

Montana Water Court
PO Box 879
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(406) 586-4364

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

* * * * *

IN THE MATTER OF THE ADJUDICATION
OF THE EXISTING RIGHTS TO THE USE
OF ALL THE WATER, BOTH SURFACE AND
UNDERGROUND, WITHIN THE JEFFERSON
RIVER DRAINAGE AREA, INCLUDING ALL
TRIBUTARIES OF THE JEFFERSON RIVER
IN BROADWATER, GALLATIN, MADISON,
JEFFERSON AND SILVER BOW COUNTIES,
MONTANA.

) CASE NO. 41G-137
) 41G-W-182142-00
) 41G-W-182145-00
) 41G-W-186768-00

FILED

JAN - 4 1994

Montana Water Court

CLAIMANT: Katherine D. Murray, Denison Mines Ltd.(former owners)
Denimil Resources U.S., Inc. (present owners)

OBJECTOR: Katherine D. Murray

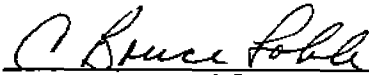
ORDER ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, §85-2-233(4), the above entitled case was assigned to Water Master Michael J. L. Cusick. On April 26, 1993 the Water Master issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. Over ten (10) days have elapsed since service, and no objections to the Findings and Conclusions have been filed by any party.

The Court has reviewed carefully the Water Master's Findings and Conclusions. Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim numbers 41G-W-182142-00, 41G-W-182145-00 and 41G-W-186768-00 as they appear in the Temporary Preliminary Decree of the Jefferson River Basin (41G).

DATED this 4th day of January 1994.


C. Bruce Loble
Chief Water Judge

IN THE WATER COURT OF THE STATE OF MONTANA

* * * * *

FILED

NOTICE OF FILING OF MASTER'S REPORT

APR 26 1993

Montana Water Court

TO: ALL PARTIES

RE: Case 41G-137, claims 41G-W-182142-00, 41G-W-182145-00,
41G-W-186768-00

This is to provide you with Notice that the Water Master has filed a Master's Report (Findings of Fact and Conclusions of Law) with the Clerk of the Water Court for the water right(s) listed above. A copy of the Master's Report is enclosed with this Notice.

Please review this Master's Report carefully. If there are any corrections or changes that need to be made, you have 10 days from service of this Notice to file a written objection. You must mail a copy of your written objection to all the other parties who have been involved in this proceeding and file a certificate of such mailing with the Water Court. (This procedure is required by Rule 1.II. Water Right Claims Examination Rules and by Rules 5 and 53 of the Montana Rules of Civil Procedure.)

DATED this 26th day of April 1993.

LORI M. BURNHAM
Clerk of Court
Montana Water Court
P. O. Box 879
Bozeman, MT 59771-0879
(406) 586-4364
1-800-624-3270 (in Montana)

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
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IN THE MATTER OF THE ADJUDICATION
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APR 26 1993

Montana Water Court

CLAIMANT: Katherine D. Murray, Denison Mines Ltd. (former owners)
Denimil Resources U.S., Inc. (present owners)

OBJECTOR: Katherine D. Murray

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
AND MASTER'S REPORT

On March 18, 1993, the objector and co-claimant, Katherine D. Murray, filed a motion requesting the Water Court to enter an order declaring that the facts stated in her Corrected Second Requests for Admission of Facts be deemed admitted pursuant to Rule 36(a), M.R.Civ.P. The grounds stated for the motion are that the opposing party, co-claimant Denimil Resources (U.S.), Inc. [Denimil], has failed to respond to the requests. This motion was accompanied by a second motion requesting the Court to enter an order declaring Katherine D. Murray to be the sole owner of water right claims 41G-W-182142-00, 41G-W-182145-00 and 41G-W-186768-00.

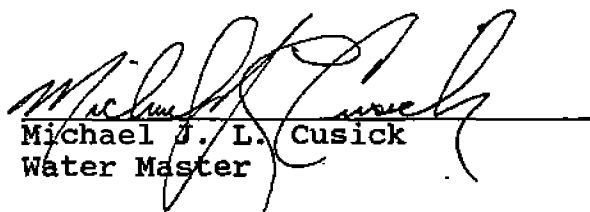
These combined motions have the effect of a motion for summary judgment under Rule 56(c), M.R.Civ.P. The objector certified that a copy of the motion was served upon Denimil Resources (U.S.), Inc. and its agent George Agiorgitis by mail on March 15, 1993. Over 10 days, plus an additional 3 days for

service by mail, have elapsed since the filing of the motions.

