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MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B

CLAIMANTS: Welker Ranch LLC; Ral LC Johnston Series

CASE 43B-6002-A-2022

43B 6296-00

OBJECTORS: Emigrant Peak Ranch LLC; Emily P. Berg Trust;
Nancy Perkins Docherty; Mary L. Perkins;
Sarah E. Perkins; Warren K. & Ellavina T.
Perkins Trust; Big Sky Moonrise LLC; Ral LC
Johnston Series

43B 30103794

**ORDER ON EMIGRANT PEAK RANCH LLC’S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Welker Ranch LLC (“Welker Ranch”) filed a motion to amend water right claim 43B 6296-00 to add two additional points of diversion. Emigrant Peak Ranch LLC (“EPR”) and several other parties oppose the motion. EPR filed a motion for partial summary judgment seeking rulings on five issues. For the reasons stated in this Order, the Court denies the motion on the basis that issues of material fact preclude summary judgment.

PROCEDURAL BACKGROUND

The Water Court decreed claim 43B 6296-00 in the Preliminary Decree for Basin 43B. Basin 43B covers the upper Yellowstone River basin above its confluence with Bridger Creek in Sweet Grass County. The claim 43B 6296-00 preliminary decree abstract included one notice-only issue remark and did not receive objections. The Court consolidated the claim in case 43B-0599-R-2022, removed the issue remark, and closed the claim in a closing order dated February 2, 2022.

The preliminary decree abstract for claim 43B 6296-00 decreed one point of diversion. On August 26, 2022, Welker Ranch moved to amend 43B 6296-00. The motion asks the Court to add two more points of diversion. The motion characterizes the proposed modifications as clerical in nature.

The Water Court opened case 43B-6002-A-2022 to address the motion. The Court required Welker Ranch to file more information (Doc. 2.00) and then to publish notice of the motion (Doc. 7.00). Welker Ranch completed these requirements.

EPR and several other parties filed objections after publication. The Court then put the case on a hearing track. After conducting discovery and after a field investigation conducted by the Department of Natural Resources and Conservation (“DNRC”),¹ EPR filed its partial summary judgment motion. (Doc. 87.00). Welker Ranch responded opposing the motion. (Doc. 90.00). EPR filed a reply. (Doc. 92.00). The other objectors did not take a specific position as to the motion.²

EPR and Welker Ranch filed extensive documents to support their filings. EPR’s supporting documents include an affidavit of expert witness Russ Radliff (“Radliff Aff.”), some mapping Radliff prepared, various material from the claim files, pleadings and prior court orders, and a report. Welker Ranch’s supporting documents include deposition transcripts, pages from the Water Resource Survey for this area, an affidavit of Larry Joe Stands (“Stands Aff.”), a printout of some email correspondence, and several other documents.

UNDISPUTED FACTS

Based on the briefs, supporting documents and the prior filings, and the public record, the following facts are undisputed:

1. Claim 43B 6296-00 is based on a statement of claim filed by Alvin L. Stands and Flora M. Stands on November 5, 1980. The statement claimed the right to use water from Sixmile Creek in Park County for irrigation use with a July 12, 1912 priority date. Sixmile Creek is a tributary of the Yellowstone River.

¹ DNRC filed its field investigation report on October 31, 2024. (Doc. 45.00).

² The parties also participated in a mediation. On December 22, 2025, the mediator reported that the parties did not reach a settlement. (Doc. 105.00).

2. The Stands statement of claim describes three points of diversion, all in section 29, township 6 south, range 8 east. The three points of diversion within section 29 include (a) the SESWNE; (b) the SWNWNE; and (c) the NENWNE. The statement of claim described the place of use as 200 acres in the south half of section 20, township 6 south, range 8 east. (Doc. 87.00, Ex. B). Section 20 is directly north of section 29.

3. The statement of claim form describes the right as a “decreed” right. As evidentiary support, the statement of claim included pages of a state district court order from the case *John Counts, et al. v. Philip Bottler, et al.*, (Case No. 2112, Mont. Sixth Jud. Ct., Park County) (“*Counts v. Bottler*”).

4. In *Counts v. Bottler* the Park County District Court decreed rights between certain water users on Sixmile Creek. On July 25, 1912, Joseph A. Stands filed a petition in the case to authorize an additional appropriation to divert water from two points on the west bank of Sixmile Creek for use on lands described in the petition as:

The South-west Quarter, the North half of the South-east quarter and the South-west quarter of the South-east quarter of Section Twenty, Township Six, South Range Eight East.

(Doc. 87.00, Ex. D).

