

1-1-2014

## Heavirland v. State, 311 P.3d 813 (Mont. 2013)

Lauren Bushong

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

---

### Custom Citation

Lauren Bushong, Court Report, Heavirland v. State, 311 P.3d 813 (Mont. 2013), 17 U. Denv. Water L. Rev. 425 (2014).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

Court extended the power to consider these factors to water rights administration. The Court stated that preventing the Director from considering whether a senior rights holder is putting their water to beneficial use would be to ignore the constitutional requirement that only to those using the water enjoy priority over the water. The Court also noted that the Director has discretionary authority in water management and administration cases that is not available in a water rights case. The Court reasoned that reasonableness is not an element of a water right, so evaluation of whether a diversion is reasonable in the administration context should not be a re-adjudication. The application of established evidentiary standards, legal presumptions, and burdens of proof tempers the Director's discretion. The senior rights holder is not required to prove their entitlement to the water. The rules do allow the Director to use various tools, including baseline methodology, to determine how diversion can impact other water sources.

Groundwater Appropriators and the City argued there is no basis in Idaho law to require use of the clear and convincing evidence standard as opposed to the preponderance of the evidence standard. They both requested the establishment of the preponderance of the evidence standard as the appropriate standard. The Court readily dispensed with the evidentiary issue by citing *A&B Irr. Dist. v. Idaho Dep't of Water Resources*, stating a longstanding rule that clear and convincing evidence must support changes to a decree. The Court saw no reason to change this established precedent.

The Court concluded the Director had authority to use a baseline methodology to determine whether to initiate administrative proceedings or to manage the water resources. The Court also concluded that the district court had applied the correct evidentiary standard. The Court therefore affirmed the district court ruling, and allowed the Director to proceed with the water management and administration plan.

*Peter Almaas*

## MONTANA

**Heavirland v. State, 311 P.3d 813 (Mont. 2013).** (holding (i) Montana case law applies retroactively in determining sufficiency of evidence rebutting the presumption of abandonment of water rights founded on a prolonged time of non-use, and (ii) claimants provided sufficient evidence to defeat the presumption of abandonment and excuse twenty-four years of nonuse of irrigation rights).

Frank Truchot filed and perfected the subject water right in 1904. Under this right, Truchot diverted water from Muddy Creek for irrigation. Christina and Henry Weist purchased the water right in 1913. Their son, Ray Weist, took over the farm and continued to utilize the water right for flood irrigation, when available, from the mid-1940's until 1961. Utilization of the right was particularly difficult because of the slope and heavy clay soil of the Weists' fields. Ray stopped irrigating in 1962. His son, Lyle, stated that his father's age and the inefficiency of flood irrigation were the reasons Ray stopped irrigating. Lyle also testified that Ray had three-phase power connected to the farm to accommodate potential future pivot irrigation.

Lyle returned to and purchased the family farm in 1975. After researching the farm's water rights history, in 1981 Lyle and his wife, Linda, filed a statement of claim in the Montana general stream adjudication. Lyle installed a fourteen-tower Valley Center Pivot and resumed irrigation in 1981-82. He continued to use the pivot until 1991, when he sold the water right and property to Loren and Sue Heavirland. The Heavirlands thereafter irrigated every year but one, when water was unavailable.

Lyle and Linda Weist's claim appeared in the Temporary Preliminary Decree for Basin 410 with attached Department of Natural Resources and Conservation (DNRC) issue remarks. The remarks noted that the 1962 Teton County Water Resource Survey and the 1978 USDA Aerial Photography indicated zero acres irrigated at the farm. Meetings between DNRC and the Weists did not resolve the issue remarks. DNRC Water Resource Specialist Kraig Van Voast ("water master") reviewed the documentation and found he did not have information that could resolve the lack of proof of irrigation from Muddy Creek. The water master therefore joined the State of Montana in the adjudication. The State moved for partial summary judgment regarding the issue of abandonment and the water master granted the motion. The water master found that the period of nonuse from 1962 to 1982 raised a rebuttable presumption of abandonment.

At an evidentiary hearing, the water master found the Weists had abandoned the water right, stating that the Weists' and Heavirlands' (together, "claimants") evidence did not overcome their burden to rebut the presumption of intent to abandon the water right. Claimants then filed an objection with the Chief Judge of the Montana Water Court ("water court"). Claimants presented two central arguments: (i) the law as it stood in 1973 applied to the abandonment of then-existing water rights, meaning the water master erred in retroactively applying *79 Ranch, Inc. v. Pitsch* to their existing water right; and (ii) even if *79 Ranch* applied, the claimants offered evidence sufficient to rebut the presumption and excuse the twenty years of nonuse.

The water court first held that *79 Ranch* applied to the case at hand. *79 Ranch* states that a long period of nonuse creates a presumption of intent to abandon a water right and causes the burden of explaining the nonuse to shift to the claimant. *79 Ranch* also requires a claimant present concrete facts or conditions excusing the nonuse, not just wants and wishes to utilize the right, to rebut the presumption of abandonment. The water court then applied *79 Ranch* and concluded the water master erred in not finding the evidence was sufficient to rebut the presumption of intent to abandon. The State appealed to the Montana Supreme Court ("Court").

The first question the Court examined was whether the water court correctly found *79 Ranch* applied to the abandonment of a water right that predated that case. The Court noted that the 1973 Montana Constitution, as well as the state's Water Use Act, protects "existing rights." But the Court went on to hold that *79 Ranch* did not run counter to the state constitution's protection of those rights and did not change or create new law; rather, *79 Ranch* clarified the standard for abandonment, meaning its retroactive application did not offend the claimants' rights or Montana law. Thus, the Court concluded the water court correctly held Montana law did not bar retroactive application of *79 Ranch*.

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