Pursuant to Rule 53(c), M.R.Civ.P. and Rule 1.II(4), Water Right Claim Examination Rules, and in light of Denimil's failure to respond to objector's discovery requests, the facts stated in objector's Corrected Second Requests for Admission of Facts are DEEMED ADMITTED under Rule 36(a), M.R.Civ.P., and it is

ORDERED that the objector's, motion for summary judgment is hereby GRANTED for the reasons set forth in the accompanying memorandum.

DATED this 22nd day of April 1993.


Michael J. L. Cusick
Water Master

MEMORANDUM

I. Statement of the Case

Katherine D. Murray, William B. Murray and Denison Mines filed Statements of Claim for Existing Water Rights numbers 41G-W-182142-00, 41G-W-182145-00 and 41G-W-186768-00. The front page of the Statements of Claim indicate that these claims were owned by the Murrays, and addenda to the Statements of Claim indicated that Denison Mines was an additional co-owner of these claimed water rights.

A Water Right Transfer Certificate filed on April 6, 1990 indicates that William Murray's interest in these water right claims was transferred to Katherine D. Murray pursuant to a decree of distribution from her husband's estate.

The Temporary Preliminary Decree of the Jefferson River Basin (41G), issued on October 17, 1989, indicated that Denison Mines was a co-owner of these water right claims. Katherine Murray filed an objection to the ownership appearing in the decree, alleging that Denison Mines had only a leasehold interest in the mining claims to which these water right claims are appurtenant and that ownership of the water rights should be solely in her name. Mrs. Murray further alleged that the reason Denison Mines appeared as a co-owner was because Denison Mines requested that its attorney file these Statements of Claim on behalf of itself and the Murrays and the attorney subsequently listed all parties as co-owners.

On June 29, 1992 Mrs. Murray filed a motion with the Water Court requesting the Court to remove Denison Mines from the

ownership records of these claims. In support of this motion, Mrs. Murray attached a letter, allegedly written by Denison Mines and directed to her, indicating that Denison Mines no longer had any interest in these claims. The letter states that "Denison conveyed any and all of its interests, including any interest in the water rights, to Denimil [Denimil Resources (U.S.), Inc., hereinafter referred to as Denimil]. We are able to confirm that Denison did not retain any interest in the Water Rights." Denison Mines did not respond to the motion nor did Denimil, Denison Mines' apparent successor-in-interest according to the letter. The Court treated the motion as one for summary judgment under Rule 56, M.R.Civ.P. Because the prima facie validity of the ownership record attested to in the statement of claim created an inherent factual issue regarding ownership, and because the movant did not present further competent evidence demonstrating that no genuine factual issues regarding ownership existed, the Court denied the motion. (See Order On Motion for Summary Judgment and Setting Status Conference, Case 41G-137, July 21, 1992.) Furthermore, at the time the motion was denied, the ownership record was still unclear.

On August 18, 1992 a Water Right Transfer Certificate was filed indicating that Denison Mines interest in these water right claims was transferred to Denimil Resources (U.S.), Inc.

After denial of her first motion for summary judgment, the objector Katherine Murray made several discovery requests upon Denimil regarding the basis of its co-ownership of these water right claims. At one point during discovery, Mrs. Murray moved the

Court for an Order Compelling Discovery directing Denimil to respond to certain interrogatories with complete and non-evasive answers. Denimil did not respond to the motion. The Court deemed the motion well taken pursuant to Rule 2, Montana Uniform District Court Rules and issued an Order Compelling Discovery.

On January 28, 1993, objector Katherine Murray certified that she served a copy of objector's Corrected Second Requests for Admission of Facts and Interrogatories by mail upon Denimil Resources (U.S.), Inc. and its agent George Agiorgitis. Denimil has not responded to this discovery request.

On March 18, 1993, the objector and co-claimant Katherine D. Murray filed a motion requesting the Water Court to declare the facts stated in her Corrected Second Requests for Admission of Facts admitted pursuant to Rule 36(a), M.R.Civ.P. The grounds stated for the motion are that Denimil failed to respond to the requests within the time allotted in Rule 36. This motion was accompanied by a second motion requesting the Court to enter an order declaring Katherine D. Murray to be the sole owner of water right claims 41G-W-182142-00, 41G-W-182145-00 and 41G-W-186768-00. Denimil has not responded to either motion.

II. Discussion

The combined motions filed on March 18, 1993 are in essence a single motion for summary judgment. See e.g. Bretz v. Ayers, 232 Mont. 132, 756 P.2d 1115 (1988). The Court shall render judgment in favor of the party requesting summary judgment if the

record demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Once the moving party has sufficiently demonstrated the absence of any genuine material fact issues, the burden shifts to the non-moving party to demonstrate the existence of material fact issues rendering summary judgment improper. See Thelen v. City of Billings, 238 Mont. 82, 776 P.2d 520 (1989).