5. As part of the District Court petition process, Joseph A. Stands filed a survey. The survey depicted three ditches. The survey indicated two of the ditches diverted water from the west side of Sixmile Creek. The survey labeled these ditches as “Desert Entry Ditch” and “Homestead Ditch No. 1.” The survey also shows a ditch on the east side of Sixmile Creek, labeled as “Homestead Ditch No. 2.” (Doc. 87.00, Ex. E).

6. On October 3, 1912, the District Court approved the petition. The order authorized a new appropriation for Joseph A. Stands consisting of the right to use 260 miner’s inches (6.5 cfs) from Sixmile Creek on land described as:

The South West Quarter; the North half of the South-east quarter, and the South-west quarter of the South-east quarter Section 20 Township 6 (six) South Range Eight East Park County, Montana.

(Doc. 90.00, Ex. F).

7. The land described in the Joseph A. Stands petition and the District Court’s order approving the petition did not include land in the SESE of section 20.

8. Joseph A. Stands acquired ownership of the SESE of section 20 in October 1927. (Doc. 87.00, Ex. G).

9. In 1951 the Montana State Engineer’s Office prepared a Water Resources Survey (“WRS”) for Park County. The WRS includes a map depicting irrigation in section 20. The map shows section lines but does not contain lines depicting the aliquot subparts of the sections.

10. Prior to 1973, up to at least “8 or 9 acres” was irrigated in the SESE of section 20. (Radliff Aff., ¶ 11).

11. The Water Court decreed claim 43B 6296-00 twice. First, on January 16, 1985, the Court issued a temporary preliminary decree (“TPD”). The TPD abstract quantified the claim as right to use up to 6.5 cubic feet per second (“cfs”) on a 200 acre place of use in the south half of section 20, township 6 south, range 8 east. The TPD abstract decreed one point of diversion: the SESWNE of section 29, township 6 south, range 8 east.

12. According to the TPD abstract, Alvin L. Stands and Flora M. Stands still owned the claim as of the date of the TPD. Alvin and Flora Stands did not self-object to the TPD abstract even though the TPD decreed only one point of diversion.

13. Several third parties objected to claim 43B 6296-00 during the TPD objection period. The objectors included the United States of America, Bureau of Reclamation (“United States”), the Montana Department of Fish, Wildlife and Parks (“FWP”), and DNRC. The Water Court also called the claim in on its own motion. The United States, FWP, DNRC, and the Water Court’s motion all identified acres irrigated as an issue. FWP’s objection also raised a place of use issue. None of the TPD objections identified points of diversion as an issue.

14. The Water Court resolved the TPD objections in a Master’s Report dated December 19, 1989, in Water Court case 43B-12.³ The Court adopted the Master’s Report on January 3, 1990. The order in case 43B-12 reduced the place of use to 148.40 acres described as follows:

<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	134.40		S2	20	6S	8E	PARK
2	<u>14.00</u>		N2N2	29	6S	8E	PARK
Total	148.40						

³ EPR included copies of the Master’s Report and the Court’s order amending and adopting the report as Exhibit E to its motion. (Doc. 87.00, Ex. E).

15. In 2015, the Water Court issued an order (“Split Order”) splitting claim 43B 6296-00 in connection with a division of ownership of the property to which the claim is appurtenant. The Split Order authorized new claim no. 43B 30103794, owned by Larry Joe Stands LLC.⁴ The Split Order divided the place of use for the two claims as follows:

Claim 43B 6296-00

<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	74.20		S2S2	20	6S	8E	PARK
Total	74.20						

Claim 43B 30103794

<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	74.20		N2S2	20	6S	8E	PARK
Total	74.20						

16. The Split Order also allocated a flow rate of 3.25 cfs to each claim, which cumulatively is 6.5 cfs, the same flow rate decreed in the TPD.

17. As of the date of the Split Order, Anastasia Stands owned the S2S2 of section 20 and claim 43B 6296-00. Larry Joe Stands LLC owned the N2S2 of section 20 and claim 43B 30103794.

18. The Water Court again decreed claim 43B 6296-00 when it issued the Basin 43B Preliminary Decree on May 9, 2019. The Preliminary Decree describes the claim as a decreed right to use water from Sixmile Creek for irrigation use with a July 25, 1912 priority date. The decree abstract identifies one point of diversion located in the SESWNE of section 29, township 6 south, range 8 east, the same as what the Water Court decreed in the TPD.

