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Hughes v. Hughes, 305 P.3d 772 (Mont. 2013)

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The second question the Court addressed was whether the water court properly held the claimants presented adequate evidence to show they did not intend to abandon their water right. The State argued the evidence presented was insufficient because (i) the claimants did not offer adequate evidence to show Ray stopped irrigating his property because of his age or health; and (ii) the connection of three-phase power to the property did not necessarily indicate intent to install a pivot irrigation system.

The Court held the claimants' presentation of the difficulty of flood irrigation on the property, coupled with Lyle's testimony regarding his father's age and health, were sufficient to overcome the presumption of abandonment. The Court stated there was no reason to doubt Lyle's statements about his father and the property. The Court also found Ray's installation of a pivot irrigation system was proof enough of his father's belief that Lyle would want to use that type of system. The Court also stated that Lyle's subsequent irrigation with the new system supported the notion that the Weists did not intend to abandon the water right. Weighing the evidence presented in its totality, the Court held the water court correctly concluded that the water master erred in finding a lack of sufficient evidence to rebut the presumption of intent to abandon the water right.

The Court therefore affirmed the water court's decision to apply *79 Ranch* retroactively. The Court also affirmed the water court's conclusion that the claimants presented evidence sufficient to justify the decades-long nonuse and, therefore, enough to rebut the presumption of abandonment.

Lauren Bushong

Hughes v. Hughes, 305 P.3d 772 (Mont. 2013) (holding (i) the lower court had jurisdiction to adjudicate the alleged stock water easement; (ii) partition of land does not extinguish existing water rights on other land unless the parties intended such a result; and (iii) an implied easement was the appropriate remedy to allow continued use of the stock water right).

The Supreme Court of Montana ("Court") reviewed various complaints Jack and Shirley Hughes ("Jack") filed against their son, Johnny Hughes ("Johnny"). The Tenth Judicial District Court ("lower court") consolidated Jack's complaints, which concerned money he loaned to Johnny, an alleged stock water easement following a partition of jointly-owned land, and a disputed pasture lease. The lower court found in favor of Johnny on all matters except the water rights issue. Jack appealed the non-water issues and Johnny cross-appealed the stock water issue.

These disputes arose in the wake of a falling-out between Jack and Johnny and the subsequent referee-supervised property partition. In separate deeds dated 1984, 1985, and 1986, Jack granted Johnny an undivided fifty-six percent interest in Melby Ranch but retained a life estate in the buildings and improvements. Thus, at the time of partition in 2011, Jack and Johnny owned Melby Ranch as tenants in common. In light of their falling-out, the parties engaged three referees to partition the land. Jack and Johnny agreed that Johnny would receive the section of Melby Ranch that included Flatwillow Creek although Jack had previously acquired an adjudicated water right to use Flatwillow Creek for stock water purposes. The parties agreed to fence their boundaries to better

reflect the partition. However, the parties did not specify how this partition would affect Jack's stock water right, which he used to sustain his cattle business on land not subject to the partition. In his complaint, Jack sought an easement either to allow his cattle access to Flatwillow Creek or to construct a pipe to bring water across Johnny's parcel. Johnny opposed, arguing that the partition agreement did not provide for a stock water easement.

The lower court granted Jack a water gap through the fence and over Johnny's land, but in the same order determined it lacked jurisdiction over the water issue. When the parties asked for clarification, the lower court stated it no longer had jurisdiction to grant the water gap. Johnny thereafter appealed the original order granting Jack a water gap.

After resolving the non-water issues, the Court discussed the lower court's jurisdiction and found it well-established that district courts have jurisdiction to supervise already-adjudicated water rights. Jack possessed rights to use Flatwillow Creek for stock water through J&S Family Limited Partnership. The Court also stated that, regardless of the lower court's jurisdiction over water rights, an easement is a legally distinct property right. For these reasons, the Court concluded the lower court possessed the jurisdiction to determine whether Jack held an implied easement to continue using Flatwillow Creek.

