

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)
PRELIMINARY DECREE

CLAIMANT: Montana State Board of Land Commissioners

OBJECTOR: Rose A. Stoneberg

CASE 40E-0012-R-2022

40E 112464-00

40E 112465-00

40E 112476-00

ORDER DENYING OBJECTION TO MASTER’S REPORT

I. INTRODUCTION

The Montana State Board of Land Commissioners (“Land Board”) filed three water rights at issue in this case. The Land Board filed these rights for use on land held in trust for public schools by the State of Montana.

The Land Board filed claim 40E 112464-00 for stockwater from an unnamed tributary of Frenchman Creek. The means of diversion is a reservoir. The reservoir and the point of diversion and place of use are located on State land in Section 16, T25N, R34E. The claimed priority date is June 17, 1960.

The Land Board filed claim 40E 112465-00 for stockwater from an unnamed tributary of North Frenchman Creek. The means of diversion is a reservoir and the point of diversion and place of use are also on State land in Section 16, T25N, R34E. The claimed priority date for this right is June 17, 1960.

The Land Board filed claim 40E 112476-00 for stockwater from Timber Creek. As with the other two claims, water is impounded in a reservoir. The point of diversion and place of use are on State land in Section 36, T25N, R33E. The claimed priority date is August 3, 1960.

The Water Court issued a Preliminary Decree for Basin 40E that included the claims referenced above. Through her attorney, Rose Stoneberg of Horse Ranch objected to ownership, priority date, and purpose of right for all three claims. She asserted that Horse Ranch was not identified as a valid senior stockwater appropriator, that the State of Montana (“State”) owns no stock and cannot put the claims to beneficial use, that predecessors of Horse Ranch used this water prior to laws establishing school sections, and that the point of diversion for 40E 112476-00 is incorrect. She also raised issues of abandonment or non-perfection for each claim.

The Land Board moved for summary judgment on the issue of ownership. It asserted that the State owns both the point of diversion and place of use for all three claims, that the State owned the land prior to appropriation of the water rights, and that it had not been compensated for any of the rights. The Land Board argued there was no genuine issue regarding these facts and that it was entitled to judgment as a matter of law under *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985).

In response to the Land Board’s motion for summary judgment, Stoneberg replied that the State does not own the land where the three reservoirs are located, did not construct the reservoirs, and does not own livestock that watered from the reservoirs. Stoneberg contends her family built the reservoirs for storage of their senior stockwater rights.

Stoneberg asserts the Land Board cannot act on behalf of the State of Montana because it does not own the land at issue. Stoneberg also asserts that the water impounded in the reservoirs is appurtenant to land owned by Horse Ranch rather than State land. She asserts the reservoirs were constructed by her predecessors before the State acquired the land described in its water right claims. Based on this assertion, Stoneberg contends that the State’s title is subject to water rights previously appropriated by Stoneberg’s

predecessors. Stoneberg argues that the three water rights in this case belong to her and other co-owners of Horse Ranch and not the State of Montana.

The Senior Water Master presiding over this case granted the Land Board's motion for summary judgment, ruling that Stoneberg and her family did not own the water rights claimed by the Land Board. Stoneberg reiterated the arguments she made during the summary judgment phase and additionally contends that the Water Master erred by relying on inadmissible evidence, that the Water Master improperly resolved the appurtenancy issue, and that the Water Master failed to properly distinguish between the Land Board and the State of Montana.

II. ISSUES

1. *Did the Water Master improperly rely on inadmissible hearsay evidence?*
2. *Did the Water Master err by finding that the three water rights at issue were appurtenant to State land?*
3. *Did the Water Master err by failing to properly distinguish between the Land Board and the State of Montana?*

III. STANDARD OF REVIEW

A. Standard of Review of a Master's Report

The Water Court appoints water masters to hear cases and prepare reports containing findings of fact and conclusions of law. Rule 53(a)(1)(C), M. R. Civ. P.; Rule 23, W.R.Adj.R. The Water Court reviews findings of fact for clear error and conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 13, 372 Mont. 300, 311 P.3d 813).