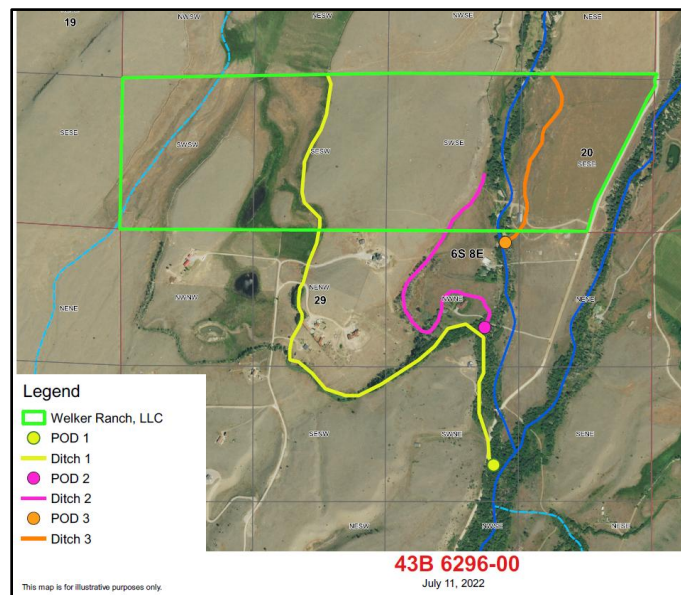
19. The preliminary decree abstract identifies Anastasia Stands as the owner of claim 43B 6296-00 as of the date of the decree.

20. Neither Anastasia Stands, EPR, nor anyone else objected to the claim during the objection period. The Water Court removed the notice only issue remarks and closed the claim on February 2, 2022 in case 43B 0599-R-2022.

⁴ On September 11, 2025, the Court granted the unopposed motion to substitute RAL LC Johnston Series for Larry Joe Stands, LLC. (Doc. 94.00).

21. Anastasia Stands is the predecessor in interest to Welker Ranch. (Doc. 87.00, Ex. T). Welker Ranch acquired ownership of claim 43B 6296-00 and its place of use on November 13, 2020, after the preliminary decree objection period closed but before the February 2, 2022 date of the Court’s closing order. Welker Ranch then filed the motion to amend on August 26, 2022

22. The motion to amend asks the Court to add two more points of diversion to claim 43B 6296-00. The proposed new points of diversion are in the SWNWNE and the NENWNE of section 29 in township 6 south, range 8 east. The following diagram is an excerpt from Welker Ranch’s motion that depicts the relative location of the decreed and proposed points of diversion:



23. According to this diagram, POD 1 (marked in yellow) is the currently decreed point of diversion. Welker Ranch’s motion to amend seeks to add POD 2 (marked in pink) and POD 3 (marked in orange) to the claim. The parties use the colors of these markings to establish the nomenclature for their briefing. They refer to the point of diversion in the SWNWNE of section 29 as “POD 2” and the ditch associated with it as the “pink ditch.” They call the point of diversion in the NESWNE of section 29 “POD 3” and its associated ditch the “orange ditch.”

24. As the diagram also indicates, the locations of POD 1 and POD 2 are on the left bank of Sixmile Creek. The location of POD 3 is on the right bank.

25. POD 2 and POD 3 currently are in a state of disrepair and neither point of diversion has been actively used in recent years.

DISCUSSION

A. Applicable Standards.

1. Motion to Amend Standard.

Section 85-2-233(6), MCA and Rule 10, W.R.Adj.R. authorize motions to amend. If the Court determines the proposed modification may adversely affect other water users, the Court requires notice and the opportunity to object before approving the modification. Section 85-2-233(6), MCA. That was the case with Welker Ranch's motion to amend, which led to EPR and other parties objecting.

When a claimant seeks to amend an element of their own water right, the claimant must prove by a preponderance of the evidence that the modification overcomes the prima facie status of the claim. Rule 19, W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558. When, as here, a motion to amend comes after the objection periods close, the Court examines the motion to determine whether it is functionally a disguised late objection. *In re Lyndes*, Case 43B-0792-R-2022, 2023 Mont. Water LEXIS 878, *3-4. If so, the Court may deny the motion even if it contains evidence of historical use that differs from what the Court decreed. In contrast, if the motion contains evidence of a clerical error or other reason why the proposed modification could not have been raised during the objection period, the Court may consider the motion on its merits and grant the motion if meritorious. *See, In re Garman Ranch Revocable Trust*, Case 39F-0005-I-2024, 2024 Mont. Water LEXIS 512; *In Carol Nickelson Trust*, Case 43B-6005-A-2023, 2024 Mont. Water LEXIS 78, *5.

