

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
MAINSTEM BITTERROOT RIVER AND EAST SIDE SUBBASIN (76HA)

CLAIMANTS: Ward Irrigation District; Farmers Plant Aid Corp; Lee
Foss; Huggans Land Co. LLC; Cheryl D. Rothlisberger;
Daniel L. Rothlisberger

76HA-0563-P-2018

76H 5824-00

76H 5828-00

76H 105036-00

OBJECTORS: Avista Corporation; Farmers Plant Aid Corp; Lee Foss;
Huggans Land Co. LLC; Cheryl D. Rothlisberger; Daniel
L. Rothlisberger; United States of America (Fish and
Wildlife Service); Ward Irrigation District

NOTICE OF INTENT TO APPEAR: United States of America (Fish and
Wildlife Service)

CLAIMANTS: Ward Irrigation District; Farmers Plant Aid Corp; Lee
Foss; Huggans Land Co. LLC; Cheryl D. Rothlisberger;
Daniel L. Rothlisberger

76HA-0564-P-2018

76H 5825-00

76H 5826-00

76H 105037-00

OBJECTORS: Avista Corporation; Farmers Plant Aid Corp; Lee Foss;
Huggans Land Co. LLC; Cheryl D. Rothlisberger;
Daniel L. Rothlisberger; United States of America (Fish
and Wildlife Service); Ward Irrigation District

NOTICE OF INTENT TO APPEAR: United States of America (Fish
and Wildlife Service)

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

These cases involve competing claims for water rights from the Bitterroot River.
The rights at issue were originally decreed to George Ward in a district court proceeding

titled *Corvallis Canal & Water Co. v. Berryman et al.*, Cause No. 1287, 4th Judicial Dist., Ravalli County (1912). The current claimants for the George Ward rights are as follows:

Ward Irrigation District (WID)

<u>Claim</u>	<u>Priority Date</u>
76H 5824-00	March 8, 1909
76H 5828-00	March 8, 1909
76H 5825-00	June 30, 1903
76H 5826-00	June 30, 1903

Lee Foss, Huggans Land Co., LLC, Farmers Plant Aid Corp., Daniel L. and Cheryl D. Rothlisberger (Foss et al.)

<u>Claim</u>	<u>Priority Date</u>
76H 105036-00	March 8, 1909
76H 105037-00	June 30, 1903

Both WID and Foss et al. claim the entirety of the Ward decreed rights, thereby setting up a decree exceeded problem. WID filed a motion for summary judgment asserting it is the sole owner of the George Ward rights. WID's motion for summary judgment is the subject of this order. WID asserts sole ownership of these rights based on a district court decision issued in 1984. The 1984 decision was titled *In the Matter of the Establishment and Organization of the Ward Irrigation District*, Cause No. 6689 (hereafter Cause No. 6689). Relying on the order in Cause No. 6689, WID contends the doctrines of res judicata and collateral estoppel bar parties to the present action from claiming the George Ward rights. WID also contends a 1938 order creating the District transferred the George Ward decreed rights to the District from Ward's successors.

II. BACKGROUND

George Ward was an early settler in the Bitterroot valley. He died in 1916 and his lands were acquired by various parties including Samuel and Alice Foss. The current claimants of 76H 105036-00 and 76H 105037-00 are successors to Sam and Alice Foss or George Ward.

Sam Foss and other landowners petitioned the district court to create the Ward Irrigation District. The petitioners did not state they intended to convey their water rights

to the irrigation district they sought to create. J. S. James, the State Engineer, wrote a letter to the judge presiding over the petition to create the WID. Mr. James wrote:

I am advised that the present proposal is the formation of an Irrigation District only to take over and operate the existing main canal and structures for the transportation and delivery of water to which the lands comprising the district are entitled under individual water rights severally established. Further, that it is not contemplated that the District will take over such rights.