The Court uses a three-part test for reviewing objections to a water master's findings of fact. *See Interstate Prod. Credit Assn. v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991); Rule 11(c), W.R.Adj.R. (referencing Rule 53(e), M. R. Civ. P.); *see also In re the Existing Rights within the Jefferson River Drainage Area*, Nos. 41G-137, 41G-W-182145-00, 1999 Mont. Water LEXIS 1 at *3-4 (Dec. 27, 1999).

First, the Water Court reviews the record to see if the water master's findings are supported by substantial evidence. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." *Skelton Ranch*, ¶ 27 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)).

Second, even if the findings are supported by substantial evidence, the Court may determine a finding is clearly erroneous if the water master misapprehended the effect of the evidence.

Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still determine that a finding is clearly erroneous when a review of the record leaves the Court with the definite and firm conviction that a mistake has been committed. *Skelton Ranch*, ¶ 27 (citing *Heavirland*, ¶ 16). A finding may be clearly erroneous even though there is evidence to support it. *Id.*

The Water Court reviews a water master's conclusions of law to determine whether they are correct. *Heavirland*, ¶ 14 (citing *Geil v. Missoula Irr. Dist.*, 2002 MT 269, ¶ 22, 312 Mont. 320, 59 P.3d 398). "Thus, the Water Court reviews the water master's findings of fact for clear error and the Water Master's conclusions of law for correctness." *Heavirland*, ¶ 14 (citing Rule 53(e)(2), M. R. Civ. P.; *Geil*, ¶ 22).

Based on these standards of review, the water judge "may adopt, modify, or reject the [water master's] report, in whole or in part, or may receive further evidence or recommit it with instructions." Rule 23, W.R.Adj.R.

B. Summary Judgment Standard

Summary judgment is proper only when no genuine issues of material fact exist 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.) To determine the existence or nonexistence of a genuine issue of material fact, the Court will look to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 24, 304 Mont. 356, 22 P.3d 631. All

reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 25.

The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues. *Id.* Proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel. *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997). Where the moving party can demonstrate that no genuine issue of material fact remains in dispute, the burden shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the party opposing summary judgment must “present material and substantial evidence, rather than merely conclusory or speculative statements.” *Id.*

IV. ANALYSIS

1. Did the Water Master improperly rely on inadmissible hearsay evidence?

The Land Board relied on an affidavit by Dennis Meyer to support its motion for summary judgment. Meyer is a hydrologist and water rights specialist for the Department of Natural Resources and Conservation’s (“DNRC”) Trust Lands Management Division. Meyer attached several documents to his affidavit, including maps prepared from aerial photographs, General Land Office (“GLO”) Survey information downloaded from the United States Bureau of Land Management website, and copies of patents from the United States to the State of Montana.

The Water Master relied on Meyer’s affidavit and the documents attached to it when he granted summary judgment in favor of the Land Board. Stoneberg asserts the documents attached to Meyer’s affidavit contain inadmissible hearsay, that the documents attached to the affidavit were not properly authenticated, and that Meyer lacks personal knowledge required by Rule 56(e)(1), M. R. Civ. P.

Rule 56(a), M. R. Civ. P. allows use of affidavits to support motions for summary judgment. Affidavits “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.” Rule 56(e)(1), M. R. Civ. P. Documents attached to affidavits must be sworn or certified copies. *Id.* The Montana Supreme Court applies a strict compliance standard to

the evidentiary requirements of Rule 56(e), M. R. Civ. P. *Amour v. Collection Pros., Inc.*, 2015 MT 150, ¶ 18, 379 Mont. 344, 350 P.3d 71.

Meyer signed his affidavit under the penalty of perjury. He is a hydrologist and water rights specialist with the DNRC. Meyer attached maps to his affidavit showing that points of diversion and places of use for claims 40E 112464-00, 40E 112465-00, and 40E 112476-00 are on State land. Exhibits D and E to his affidavit consist of records from the Bureau of Land Management's ("BLM") website showing the dates GLO Surveys were accepted for the lands shown on his maps. He testified that Exhibits D and E are "a true and accurate copy of the BLM website containing this information." Meyer Affidavit, ¶¶ 5 and 6. Meyer also attached to his affidavit a land patent showing grants of the lands underlying the water rights in this case from the United States to the State of Montana.