2. Summary Judgment Standard.

Summary judgment is appropriate when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Once the party moving for summary judgment meets its burden of establishing an absence of genuine issues of material fact, the opposing party must present substantial evidence to raise a genuine issue of material fact that is more than “speculative, fanciful, or conclusory statements.” *Simmons v. Jenkins*, 230 Mont. 429, 432, 750 P.2d 1067, 1069 (1988) (citation omitted). A summary judgment ruling sometimes is described as an “extreme remedy which should be granted only when there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law.” *Safeco Ins. Co. of Am. v. Liss*, 2000 MT 380, ¶ 22, 303 Mont. 519, 516 P.3d 399.

The court may issue a ruling as a matter of law only if there are no disputed material facts. Rule 56(c), M. R. Civ. P. The court looks to the “pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine whether there is a genuine issue as to any material fact relating to the legal issues raised.” *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675. A genuine issue of material fact is an issue of inconsistent fact, material to the elements of a claim or defense at issue, and not amendable to judgment as a matter of law. *Matter of Est. of Wolfe*, 2025 MT 159, ¶ 8, 423 Mont. 134, 572 P.3d 824 (citation omitted).

In evaluating a motion for summary judgment, a court may not “make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses.” *Hanson v. Town of Fort Peck*, 2023 MT 208, ¶ 35, 414 Mont. 1, 538 P.3d 404. Instead, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn in favor of the party opposing summary judgment. *Thornton v. Flathead Cnty.*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

B. Application to EPR’s Summary Judgment Motion.

1. Scope of Issues.

Welker Ranch’s motion to amend asks the Court to correct what Welker Ranch characterizes as “clerical” errors. The motion asserts these errors resulted in only one point of diversion being decreed in both the TPD and the Preliminary Decree even though three points of diversion were listed on the original claim form. Welker Ranch theorizes DNRC miscoded the points of diversion when it did its data entry following the claim filing period. (Doc. 1.00, at 1-2). Welker Ranch contends that if DNRC had performed the clerical act of data entry correctly, all three points of diversion would have appeared on both the TPD abstract and the Preliminary Decree abstract.

EPR’s summary judgment motion does not directly address one way or the other whether the modifications are clerical in nature. EPR’s motion also does not raise concerns with Welker Ranch’s explanation as to why the motion to amend was not filed during the objection period for either the TPD or the Preliminary Decree or addressed in

the Split Order. Instead, EPR's motion asks the Court to rule on five issues and to conclude as a matter of law that:

- 1) POD 3 was never intended to serve the SESE of section 20, and therefore POD 3 should not appear on claim 43B 6296-00;
- 2) POD 3 is precluded from serving the SESE of section 20 pursuant to the District Court's order granting Joseph A. Stands an appropriation from Sixmile Creek;
- 3) There was not a pre-1973 change of the water right into the SESE of section 20, it was instead an impermissible expansion of the water right;
- 4) POD 2 has not been used in at least 12 years, and POD 3 has not been used in at least 13 years, which is a prolonged period of non-use; and
- 5) Based on the prolonged period of non-use, the burden has shifted to Welker to rebut a presumption of an intention to abandon POD 2 and POD 3.

The issues EPR raises fall into two general categories. EPR's first three issues address whether the proposed amendments accurately reflect historical use. EPR contends they do not because neither Welker Ranch nor its predecessors had authority to use the proposed points of diversion to irrigate the SESE of section 20. These three issues are addressed collectively as the "SESE section 20 issues."

The last two issues EPR raises do not address the historical bases for the proposed amendments but instead assert that even if the two points of diversion were part of the historical water right, the undisputed facts about water nonuse are sufficient to shift the burden of proof to Welker Ranch to show lack of intent to abandon. These two issues are addressed collectively as the "abandonment issues."

2. SESE section 20 issues.

a. Was POD 3 intended to serve the SESE of section 20?

Joseph A. Stands did not own the SESE of section 20 in 1912 when he petitioned the District Court for a new appropriation and arranged for the survey the District Court approved. EPR argues this means "POD 3 was never intended to be used on the SESE of Section 20." Instead, EPR maintains Joseph A. Stands' intent for POD 3 was limited to conveying water to the NESE of section 20. (Doc. 87.00, at 40).

Welker Ranch responds that whether Stands intended to irrigate the SESE of section 20 as of the date of the petition or the District Court's order is a disputed fact because evidence exists that the SESE ultimately was irrigated. Welker Ranch cites several evidentiary sources, including the 1951 WRS and various aerial photographs indicating irrigation, which Welker Ranch argues EPR's expert concedes. Welker Ranch also argues pre-1973 law authorized water users to change the use of their water right without a regulatory approval requirement. (Doc. 90.00, at 5, *citing* § 89-803, RCM (1947)).