J. S. James Letter to Hon. Albert Besancon (June 7, 1938) (Brief in Support of Ward Irrigation District's Motion for Partial Summary Judgement ("WID Brief"), Ex. L (Sept. 4, 2020)).

The district court issued an order creating WID on July 5, 1938. The order did not reference a conveyance of water rights from the petitioners to the District. WID Brief, Ex. A. The boundaries of the newly formed WID did not include all the lands irrigated with the George Ward water rights. Some of those lands were outside the District and continued to be irrigated by successors of Sam and Alice Foss.

In the early 1980s, litigation arose between WID and landowners both inside and outside the District. The parties disagreed about water rights and control of ditches, points of diversion, and headgates.

The judge in Cause No. 6689 issued an order titled Court's Findings of Fact, Conclusions of Law and Judgment on April 20, 1984. Finding of Fact 1 reads as follows:

The District is the owner of water rights originally decreed to George W. Ward as follows:

<u>Stream</u>	<u>Quantity</u>	<u>Priority Date</u>
Lost Horse Creek	1,000 miners inches	September 12, 1905
Bitterroot River	700 miners inches	June 30, 1903
Bitterroot River	300 miners inches	March 8, 1909
Bitterroot River	5,300 miners inches	June 30, 1903
Bitterroot River	1,700 miners inches	March 8, 1909

Court's Findings of Fact, Conclusions of Law and Judgment, at 2 (April 20, 1984) (WID Brief, Ex. Y).

Conclusion of Law 1 reads as follows: “In this action, the Court does not have jurisdiction to determine water rights in the Bitterroot River, lost Horse Creek, Hayes Creek, Camas Creek or the District’s ditches because of lack of notice to all owners.” *Id.* at 3.

Judge Holter was the presiding judge in Cause No. 6689. The claims filing deadline for water rights in Montana’s general adjudication was March 30, 1982, approximately two years before Judge Holter rendered his decision. Judge Holter did not terminate claims 76H 105036-00 and 76H 105037-00. These claims for the George Ward decreed rights belonged to successors of Sam and Alice Foss.

On appeal, the Montana Supreme Court described Holter’s decision as an order “adjudicating the control over the Bray Lane Headgate in the Ward Irrigation District...” *In re Establishment & Organization of Ward Irrigation Dist.*, 216 Mont. 315, 316, 701 P.2d 721, 722 (1985).

III. ISSUES AND DISCUSSION

1. Did creation of the Ward Irrigation District result in a transfer of ownership of the George Ward decreed rights to the District?

Irrigation districts are authorized by statute to acquire water rights “by purchase, lease, or contract”. § 85-7-1904(1)(b), MCA. There is no evidence owners of the George Ward decreed rights sold, leased, or contracted any portion of their ownership interest in their rights to WID.

Nothing in the 1938 court order creating the WID indicated that such a transfer occurred, and the judge did not rule that the petitioners surrendered their water rights. The State Engineer’s letter referenced “individual water rights severally established” and stated, “it is not contemplated that the District will take over such rights.” WID Brief, Ex. L. This suggests the State Engineer believed no ownership transfer was intended.

The State Engineer’s belief was consistent with the statute governing creation of irrigation districts where water rights and the systems to distribute them already exist. “This part does not contemplate the acquisition by the district of the existing water, water

rights, or system or works owned by the respective water rights owners within the district.” § 85-7-301(2), MCA.

WID contends that “when lands are put into an irrigation district, the water rights appurtenant to them pass to the district, to hold in trust for the landowner/users.” WID Brief, 11. To support this assertion, it cites language from the appeal of Judge Holter’s order. “[B]y authority of the Order establishing an irrigation district, the rights to claim and use water under water rights appurtenant to lands included within a district are conveyed thereto.” *In re Est. & Org. of Ward Irr. Dist.*, 216 Mont. at 322, 701 P.2d at 726.