Meyer determined that the State of Montana took title to the subject lands well before the priority dates of the three water rights at issue in this proceeding. Based on Meyer's affidavit, the Water Master concluded the State of Montana owned the three water rights at issue in this case.

Stoneberg incorrectly asserts that the documents relied on by Meyer contain inadmissible hearsay. The BLM records and federal patent would all be admissible under the government records exception to the hearsay rule found in Rule 803(8), Mont. R. Evid. and potentially under Rule 803(16), Mont. R. Evid. Stoneberg's assertion that the GLO Survey records were not properly authenticated is rebutted by the statements in Meyer's affidavit.

Finally, Stoneberg asserts Meyer cannot testify about land ownership because he doesn't have sufficient personal knowledge regarding the date of acceptance of GLO Surveys. Water rights cases are unique. They often involve events that predate the memory of any living person. Resolution of these cases requires documents, many of which cannot be authenticated using conventional means. "In usual cases involving water rights, witnesses are seldom able to testify as to the appropriative intent and first use of their claimed water rights. So, the appellate as well as the trial court must do the best it

can with what it has to work with.” *Hoon v. Murphy*, 2020 MT 50, P36, 399 Mont. 110, 460 P.3d 849 (citations omitted).

Applying Stoneberg’s rationale literally would preclude anyone from testifying about government surveys because most are too old for any living person to have personal knowledge of them. Nevertheless, such documents are often the key to resolving water rights cases.

Meyer is an employee of the DNRC’s Trust Lands Division. He is qualified to testify on what lands the State owns. It was proper for him to rely on BLM documents to evaluate ownership. He provided true and accurate copies of the documents he examined. The Water Master did not err by relying on the Meyer affidavit and attached documents in reaching his conclusion that summary judgment was proper.

2. *Did the Water Master err by finding that the three water rights at issue were appurtenant to State land?*

The information in the Meyer affidavit shows that the points of diversion and places of use for the three water rights at issue in this case are appurtenant to State lands. The Water Master did not err in concluding that these water rights were appurtenant to State land.

Stoneberg argues that her predecessors appropriated all three water rights while they were part of the federal domain and before they became property of the State of Montana. The lands to which these rights are appurtenant were granted to the State of Montana by the Federal Government in the Montana Enabling Act. Act of February 22, 1889, ch. 180, 25 Stat. 676. Section 10 of the Enabling Act set aside sections 16 and 36 of each township to the States for support of common schools.

Stoneberg offers no evidence that any of the subject water rights were appropriated before the Enabling Act. On the contrary, the claims for all three rights show priority dates in 1960. Accordingly, the priority dates for all three rights fall approximately eighty years after the Enabling Act, and decades after acceptance of the GLO Surveys describing those same lands.

The fact pattern in the instant case is like the *Pettibone* case. *See In re Powder River Drainage Area*, 216 Mont. 361 (1985).

3. ***Did the Water Master err by failing to properly distinguish between the Land Board and the State of Montana?***

Stoneberg asserts the Water Master did not properly distinguish between the Land Board and the State of Montana. This argument is not well taken. The Land Board “has the authority to direct, control, lease, exchange, and sell school lands...” under the Montana Constitution, Art. X § 4. The Land Board's actions in this matter were consistent with its constitutional authority.

V. **CONCLUSION**

The Water Master did not rely on inadmissible hearsay evidence when concluding that the three water rights in this case were appurtenant to school trust lands. Stoneberg supplied no credible evidence that she or her predecessors appropriated the subject water rights while the lands to which they are appurtenant were part of the federal public domain. Accordingly, there was no genuine issue of material fact regarding appurtenancy, and under the rationale of *Pettibone*, the subject water rights belong to the State of Montana.

Stoneberg’s objection to the Master’s Report is denied. Claims 40E 112464-00, 40E 112465-00, and 40E 112476-00 shall remain as described in the Senior Water Master’s Report and the abstracts attached thereto.

ELECTRONICALLY SIGNED AND DATED BELOW.

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