EPR cites *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900), in support of its lack of intent argument. *Toohey* involved a dispute over rights to use water from the East Gallatin River. The district court awarded 200 miner's inches with a June 1868 priority date. The Montana Supreme Court reduced the decreed flow rate to 50 miner's inches based on an evidentiary record that contained the acquisition dates of different parcels of property. The Court determined the later acquired property was only entitled to a junior priority date and a portion of the decreed flow rate. The Court did not specifically limit the place of use though. Instead, the acquisition dates of the places of use were used as evidence to quantify the flow rates and priority dates based upon the incremental development of the right.

Welker Ranch's motion does not ask the Court to modify the decreed flow rate of claim 43B 6296-00. Instead, the flow rate has remained a consistent 260 miner's inches and 6.5 cfs over the history of court orders and decrees involving the claim, including the cumulative flow rates in the Split Order. Unlike *Toohey*, EPR's motion does not contain undisputed facts of incremental development of the flow rate. The motion also does not provide undisputed facts as to what the Stands family intended over the period between 1912, when the District Court issued its order, and 1973, when the Legislature passed the Water Use Act. In other words, when viewed in a light most favorable to Welker Ranch, as the Court must, EPR's statement that "POD 3 was *never intended* to be used on the SESE of Section 20" (emphasis added) is not supported by undisputed facts.

- b. Did the District Court's order preclude the use of POD 3 from serving the SESE of section 20 pursuant?*

EPR next argues that the 1912 Joseph A. Stands appropriation was a “unique water right because it was issued by the Park County District Court pursuant to RCM §§ 4871 through 4880 (1907).” (Doc 92.00, at 2). EPR explains that Montana law in force as of 1912 authorized district courts to settle the relative priorities and rights of parties to a water dispute on a particular stream or source. R.C.M. § 4852 (1907). As EPR interprets this law, once the District Court decreed rights on Sixmile Creek the sole method to obtain an additional appropriation was through the statutory petition and court approval process. EPR goes on to argue that the Stands’ appropriation was strictly limited to the terms of the District Court’s authorization. According to EPR’s argument, any future water use in the SESE of section 20 was unauthorized unless the District Court subsequently authorized it, which it never did. (Doc. 87.00, at 41-42).

Welker Ranch responds that EPR’s interpretation of the statute is inconsistent with other provisions of Montana’s pre-1973 statutes. Again, Welker Ranch cites § 89-803, RCM (1947), which authorized non-injurious changes to water rights.

Here, the facts are undisputed that the District Court did not issue a subsequent order authorizing water use in the SESE of section 20. But EPR does not cite any law to support its position that an appropriation authorized through the district petition process was ineligible for pre-1973 statutory change authorization process. EPR’s argument is not meritorious for several reasons.

First, the plain language of the pre-1973 change statute applied to any use of water, without exception as to how that use previously was authorized. The statute stated:

The person entitled to the use of water may change the place of diversion, if others are not thereby injured, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, *to any place other than where first use was made*, and may use the water for other purposes that that for which it was originally appropriated.

Section 89-803, RCM (1947) (emphasis added).⁵ Under the plain language of this statute, once water use was authorized, whether by district court order or otherwise, Montana law recognized a right to change the right so long as other water users were not injured.

Second, in a decision issued after briefing was complete, the Montana Supreme Court clarified the effect of pre-1973 district court orders on adjudicated streams. In a

⁵ This statute was recodified several times prior to 1947, with different statutory citations.

lengthy footnote in *Petrich Fam. Ltd. P'ship v Trout Unlimited*, 2026 MT 34, ¶ 38, n. 10, 426 Mont. 334, 584 P.3d 102, the Supreme Court recognized the possibility of use rights on adjudicated streams, albeit subject to statutory priority date penalties, and potentially junior priority dates.⁶ Like this case, *Petrich* involved two consolidated cases where a district court authorized new appropriations on a previously adjudicated source. The Supreme Court's decision confirmed the possibility of water rights beyond the scope of what the district court previously authorized in a petition process.

c. *Did the Stands' water use on the SESE of section 20 amount to an impermissible expansion of the water right?*

EPR's third argument asserts any water use in the SESE of section 20 amounted to an impermissible expansion of the right. As authority, EPR relies on *Quigley v McIntosh*, 110 Mont. 495, 103 P.2d 1067 (1940). *Quigley* involved a dissatisfied water user action challenging alleged expanded water use. The Montana Supreme Court held that water use increasing the burden on the source through expanded acreage or extended ditches violated the no injury rule even when the point of diversion and flow rate did not change.