This passage might be persuasive if it were the only statement on this topic, but the opinion as a whole conveys a different meaning. The narrow question addressed by the Supreme Court was control of a headgate, not ownership of water rights. Regarding water rights ownership, the Supreme Court noted the Fosses “have decreed water rights for their land from Hayes Creek, Camas Creek, and the Bitterroot River. The existence of these rights is not in dispute.” *Id.* at 318 (emphasis added).

The right to control the system used to divert and distribute water is different from ownership of a property interest in water rights. An irrigation district’s right to control water rights owned by its members is conferred by statute. A district’s board of commissioners has the authority to “regulate, supervise, apportion, and control the furnishing and delivery of water through the distribution system of the district.” § 85-7-1922(1), MCA.¹ But control over a distribution system can be ceded without giving up ownership of underlying water rights. “The most important function of an irrigation district is the control, to the mutual advantage of all the members, of the irrigation system. Indeed, though water rights remain with the private appropriator, the prerogative of control must lie exclusively with the district.” *In re Est. & Org. of Ward Irr. Dist.*, 216 Mont. at 322, 701 P.2d at 726.

¹ The next sentence of this statute reads: “The authority to regulate, supervise, apportion, and control does not apply to users who have water rights or ditch rights, established, acquired by court decree, use, appropriation or otherwise, at the time or prior to the organization of the district...” The issue raised by WID in its motion for summary judgment is ownership, not control, and this court expresses no opinion on the control question.

The Supreme Court determined that the district court's 1938 order creating the Ward Irrigation District did two things. First, it "granted the District exclusive *control* over the described distribution system...." *In re Est. & Org. of Ward Irr. Dist.*, 216 Mont. at 324, 701 P.2d at 727. Second, it "also effected a transfer of control of the water rights appurtenant to the lands included within the district." *Id.*

Given this history, it is not surprising that WID controlled use of the water supplied to its members, and that water commissioners dealt with the District rather than individual members within the District. WID cites no other cases for the rule that water users seeking formation of an irrigation district must surrender ownership of their water rights when a district is formed, and no cases cite *In re Establishment & Organization of Ward Irrigation District* for this proposition.

The foregoing review of facts and law leads to two conclusions. First, there is insufficient evidence at this stage of the proceeding to show that owners of the George Ward decreed rights transferred those rights to the Ward Irrigation District. Evidence offered by WID showing it controlled use of those rights is not adequate to show ownership. Second, WID has not cited sufficient authority to support its argument that creation of the District resulted in a transfer of ownership by operation of law.

"Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620 (citing Rule 56(c), M. R. Civ. P.). The historical usage of the George Ward decreed rights from the Bitterroot River remains in dispute. There are factual questions about where these rights were used and who used them. WID has not shown that the owners of these rights transferred them to WID and has not shown as a matter of law they transferred otherwise when WID was created. It is not entitled to summary judgment on the ownership issue.

2. Do the doctrines of res judicata or collateral estoppel preclude Foss et al. from asserting ownership of the George Ward decreed rights?

The doctrines of res judicata and collateral estoppel are "based on a judicial policy favoring a definite end to litigation." *Kullick v. Skyline Homeowners Ass'n*, 2003 MT

137, ¶ 17, 316 Mont. 146, 69 P.3d 225. Res judicata applies when the following requirements have been met: “(1) the parties or their privies are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them.” *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 27, 321 Mont. 432, 92 P.3d 620.

WID has not satisfied the third and fourth elements of the res judicata test. The subject matter of the present proceeding is ownership of the George Ward decreed rights from the Bitterroot River along with elements of those rights. WID contends that, at a minimum, Judge Holter decided the question of ownership of these rights in Cause No. 6689, but there are several problems with this assertion. First, notwithstanding the language of Finding of Fact No. 1, Judge Holter explicitly disavowed jurisdiction to adjudicate these rights. “[T]he court does not have jurisdiction to determine water rights in the Bitterroot River....” Court’s Findings of Fact, Conclusions of Law and Judgment, at 2 (April 20, 1984) (WID Brief, Ex. Y).

