

**FILED**

NOV 22 2016

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION SHOSHONE RIVER - BASIN 43N

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CLAIMANT: Betty Jean Zier; David D. Zier

OBJECTOR: Apsaalooke (Crow) Tribe

**CASE 43N-3**  
43N 20238-00  
43N 20239-00

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**I. STATEMENT OF THE CASE**

This matter involves two water rights owned by Betty Jean Zier and David D. Zier (“Zier” or “the Ziers”). The Ziers are successors to Clarence Parker, the original claimant of both rights. The Apsaalooke (Crow) Tribe objected to all elements of the Ziers’ rights. By the time of trial, the Tribe’s objections had narrowed to an assertion that both rights had been abandoned. Zier acknowledges non-use of both rights, but asserts there was no intent to abandon, and therefore no abandonment.

**II. ISSUES**

1. Did the evidence show a prolonged period of non-use for the Zier rights?
2. If a prolonged period of non-use was established, did the Ziers rebut the presumption of abandonment?

**III. FINDINGS OF FACT**

These findings of fact are based on a preponderance of the evidence.

Claim 43N 20238-00 is an irrigation claim filed by Clarence Parker for waste water from irrigation on a neighbor’s property to the north. The neighbor’s ranch has had a number of names over the years, but is referred to as the Allen Ranch in this Order.

The Allen Ranch used water from Sage Creek to irrigate lands located immediately north of Parker's property.

Flood irrigation by the Allen Ranch caused excess water, known as waste water, to run south onto Parker's land where Parker used it for flood irrigation in the SW1/4 of Section 24. This practice originated with Parker's predecessor, R. S. Smith, who filed a notice of appropriation for waste water in 1918. This notice of appropriation is the basis for the claim's July 13, 1918 priority date.

Clarence Parker filed a second irrigation claim, 43N 20239-00, for water from a developed spring. Documents attached to the claim show the source was originally a shallow well, approximately thirty feet deep. The well was located on Parker's property near his northern border. The pump used to extract water from this well is not operable and has not been operable for many years.

Parker eventually dug an open pit adjacent to the well into which groundwater seeped. Over time, the pit was enlarged by removal of aggregate and gravel for use on local roads, and the pit became a pond. As groundwater seeped into the pond, it was pumped out and used to irrigate Parker's land. The priority date of claim 43N 20239-00 is July 29, 1970.

Parker died in 1999, and his wife passed away several years later.

In the 1970s the Allen Ranch changed from flood to sprinkler irrigation. The Allen Ranch discontinued flood irrigation on its land immediately north of the Parker place and shifted to irrigation using pivots located further north and east. These pivots are visible on Exhibit O-26.

The conversion to pivot irrigation by the Allen Ranch was accompanied by the drilling of a well south of the Parker property in about 1977. This well supplied some of the pivots Allen installed.

The shift in irrigation practices on the Allen Ranch changed the availability of water on the Parker property. The factors contributing to this change included the conversion from flood to sprinkler irrigation, which reduced return flows and therefore

the availability of waste water; the change in irrigation location on the Allen Ranch; and the use of Allen's new well, which drew from groundwater that supplied Parker's pond.

As a consequence of these changes, Parker no longer had waste water available for claim 43N 20238-00, and irrigation using that source was discontinued. Similarly, the supply of groundwater used to fill Parker's pond became inadequate. Therefore, irrigation using the source claimed for 43N 20239-00 also ceased.

To mitigate these problems, Parker and the Allen Ranch made an arrangement to irrigate the Parker place from a different source. The new source was diversions from Sage Creek water diverted via the Stevens Ditch.

Use of the Stevens Ditch ended when it was obliterated by installation of a pivot on the Allen Ranch. Sage Creek water was then delivered using another ditch to the west which entered the Parker place near the location of the pond.

The Tribe asserts irrigation on the Parker place ceased in 1978, and supported its assertion with a series of aerial photos and testimony from its expert witness, Mr. Bill Bishop.

The Ziers addressed the Tribe's challenge with testimony from Doug Parker and Merrill Pfeifer.