Welker Ranch relies on *Quigley* in response to EPR's arguments as to the limitations of the petition order. Welker Ranch contends EPR produced no evidence of any injury due to the Stands' expansion of irrigation into the SESE of section 20.

Welker Ranch misreads *Quigley* by assuming EPR must prove some specific injury resulting from the change, even if the change consisted of expanded acreage. *Quigley* establishes the rule that pre-1973 expansion of acres irrigated is presumptively injurious because the time necessary to irrigate both the original acreage and the new acreage is greater than irrigating only the original acreage. That means even if the flow rate and point of diversion do not change, a greater volume of water presumably is diverted to irrigate the expanded acreage, resulting in a greater burden on the source, which in turn results in harm to junior users. In effect, if an objector proves acreage was expanded, the burden shifts to the appropriator to prove the actual water use did not increase.

⁶ In *Petrich*, the Supreme Court reversed the Water Court's decision to authorize an implied right with elements outside what the district court had decreed, but the reversal was based on issues of fact, with the case remanded for further fact-finding. The Supreme Court did not bar the possibility of such a water right as a matter of law.

In its reply, EPR argues the pre-1973 change statute only authorized changes to the place of use but did not authorize continued irrigation of the original place of use plus expansion to a new place of use. Although EPR's reply correctly states the rule from *Quigley*, the facts are not clear whether or how the Stands' irrigation practices changed after they acquired the SESE of section 20 in 1927. If they expanded their irrigation, the expanded use would be unauthorized under the *Quigley* rule unless Welker Ranch proves lack of injury to other users.

EPR contends POD 3 previously was used only to convey water to the N2S2 of section 20, land now covered by split claim 43B 30103794, which Welker Ranch does not own. To the extent the Stands started irrigating land in the SESE of section 20 after 1927, the facts are not clear whether or how much land continued to be irrigated in the N2S2 of section 20, or whether some portion of the N2S2 was retired when irrigation shifted southward after the 1927 acquisition. While the parties included various maps, they have not stipulated to a chronology of irrigation practices. The parties' arguments indicate there are too many facts at issue to resolve this issue on summary judgment.

3. *Did the owners of claim 6296-00 abandon POD 2 and POD 3?*

The second set of issues EPR asks the Court to address involve whether the Court should deny Welker Ranch's motion to amend on the basis these points of diversion have been abandoned. EPR's motion asks the Court to rule on two abandonment questions, set forth in subparts (4) and (5) of its motion: (4) whether there has been a "prolonged period of non-use of POD 2 and POD 3" and (5) whether the prolonged nonuse period shifted the burden to Welker Ranch to rebut the presumption of intent to abandon. (Doc. 87.00, at 1-2).

a. Abandonment standard.

Under Montana law, a water right is subject to abandonment when an "appropriator or his successor in interest abandons or ceases to use the water for its beneficial use." *Hoon v. Murphy*, 2020 MT 50, ¶ 30, 399 Mont. 110, 460 P.3d 849 (citation omitted). The test to determine whether a water right is abandoned focuses on the intent of the appropriator. *Featherman v. Hennessy*, 42 Mont. 535, 540, 113 P. 751, 753 (1911); *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923). For existing water rights, a long period of nonuse establishes a rebuttable presumption of intent to

abandon the water right.⁷ *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

The burden to prove a sufficiently long period of continuous nonuse to create the rebuttable presumption rests with the party asserting abandonment, in this case EPR. *In re Klamert*, 2019 MT 110, ¶ 15, 395 Mont. 420, 443 P.3d 379. If EPR proves a sufficiently lengthy nonuse period to create the presumption, the burden shifts to the appropriator, here Welker Ranch as the owner of the claim, to prove a lack of intent to abandon. *In re Clark Fork Drainage (City of Deer Lodge)*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). 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 (quotation omitted).

The Water Court has jurisdiction to determine an existing water right is abandoned even if the evidence relevant to abandonment arises after July 1, 1973. Section 85-2-227(3), MCA. The Water Court also authority to determine an existing water right is partially abandoned. Sections 3-7-501(4) and 85-2-227(3), MCA. Partial abandonment means one of the elements of a right is reduced through application of the abandonment test, but the water right as modified remains valid. *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2020 MT 80, ¶ 42, 399 Mont. 431, 461 P.3d 91; *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, 407 Mont. 278, 502 P.3d 1080.

b. What period of nonuse is sufficient to shift the burden of proof as a matter of law?