Generally, failure to file a reply brief to an adverse motion is considered an admission that the motion is well taken. Rule 2(b), Montana Uniform District Court Rules. However, in the case of summary judgment, Rule 56(c) contemplates that the party opposing the motion may serve opposing affidavits raising a genuine fact issue up until the day prior to hearing. Thus, the general rule is that where the motion is one for summary judgment, the essential question for the Court is whether a genuine issue of material fact exists, and this question cannot be decided on a mere technical fact, such as the failure to file briefs on time. Cole v. Flathead County, 236 Mont. 412, 771 P.2d 97 (1989). Because the central question is whether a factual issue exists, and because a factual issue may be raised by opposing affidavits served the day prior to the time set for hearing, the general rule is that unless the right to a hearing on a Rule 56 motion is specifically waived by all parties, either the movant or the adverse parties are entitled to a hearing in the ordinary case. Cole, 236 Mont. at 419. Simply failing to file briefs on time does not amount to a specific waiver of the right to a hearing under Cole.

The facts presented in this case can be distinguished from Cole. Here, the opposing party not only failed to respond to the objector's motion for summary judgment, but this failure is coupled with an intermediate failure to respond in a timely manner to a discovery request made pursuant to Rule 36, M.R.Civ.P. Failure to respond to a Rule 36 request carries with it consequences independent of Uniform District Court Rule 2. Rule 36(a) provides that a request for admission is deemed admitted unless answered or objected to within thirty days after service of the request. Rule 36(b), M.R.Civ.P. then provides that "any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . ." (Emphasis added.)

Admissions obtained by use of Rule 36 may show that there is no genuine issue of material fact and justify the entry of summary judgment. Holmes & Turner v. Steer-In, 222 Mont. 282, 721 P.2d 1276 (1986); Morast v. Auble, 164 Mont. 100, 519 P.2d 157 (1974), citing 8 Wright & Miller, Federal Practice and Procedure: Civil Section 2264. In Holmes, the sole factual allegation in the complaint was as follows:

Defendants, and each of them, owe plaintiff SIX THOUSAND THREE HUNDRED THIRTY FIVE DOLLARS (\$6,335.00) for accounting services rendered by plaintiff to defendants, and each of them, between July 15, 1980 and January 5, 1981, with interest at the rate of eighteen percent (18%) per annum.

Defendants denied this allegation in their answer and alternatively pled the affirmative defense of failure of consideration. Later,

the plaintiffs made the following request for admission pursuant to Rule 36 M.R.Civ.P.:

Admit that the Defendant Steer-In owes Plaintiff the sum of \$6,335 plus interest at the rate of 18% per annum for accounting services rendered by Plaintiff to Defendant between July 15, 1980 and January 5, 1981.

Over eight months passed between the time Steer-In was served with the request and when the Court issued its Order deeming the facts in the request admitted and granting summary judgment to the plaintiff. The Supreme Court affirmed, holding that summary judgment based on a fact deemed established by the operation of Rule 36, M.R.Civ.P. was proper. The Court reasoned that once the particular request was admitted, there could no longer be any issues of fact for determination at trial. The Court further noted that "the very purpose of Rule 36 is to lessen the time of trial and ultimately to set the stage for summary judgment." Holmes, 222 Mont. at 285.

The Court's decisions in Holmes and the cases preceding it predated its decision in Cole. Furthermore, the issue of the necessity for setting a hearing was not raised by any of the parties in Holmes, and consequently was not discussed in the decision. However, Cole does recognize that there are possible exceptions to the hearing requirement:

. . . unless the right to a hearing on a Rule 56 motion is specifically waived by all parties (and not waived simply by the failure to file briefs) either the movant or the adverse parties are entitled to a hearing under Rule 56 in the ordinary case. There may be an occasion when under the law and the

facts adduced, the movant would be so clearly entitled as a matter of law to a summary judgment that a district court might by order dispense with the necessity of a hearing.