Clarence Parker's son, Doug Parker, is a physician in Billings. Dr. Parker irrigated his father's place from 1970 to 1985. He used an eight-inch pipe and handline, and irrigated east, west, and south of the pond. Dr. Parker indicated that the source of water used on the Parker place was Sage Creek, and that the pit used in conjunction with claim 43N 20239-00 dried up in the late 1970s.

Merrill Pfeifer was Parker's neighbor who began helping Clarence Parker with irrigation in the early 1980s. He irrigated with Sage Creek water delivered from the north. Mr. Pfeifer did not irrigate with water from the pond, or with waste water from the Allen Ranch using claim 43N 20238-00. His method of irrigation was flood, and he did not use pipe or handline. Mr. Pfeifer testified that he last irrigated in the early 2000s and that he quit irrigating because there was no water. He went back to using the Parker place for dryland pasture only, and put in a second well for livestock.

The testimony of Dr. Parker and Mr. Pfeifer was credible, and served to rebut the Tribe's assertion that irrigation ceased altogether in 1978. There was not, however, any evidence of irrigation on the Parker place after the early 2000s.

The waste water source upon which claim 43N 20238-00 was based has not been used since the late 1970s or early 1980s. While irrigation did occur on the Parker place after this date, the source was Sage Creek water delivered to Parker by the Allen Ranch when it had excess water available. This interim practice ended in the early 2000s and no irrigation of any kind has occurred on the place of use for claim 43N 20238-00 in approximately fifteen years.

Groundwater has not been used in conjunction with claim 43N 20239-00 since the late 1970s, a period of over thirty-five years. The substitute source of supply for this right was also excess Allen Ranch water from Sage Creek. No irrigation of any kind has occurred on the place of use for claim 43N 20239-00 in approximately fifteen years.

The foregoing changes to the points of diversion and sources for both claims occurred after passage of the 1973 Water Use Act. Neither Parker nor the Ziers filed change applications with the DNRC seeking modification of the point of diversion or source for either claim.

Mr. Zier and Dr. Parker described the delivery of Sage Creek water to the Parker place as an accommodation made by the Allen Ranch because it had drilled a competing groundwater well and engaged in other activity that impeded Parker's ability to irrigate. Clarence Parker and the Ziers did not assert a priority date senior to the Allen Ranch.

The irrigation system on the Parker property is not presently operable and the pipe and handline used by Dr. Parker were disposed of many years ago.

The Ziers have not irrigated the Parker place. Mr. Zier tried to contact the present owners of the Allen Ranch about getting water but was unsuccessful. He also tried to visit the headgates used by the Allen Ranch on Sage Creek, but access to those headgates was blocked by the Tribe.

Despite the lack of irrigation on the Parker place over a prolonged period, Mr. Zier asserts that he and Mrs. Zier did not have intent to abandon the water rights claimed by Clarence Parker.

#### IV. APPLICABLE LAW

##### *The Law of Abandonment*

A central purpose of Montana water policy is allocation of a scarce resource. “It is the policy of this state ... to encourage the wise use of the state’s water resources by making them available for appropriation ... and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people ....” § 85-2-101(3), MCA. Abandonment law facilitates efficient resource allocation by limiting the rights of those who do not apply water to beneficial use.

“The controlling principle upon which water ‘rights’ in Montana are perfected and continue to possess legal validity is that of beneficial use; water rights cease when the water is no longer applied to a beneficial use.” *In re Musselshell River Drainage Area*, 255 Mont. 43, 47, 840 P.2d 577, 579 (1992) (citing *Power v. Switzer*, 21 Mont. 523, 55 P. 32 (1898)). “[I]t is a principle, quite uniformly recognized, that when once an appropriation of water has been completed, the courts will not lightly decree an abandonment of a property so valuable in a semi-arid region such as this.” *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923) (citations omitted).

“To constitute abandonment there must be a concurrence of act and intent--the relinquishment of possession and the intent not to resume it for a beneficial use.... Neither an intention to abandon nor nonuser is sufficient; the union of both is indispensable to constitute abandonment.” *Thomas*, 66 Mont. at 167, 213 P. at 599 (citations omitted).

There is no enforceable statute defining the length of non-use required to establish a presumption of abandonment. Section 85-2-404(2), MCA references a 10-year period of non-use, but does not become enforceable until the Water Court issues final decrees.