The Supreme Court has not stated a particular number of years that qualify as a sufficiently “long period” to shift the burden, though it has noted that nine years of nonuse is “very potent evidence” of intent to abandon. *In re Klamert*, 2019 MT 110, ¶ 15, 395 Mont. 420, 443 P.3d 379 (citing *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896)). The only case EPR cites in its motion is *79 Ranch v. Pitsch*. In *79*

⁷ The Water Use Act also specifies a different standard for when a water right is presumed abandoned. § 85-2-404(1) & (2), MCA. However, these subparts do not apply until existing (pre-July 1, 1973) water rights have been included in a final decree. § 85-2-404(6), MCA; *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 434, 666 P.2d 215, 219 (1983) (the Water Use Act abandonment standard “will be applied after all existing water rights have been adjudicated under part 2 of Title 85, MCA”).

Ranch, the water right at issue “had not been used for at least forty, and perhaps as many as sixty successive years.” 204 Mont. 426, 430-31, 666 P.2d 215, 217 (1983). The Supreme Court found this “long period of continuous nonuse” sufficient to shift the burden to the claimant to explain the reasons for nonuse. *Id.* at 432-33, 666 P.2d at 218.

Although the Supreme Court has not stated a specific number of years that causes the burden of proof to shift, the facts regarding nonuse may be a relevant factor. In *City of Deer Lodge*, the Supreme Court held that “uncontradicted evidence” of twenty-three years of continuous nonuse was sufficient to raise a rebuttable presumption of abandonment. *Id.*, 254 Mont. at 16, 833 P.2d at 1123. The Supreme Court also has indicated that the evidence offered to prove nonuse also may be relevant to the determination whether the presumption of abandonment has been rebutted. For example, in *Heavirland* the Supreme Court stated the Water Court should “construe the circumstances surrounding the alleged abandonment—as established by the evidence the parties set forth—to determine whether intent to abandon existed.” *Heavirland*, ¶ 23.

It certainly is possible that if the facts were undisputed and probative, twelve or thirteen years of uncontradicted nonuse could be a sufficient length of time to shift the burden of proof, especially when nine years of nonuse is “potent” evidence. But EPR does not provide the Court with authority to conclude as a matter of law that twelve or thirteen years of nonuse shifts the burden of proof as a matter of law, especially when cases like *Heavirland* involve an inquiry into the factual circumstances of the case.⁸

c. Do the undisputed facts establish twelve or thirteen years of nonuse?

Even if twelve or thirteen years of nonuse is sufficiently long to shift the burden of proof as a matter of law, the parties dispute whether nonuse spanning this period occurred. EPR’s motion sets forth twelve pages of discussion, together with numerous maps based on aerial photographs and other photographs, to support its argument that the facts are undisputed as to the nonuse of POD 2 and POD 3. EPR includes in its discussion reference to the site investigation report prepared by DNRC. EPR also summarizes its factual discussion by stating that neither POD 2 nor POD 3 are “currently capable of diverting or conveying water.” (Doc. 87.00, at 57). At the end of this lengthy discussion

⁸ EPR’s expert Russ Radliff seems to confirm this in his deposition. When asked whether a “long period of time” depends on the circumstances of the case, EPR’s expert answered “Yes.” He went on to assume ten years is a long period without stating the basis for that figure. (Doc. 92.00, at 13, citing transcript).

of the facts, EPR asks the Court to conclude “the *preponderance of the evidence* establishes that POD 2 has not been used in at least 12 years, and POD 3 has not been used in at least 13 years.” (Doc. 87.00, at 57; emphasis added).

Preponderance of evidence is the standard used to describe proof that a factual occurrence “was, is, or will be more probable than not.” *Breuer v. State*, 2023 MT 242, n.14, 414 Mont. 256, 539 P.3d 1147 (citing cases). Preponderance of the evidence is defined as “such evidence as, *when weighed with that opposed to it*, has more convincing force and the greater probability of truth.” *State v. Sebastian*, 2013 MT 347, ¶ 16, 372 Mont. 522, 527, 313 P.3d 198, 203 (emphasis added; citation omitted). However, summary judgment is not the place for the Court to weigh evidence. Instead, summary judgment requires the Court to view evidence in a manner most favorable to the nonmoving party (here Welker Ranch) and to resolve inferences in a particular manner. *See Barrett, Inc. v. City of Red Lodge*, 2020 MT 26, ¶ 8, 398 Mont. 436, 440, 457 P.3d 233, 235 (“[o]n summary judgment, trial courts do not apply a standard of proof or issue findings of fact because, at the summary judgment stage, the parties are not arguing over what happened or presenting conflicting evidence; they merely need to know which of them, under the uncontested facts, is entitled to prevail under the applicable law”) (quotation omitted).