Cole, 236 Mont. at 419 (Emphasis added). A grant of summary judgment without a hearing based on facts deemed admitted under Rule 36 can be reconciled with Cole under this exception. Because the facts deemed admitted in Holmes involved the ultimate issue in the case, the situation presented there clearly falls under the exception stated in Cole. Similarly, in this case, the sole allegation made in the objection of Katherine Murray is that she is the exclusive owner of these water right claims. Requests for Admission Nos. 21 and 22 of objector's Corrected Second Request for Admission of Facts and Interrogatories states as follows:

REQUEST FOR ADMISSION NO. 21:

Denimil admits that when Denison Mines caused its law firm, Crowley Law Firm of Billings, to prepare and file with the Water Court in 1982 Statements of Claim for Existing Water Rights, including the three water rights here at issue, Denison Mines was acting as lessee on behalf of the owners of the property, and that the effect of such filing was to elucidate the water rights, decreed or undecreed, described on Page 1 of Exhibit 1 as forming part of the leased property.

REQUEST FOR ADMISSION NO. 22:

Denimil admits that since the lease term of the Murray's contract with Vitrain dated March 3, 1977, Exhibit 1, as extended to December 31, 1992 by Denimil's agreement with Katherine Murray September 28, 1984, Exhibit 3, terminated automatically on December 31, 1992, not only the patented mining claims and mill sites but also water right Nos. 41G-W-182145, 41G-W-182145 and 41G-W-186768 belong solely to Ktherine [sic] Murray, the lessor, free from any claim by Denimil.

By attempting to solicit these admissions from Denimil, the objector is attempting to demonstrate that no genuine factual issues exist regarding the ownership of these water right claims. By failing to respond to the above request, Denimil has admitted the ultimate fact issue in this case. A fact deemed admitted by the operation of Rule 36, M.R.Civ.P. is conclusively established. The burden has now shifted to Denimil to raise a genuine material fact issue regarding ownership. Thelen, 238 Mont. at 85.

To do this, Denimil must file late answers to the requests for admissions. A party has no absolute right to file late answers to requests for admissions. The matter rests within the discretion of the trial court, and the court's decision will not be disturbed in the absence of a manifest abuse of discretion. Rule 36, M.R.Civ.P.; Swenson v. Buffalo Building Co., 194 Mont. 141, 635 P.2d 978 (1981). Furthermore, the Court notes that on numerous occasions, Denimil has failed to respond in a timely manner to objector's motions and discovery requests. Generally, a "last minute" tender of relevant discovery materials by a dilatory party cannot cure a problem previously created by that party. Dassori v. Roy Stanley Chevrolet Co., 224 Mont. 178, 181, 728 P.2d 430 (1986).

The necessity for setting a hearing--thereby enabling Denimil to file affidavits raising a factual issue up until the day prior thereto--is moot as the ultimate fact issue in this case has already been admitted. Denimil can raise a factual issue only by permission of the court allowing Denimil to file late responses. As of this date, Denimil has made no such requests. Therefore, as stated

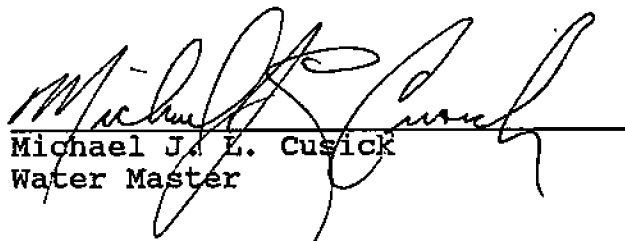
in the order preceding this memorandum, the facts stated in objector's Corrected Second Requests for Admission of Facts are DEEMED ADMITTED, and objector's motion for summary judgment is GRANTED.

MASTER'S REPORT

Pursuant to the above Order Granting Motion for Summary Judgment and Memorandum, and in accordance with Rule 53, M.R.Civ.P., the Master makes the following conclusions and recommendations to the Court:

The current ownership record of water right claims 41G-W-182142-00, 41G-W-182145-00 and 41G-W-186768-00, as based on the water right transfer certificates on file and the ownership appearing in the Temporary Preliminary Decree of the Jefferson River Basin (41G), is incorrect. The ownership record should be changed to reflect that Katherine D. Murray is the sole owner of water right claims 41G-W-182142-00, 41G-W-182145-00 and 41G-W-186768-00.

DATED this 22nd day of April 1993.


Michael J. L. Cusick
Water Master

CERTIFICATE OF SERVICE


I, Janet Fulcher, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER, MEMORANDUM AND MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Katherine D. Murray
5670 S.W. Menefee Dr.
Portland, OR 97201

George Agiorgitis
Denimil Resources U.S., Inc.
Nikolaiweg 9, 6100 Darmstadt
Germany

Denimil Resources U.S., Inc.
1626 W. Wisconsin Ave.
Milwaukee, WI 53233

DATED this 26 day of April 1993.


Janet Fulcher
Deputy Clerk of Court