WID asserts that as a division water judge, Holter had authority to adjudicate water rights in a district court action, but this assertion is mistaken. The Water Court has exclusive jurisdiction to adjudicate existing rights, while district courts have exclusive authority to administer water rights once they have been determined by the Water Court. Division water judges are district court judges that hear cases arising in the Water Court. They hear such cases when the Water Court judges cannot do so, which is infrequently. Judge Holter was not acting as a Water Court judge when he issued his judgment in Cause No. 6689. That lawsuit was brought in district court and was focused on issues surrounding control of the Bray Lane Headgate and other structures used to distribute water to users inside and outside the WID. These issues were within the purview of the district court pursuant to its authority over water distribution and irrigation districts.

In contrast, actions to adjudicate water rights can only be initiated by filing water right claims and objections in the Water Court. Judge Holter’s status as a division water judge entitled him to adjudicate water rights in the Water Court, but not in a district court

action. Holter recognized this distinction when he disavowed jurisdiction to determine water rights in Cause No. 6689. The subject matter in Cause No. 6689 was not the same as the subject matter now before the Water Court.

WID relies heavily on Finding of Fact No. 1 in Holter's order. Determination of water rights ownership is often a mixed question of law and fact. For example, whether a water right attaches as an appurtenance to land in Montana is a question of fact. *Shields River Basin*, 2000 Mont. Water LEXIS 1, *35. Judge Holter made no determination regarding appurtenance of the George Ward rights in his order.

Whether a water right transfers by deed or order of a court is a question of law. The right to title of a water right based on appurtenance typically depends on interpretation of deeds furnishing the chain of title. *Id.* The interpretation and construction of writings granting an interest in real property are questions of law. *Mattson v. Montana Power Co.*, 2009 MT 286, ¶ 18, 352 Mont. 212, 215 P.3d 675. Judge Holter did not discuss transfer of the George Ward decreed rights to WID in his order. Instead, he noted that he lacked jurisdiction to determine those rights.

The same analysis applies to evaluation of the third element of the res judicata test. That test requires that the issues be the same in both actions. Again, in the words of the Montana Supreme Court, Cause No. 6689 was a case about control of the Bray Lane Headgate and control of the water rights diverted through it. *In re Est. & Org. of Ward Irr. Dist.*, 216 Mont. at 316, 701 P.2d at 722. The doctrine of res judicata does not prevent successors to the George Ward decreed rights from asserting whatever ownership interest they may have in those rights.

The next question is whether the doctrine of collateral estoppel prevents parties other than the WID from claiming the George Ward decreed rights. The answer to this question is no because a final judgment regarding ownership of the George Ward decreed rights was not made in Cause No. 6689.

The doctrine of collateral estoppel applies when:

- (1) the identical issue raised was previously decided in a prior adjudication;
- (2) a final judgment on the merits was issued in the prior adjudication;

(3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and

(4) the party against whom the doctrine may be asserted had a full and fair chance to litigate the issues which may be barred.

Montana Env'tl. Info. Ctr. v. Montana Dep't of Env'tl. Quality, 2016 MT 9, ¶ 17, 382 Mont. 102, 365 P.3d 454.

Judge Holter did not issue a final judgment regarding ownership of the George Ward decreed rights in the Bitterroot River because he did not have jurisdiction to do so. Resolution of that issue is now before the Water Court and no present claimant of these rights is barred from asserting their ownership interest by the doctrine of collateral estoppel.

IV. CONCLUSION AND ORDER

Determining whether the doctrines of res judicata or collateral estoppel apply is a question of law. WID must show these doctrines apply to prevail on summary judgment. WID did not show that either doctrine is applicable. Accordingly, its motion for summary judgment is denied.

Russ McElyea
Chief Water Judge

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