EPR rests its assertion of twelve and thirteen years of nonuse mainly on the aerial photograph analysis conducted by Russ Radliff. Radliff states in his affidavit that based on his review of several aerial photographs, he found no evidence of use of POD 3 after 2011 and POD 2 after 2013. Radliff Aff., ¶¶ 12-13.

Welker Ranch disagrees and responds to the motion by arguing the facts are disputed in at least four respects. First, Welker Ranch submits email correspondence from Mark Talt, a neighboring property owner regarding historical irrigation who recalled POD 2 and POD 3 being used less than twelve or thirteen years ago. (Doc. 90.00, Ex. 6). EPR argues this is hearsay because Welker Ranch did not provide the statements in the form of an affidavit. Even if that is true, Welker Ranch provides additional facts that contradict the Radliff Affidavit.

Second, Welker Ranch references the December 2, 2024 affidavit of Larry Joe Stands that discusses some of the history of irrigation on the Stands property. Stands

describes some irrigation throughout their ownership and states his family has irrigated portions of the south half of section 20 during his lifetime. Stands Aff., ¶ 3. The Stands affidavit contains numerous references to irrigation of the SESE of section 20. For instance, in paragraph 9, the affidavit states: “Throughout my life, there has been a ditch which has run across the SE¼SE¼ and along the east boundary of the NESE of Section 20, which was used for flood irrigation purposes.” *Id.* EPR responds to the Stands affidavit by focusing on the equivocal nature of many of the statements it contains. While this may be true, at the summary judgment stage the Court focuses more on inferences that may be drawn rather than the relative certainty of the statements. So long as the inferences create issues of material fact, summary judgment is not proper.

Third, Welker Ranch cites excerpts from the deposition transcript of EPR’s expert Russ Radliff who referred to a “pumping pit” as part of the infrastructure for POD 3 and its corresponding ditch. Radliff also testified that older aerial photographs indicated irrigation. (*E.g.*, Doc. 87.00, Ex. L). The aerial photograph analysis Radliff prepared for more recent years does not include cross-hatching depicting flood or sprinkler irrigation. But whether Radliff’s photographic interpretation is enough to pin the date that irrigation ceased and shift the burden of proof to Welker Ranch requires the Court to weigh this evidence against the evidence Welker Ranch cited. The place to weigh evidence is at a hearing, not in a summary judgment analysis.

Fourth, Welker Ranch cites excerpts from the deposition testimony of Ben Davis. Davis prepared a report based on a site visit conducted in 2020. Although the deposition testimony is somewhat murky, Davis seems to suggest the ditches were still used in 2013 and were beginning to degrade by 2017. EPR takes issue with this testimony, but for purposes of summary judgment, it is enough of an inference to create an issue of fact as to when nonuse began for purposes of the abandonment standard. The weight of Davis’s testimony can be tested through cross-examination at trial.

In addition to the four categories of factual disputes Welker Ranch raises, the parties’ filings also are not clear as to the effect of the DNRC field investigation report. For instance, EPR’s brief labels some of DNRC’s conclusions as “understatements.” (Doc. 87.00, at 52). Additionally, EPR also filed a lengthy and detailed response that takes issue with several aspects of DNRC’s report. (Doc. 48.00). EPR’s response prevents

the Court from relying on the report to establish undisputed facts necessary to address the legal issues raised in EPR's summary judgment motion.

To summarize, the parties' briefs and supporting documents indicate they have competing views of the evidentiary record. The parties seem to agree POD 2 and POD 3 currently are not being used, but they do not agree on much more in terms of the timing and reasons why use of the points of diversion stopped. Applying the summary judgment evidentiary standard, too many material facts are disputed for the Court to assume sufficient evidence of nonuse has occurred, especially when the factual allegations are viewed in the light most favorable to Welker Ranch, as the Court must do at this stage.

In reaching this conclusion, the Court is not ruling that EPR's facts are not relevant to the issue of nonuse. Nor is the Court providing any comment on the credibility or weight of any of the evidence. Likewise, the Court also is not ruling that the preponderance of evidence standard is not the proper standard for evaluating whatever evidence EPR elects to introduce at trial. Depending on how the evidence is offered and admitted at trial, the facts in EPR's motion may very well be relevant sufficient to shift the burden of proof. But summary judgment is not the place to weigh facts and draw conclusions as to whether an evidentiary standard has been met. That will occur after a hearing is conducted.

ORDER

Therefore, it is ORDERED that EPR's motion for partial summary judgment is DENIED.

The Court will issue a separate order setting a conference to schedule pre-hearing filings and a hearing date.

ELECTRONICALLY SIGNED AND DATED BELOW.

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****Note: Service List Updated 6-23-2026****