Under Montana case law, nine years of non-use is “certainly very potent evidence, if it stood alone, of an intention to abandon.” *Smith v. Hope Mining Co.*, 18 Mont. 432,

438, 45 P. 632, 634 (1896). An approximately 23-year period of non-use raised a rebuttable presumption of abandonment in *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). In *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 56, 375 Mont. 327, 328 P.3d 644, a period of non-use ranging from 18 to 29 years was sufficient to raise a presumption of abandonment. In *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983), a 40-year period raised a presumption of abandonment, and in *Holmstrom Land Co. v. Meagher County Newlan Creek Water District*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1979) it was 75 years.

“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 433, 666 P.2d at 218 (citations omitted). Owners of water rights rarely acknowledge intent to abandon their claims, and intent can therefore be difficult to prove. Accordingly, “intent need not be proved directly but may be inferred from all the circumstances of the case.” *Denver by Bd. of Water Comm’rs v. Snake River Water Dist.*, 788 P.2d 772, 776 (Colo. 1990). “[S]tatements of intent by the owner of the water rights are insufficient by themselves to rebut a presumption of abandonment.” *Beaver Park Water, Inc. v. City of Victor*, 649 P.2d 300, 302 (Colo. 1982) (citations omitted).

“To successfully rebut a presumption of abandonment, a claimant must produce ‘[s]pecific evidence explaining or excusing the long period of non-use of the particular water rights on the specific property....’” *Heavirland v. State*, 2013 MT 313, ¶ 32, 372 Mont. 300, 311 P.3d 813 (quoting *Musselshell River*, 255 Mont. at 51, 840 P.2d at 582). “[C]onclusory statements concerning a variety of negative factors” are insufficient to meet the claimant’s burden. *Musselshell River*, 255 Mont. at 52, 840 P.2d at 582.

Abandonment is a question of fact, and “determining whether a water right has been abandoned requires weighing all of the relevant factual circumstances of the case.” *Heavirland*, ¶ 32.

## V. ANALYSIS

The evidence establishes two separate types of non-use for the Zier rights. The most recent is a 15-year period during which no irrigation of any kind occurred. That 15-year period was preceded by an even longer period during which the original sources of water and points of diversion for these rights were not used, and an alternate supply from Sage Creek was temporarily substituted.

Each of these periods of non-use are, by themselves, long enough to establish a rebuttable presumption of abandonment.

Once a rebuttable presumption has been established, the claimant must either produce evidence to show that the period of non-use was not as long as that asserted by the objector, or produce evidence showing a lack of intent to abandon in the face of non-use. The claimants have not met either of these objectives.

The claimants' witnesses established both a 15-year period of total non-use, and an interim period when irrigation occurred, but the originally-claimed sources and points of diversion for the Zier claims were not used.

Mr. Zier asserts that even though non-use has been occurring for a long time, he and his wife, and Clarence Parker before them, did not intend to abandon their rights. Mr. Zier's assertion is undoubtedly true. Mr. Zier was a credible witness, and this Court has no reason to doubt the sincerity of his assertions regarding intent.

Claimants often do not acknowledge intent to abandon their rights. Few water rights would ever be abandoned if an assertion of lack of intent alone was enough to stop abandonment of a water right. For this reason, the law allows intent to abandon to be inferred from the facts and circumstances of the case. Intent, or lack of intent, can be drawn from the actions and inactions of the claimants and their predecessors.

Here, Parker had a handshake agreement with the Allen Ranch to use replacement water from Sage Creek when water became unavailable from the sources he originally claimed. Unfortunately, that agreement was not accompanied by an effort to file a change application with the DNRC for the approval of a conversion from the original sources to the replacement source. A change application was required by statute. § 85-2-

302, MCA. Without an approved change application, Parker had no legal right to divert water from Sage Creek. The failure to comply with applicable law is evidence of intent to abandon a water right because Parker took no action to secure a lawful and permanent alternate supply once his primary sources became unavailable.

Parker and the Ziers did not make efforts to restore their original sources of water. They agreed to subordinate their rights by accepting water left over from Sage Creek after the Allen Ranch had satisfied its irrigation needs. And, although irrigation directly from Sage Creek continued for some time, it too eventually ceased. Even if the period of non-use was shortened when the claimants used an alternative source, there was still a 15-year period of non-use.

