section 36 could have existed because no federal special use permit was issued. (Docs. 53.00 at 11 & 56.00 at 7-9). HDC further argues that an appropriation in Section 36 would have constituted a trespass. *Id.* The permitting and trespass issues are not pertinent to the primary issue at hand, whether there was historical, beneficial use of the point of diversion in Section 36.

The rules cited by HDC regulate access and management of conveyances but do not prevent acquisition of a water right on federal land.³ Concerning trespassing, HDC asserted a trespass on land HDC does not own without any citation to law supporting a claim by a private party for trespass on federal land in Water Court adjudication proceedings. Federal permitting and assertions of trespass are separate claims that do not fall within the scope of these case proceedings.

b. Ditch Easements

According to Sandrus, Dales have not proved they own a right, i.e., an easement, to the Old Sperry Ditch ("the Ditch"); thus, claim 41G 24633-00 is invalid. (Doc. 53.00 at 12-13). However, water rights are distinct from ditch rights. Ditch easements are separately created, conveyed, and abandoned. *In re Musselshell River Drainage Area*,

³ Under Montana Law, a private appropriator could acquire a water right on land owned by the United States. *Case No. 40E-A*, 1991 Mont. Water LEXIS 16 *3-4 (April 5, 1991). Under state law, such a right may be a valid appropriation of water. In *Case 40E-A*, the issue was whether a grazing permittee, operating on federal land, could acquire a water right for stock water on lands owned by the United States. *Id.* The United States asserted the Act of January 13, 1897, 29 Stat. 484, 43 U.S.C. 952 et seq., precluded water users from claiming exclusive use of reservoirs constructed on the public domain. *21. This Court disagreed, emphasizing that the United States expressly recognized that Congress delegated broad power to the states in regulating water resources on the public lands. *5 (Citing *California v. United States*, 438 U.S. 645, 654 (1978); *United States v. New Mexico*, 438 U.S. 696, 702 (1978)). As described by this Court, although Congress has plenary power over federal lands, Congress delegated authority over water resources to the states through state law. *6 (Citing *California v. United States*, at 654-656). This Court concluded that the 1897 Act did not prevent acquisition of a water right that otherwise complied with state water law. *Id.* "Rather, the clear reading of the statute suggests that the Act was intended to regulate control over such reservoirs and to legislate the access to such water sources." *Id.*

255 Mont. 43, 47, 840 P.2d 577, 579 (1992); *see also* *Roland v. Davis*, 2013 MT 148, ¶ 35, 370 Mont. 327, 302 P.3d 91; *Castillo v. Kunneman*, 197 Mont. 190, 197, 642 P.2d 1019, 1024 (1982); *Connolly v. Harrel*, 102 Mont. 295, 300, 57 P.2d 781, 783 (1936); *MacLay v. Missoula Irrigation Dist.*, 90 Mont. 344, 355, 3 P.2d 286, 290 (1931); *McDonnell v. Huffine*, 44 Mont. 411, 422-23, 120 P. 792, 795 (1912). Since ditch rights are a separate stick in a property owners' bundle of rights, ditch rights do not fall under the jurisdiction of the Water Court and are not part of the adjudication proceedings. *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991); *See also* *Connolly v. Harrel*, 102 Mont. 295, 57 P.2d 781 (1936); *In re Deadman's Basin Water Users Ass'n*, 2002 MT 15, 308 Mont. 168, 40 P.3d 387.

Like the federal permitting and trespass assertions, whether there is a ditch easement is a separate issue from whether there is a water right with a point of diversion in Section 36. Further, ditch easements are outside the scope of proceedings in this case.

ANALYSIS OF REQUEST FOR SUMMARY RULING

On December 8, 2025, HDC filed a request for a summary ruling pursuant to Rule 2(b) and (c) of the Montana Uniform District Court Rules.⁴ Dales did not respond to HDC's Motion for Summary Judgment pursuant to Rule 2(b), M.U.D.C.R. Therefore, HDC states the Court must grant its summary judgment pursuant to Rule 2(c), M.U.D.C.R.

Failure to respond to a motion may be considered an admission that the motion is well taken. Rule 2(c), M.U.D.C.R. The Montana Supreme Court has interpreted this rule as allowing courts discretion to either deny or grant unsupported or unanswered motions. *Moody v. Northland Royalty Co.*, 286 Mont. 89, 94, 951 P.2d 18, 22 (1997). However, "the procedure to be followed on motions for summary judgment must conform to the provisions of Rule 56." *Cole v. Flathead Co.*, 236 Mont. 412, 417, 771 P.2d 97, 100 (1989). "[T]he essential question for the District Court in deciding a motion for summary judgment... is whether there exists a genuine issue of material fact. That

⁴ HDC cites to Rule 2(b) and (c) of the Montana Rules of Civil Procedure. It appears HDC intended to base its motion on Rules 2(b) and (c) of the Montana Uniform District Court Rules.

inquiry does not admit of decision merely on a technical point, such as whether briefs have been filed on time." *Id.* at 416, 771 P.2d at 100.

In this case, Dales' failure to respond to HDC's motion for summary judgment does not relieve the Water Court from the duty to engage in a Rule 56 analysis. As set forth in the Discussion, there are genuine issues of material fact concerning whether there is a point of diversion in Section 36 associated with claim 41G 24633-00 and what water, if any, was appropriated and used from that point. Therefore, HDC is not entitled to a summary ruling granting their motion for summary judgment based on Dales' failure to file a response brief.

CONCLUSION

The purpose of this adjudication proceeding is to determine the historical elements of claim 41G 24633-00. *See* §§ 3-7-501, 85-2-226, MCA. The relevant question in this case is whether there has been any historical, beneficial use of water associated with the point of diversion in Section 36. HDC and Sandrus have not shown there are no genuine issues of material fact concerning whether there is a point of diversion in Section 36 and that they are entitled to summary judgment terminating the claim. Therefore, it is

ORDERED that HDC's Motion for Summary Judgment is DENIED.

ORDERED that Sandrus' Motion for Summary Judgment is DENIED.

ORDERED that HDC's Request for a Summary Ruling is DENIED. HDC is not entitled to summary ruling on a 56(b) motion with existing genuine issues of material fact.

An order setting a prehearing conference to set a date and time for hearing will be issued separately.

ELECTRONICALLY SIGNED AND DATED BELOW.

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