Jack argued he possessed an implied easement by existing use over Johnny's part of the partitioned land. The Court first recited the three elements for the creation of an easement by existing use: (i) prior unity of ownership of the two parcels, (ii) severance, and (iii) an apparent, continuous, and reasonably necessary use of the land for the easement-holder's beneficial use and enjoyment. Neither party disputed these factors and the Court therefore held that Jack originally owned both parcels, the partition severed that ownership, and access across Johnny's section was reasonably necessary for Jack to exercise his stock water right.

The crux of the dispute rested on whether Jack and Johnny intended Jack's use of Flatwillow Creek to continue after the land partition. Jack did not have access to any other source for stock water besides Flatwillow Creek. The Court observed that Johnny, at the time of the partition negotiations, knew Jack possessed the water right and had no other source from which to use it. The Court also noted that nothing in the record suggested Jack intended to stop using Flatwillow Creek for his cattle. The Court reasoned that if the partition excluded Jack from exercising his water rights then the partition agreement would be inequitable and could not stand. As a result, the Court held the record supported Jack's implied easement by existing use because both he and Johnny intended the stock water use to continue after severance of the two parcels.

In opposition, Johnny further argued that Jack surrendered his water rights to Flatwillow Creek when he agreed to the partition. As Johnny argued, the partition identified and valued the two parcels of land as "dry pastureland" and "irrigated land." Jack granted Johnny all of the available irrigated land, including Flatwillow Creek. As a result, Johnny argued, Jack consciously gave up his stock water right. However, the Court disagreed and found that Johnny's argument overlooked the fact that Jack's water rights benefited land not subject to the partition.

The Supreme Court therefore concluded that, by agreeing to the partition, Jack did not intend to give away his water rights used on land not included in the agreement. The Court remanded the issue to the lower court to determine the best and most equitable way to provide Jack access to Flatwillow Creek.

Allison Robinette

NEBRASKA

Middle Niobrara Natural Res. Dist. v. Dep't of Natural Res., 838 N.W.2d 242 (Neb. 2013) (holding the Natural Resources Districts' allegations lacked standing because they did not allege any legal right, title, or interest in the subject water of the Niobrara River and Thomas Higgins' allegations lacked standing because the harm was speculative and not distinguishable from the harm that would be caused to any other landholder within the natural resources district).

The Middle and Lower Natural Resources Districts ("NRDs") and Thomas Higgins unsuccessfully appealed to the Supreme Court of Nebraska ("Court") the Department of Natural Resources' ("DNR") dismissal of their action for lack of standing. The purpose of the action was to object to Nebraska Public Power District's ("NPPD") application to appropriate an additional 425 cubic feet per second of natural flow from the Niobrara River. The NRDs are responsible for the management of ground water within their districts. Higgins is the owner of real property in the Niobrara River Basin who holds senior water rights and pending surface water appropriations from the Niobrara River. The DNR dismissed the appellant's objections *sua sponte* for lack of standing. According to DNR, NRD lacked standing because it did not allege any legal right, title, or interest in the subject water of the Niobrara River and their allegation of harm was based upon mere conjecture. Higgins did not fulfill the standing requirement because no legal right existed regarding a pending application. Further, if DNR granted the pending applications, Higgins rights would be senior to NPPD and there was no evidence of credible harm.

The Court considered four issues on appeal. First, whether the director erred when he determined that NRD did not have a cognizable interest to fulfill the standing requirement. Second, whether Higgins would be adversely affected in a manner sufficient to confer standing. Third, whether DNR applied an improper standard of review. Fourth, whether DNR failed to consider the impact of the decision on the public interest.

The Court affirmed DNR's assertion that the NRDs did not have standing. The NRDs failed to allege any legal right, title, or interest and their allegations were based on mere conjecture. The NRDs argued the granting of NPPD's application would cause a portion of the Niobrara River to be fully appropriated in the future, and a threatened injury would satisfy the standing requirements. The NRDs further argued they had standing because they were responsible for the management of ground water from the Niobrara River. The Court, in a previous case, determined that standing exists when duties are placed upon the NRDs when DNR makes a fully appropriated designation. In this case, how-