The 15-year period of non-use was not the only evidence of intent to abandon. Additional evidence included sale or disposal of irrigation equipment, failure to replace an inoperable pump, failure to maintain existing ditches, failure to pursue a meaningful and permanent solution to address the inability to irrigate, and the lack of a plan to resume irrigation in the future.

After irrigation ceased altogether, Mr. Zier made a few enquiries about water to the Allen Ranch. These enquiries were apparently ignored and Mr. Zier did not pursue them further. Mr. Zier also made one unsuccessful attempt to drive to the Allen Ranch headgate on Sage Creek. Other than that, there was no meaningful effort to restore irrigation on the Parker property, and no plans were identified to do so in the future. The Ziers made no commitment to irrigate in the future, and there were no investments made to resume irrigation. As matters presently stand, there is no indication that the Parker property will ever be irrigated again.

In summary, the Ziers' actions were not sufficient to rebut the presumption of abandonment, and the lack of action by both Parker and Zier, in the face of a protracted inability to irrigate, reinforced the notion that they accepted the loss of their water rights, despite Zier's present assertions to the contrary.

Zier contends he should not be penalized for a lack of water availability caused by his neighbor. Case law suggests that inability to irrigate caused by lack of water may toll



abandonment of a water right. *Federal Land Bank v. Morris*, 112 Mont. 445, 453, 116 P.2d 1007, 1010 (1941). There is also at least one federal case where a court determined that a shortage of water caused by other users does not lead to abandonment. *Morris v. Bean*, 146 F. 423 (D. Mont. 1906).

According to the Ziers, their water shortage was caused primarily by the actions of the Allen Ranch. Those activities included the cessation of flood irrigation on the lands immediately north of the Parker place, the conversion from flood to sprinkler irrigation, which changed return flows and groundwater recharge, and the drilling of a well, which interfered with the flow of Parker's well and groundwater pit.

Although the Ziers are correct that abandonment cannot occur when water is unavailable, this exception applies to shortages caused by natural drought or illegal expansion of competing water rights. *Federal Land Bank*, 112 Mont. at 453, 116 P.2d at 1010; *Morris v. Bean*, 146 F. at 434. These cases did not toll abandonment arising from shortages caused by the lawful diversions of other irrigators.

The Ziers did not show that Allen Ranch was using water unlawfully, or that they challenged such use if it was unlawful. Allen Ranch was not perpetually obliged to flood irrigate its land immediately north of the Parker place so that Parker could have a reliable supply of waste water. Likewise, Allen Ranch was not obligated to forego conversion from flood to sprinkler irrigation on other lands simply to protect Parker, provided such conversion otherwise complied with applicable law.

As for Allen Ranch's use of its well, there is no evidence that the well was unlawful, or that either Parker or the Ziers ever asked Allen Ranch to stop using the well because of impacts to their own well or pit. Rather than assert his senior priority and demand use of the well be curtailed, Parker agreed to accept leftover Allen Ranch water from Sage Creek. While that may have been a practical neighborly accommodation at the time, it was also a violation of the Water Use Act, and an acknowledgment that Parker no longer intended to use water from the sources he claimed.

## VI. CONCLUSIONS OF LAW

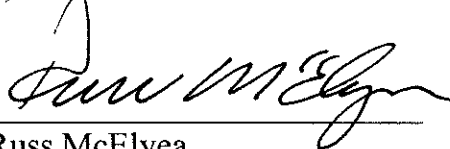
The Zier rights were not used for a prolonged period of time. This period of non-use gave rise to a rebuttable presumption that those rights were abandoned.

The Ziers did not successfully rebut the presumption of abandonment. Although Mr. Zier made a modest effort to address his inability to irrigate, those efforts were not enough to overcome the presumption of abandonment created by a prolonged period of non-use.

## VII. ORDER

Claims 43N 20238-00 and 43N 20239-00 have been abandoned and shall not appear in the final decree for Basin 43N.

DATED this 22<sup>nd</sup> day of November, 2016.

  
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Russ McElyea  
Chief Water Judge

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