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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)
PRELIMINARY DECREE

* *

CLAIMANTS: Erin L. Glennie; Bruce J. Glennie

OBJECTOR: Daniel G. DeBuff

DCERT-0001-WC-2022
40A 184511-00
40A 184518-00

Certified From:
Department of Natural Resources and Conservation
Office of Administrative Hearings

In the Matter of Application for Beneficial Water Use Permit No. 40A 30105384 by Daniel G. DeBuff and Sandra L. DeBuff

ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

BACKGROUND

Daniel G. DeBuff ("DeBuff") submitted a water use permit application to the Department of Natural Resources and Conservation ("DNRC"). After DNRC published notice of the application, J. Bruce Glennie and Erin L. Glennie ("Glennie") objected on the basis that DeBuff's water use would adversely affect Glennie's existing water rights, specifically water right claims 40A 184511-00 and 40A 184518-00.[1] Glennie's objection

[1] These procedural facts are taken from the Unopposed Motion to Certify that DeBuff filed in the DNRC proceeding. The motion to certify also is docketed as Document No. ("Doc.") 1.00 in this proceeding.

to DeBuff's application is pending in an administrative proceeding before a Department of Natural Resources and Conservation ("DNRC") hearing examiner.

DeBuff disputes the validity of the two Glennie claims that form the basis for Glennie's objections in the DNRC proceeding. As part of the DNRC proceeding, the hearing examiner certified to the Water Court questions regarding the determination of Glennie's two water right claims.

Following certification, Glennie filed a motion for summary judgment. The motion asked the Court to dismiss DeBuff's objections based on various claim and issue preclusion doctrines. On September 20, 2022, the Court denied the motion on the basis that prior Water Court proceedings did not bar DeBuff from objecting to Glennie's claims. (Doc 20.00).

After the summary judgment order, the Court issued an amended scheduling order, which has been modified several times while the parties engaged in discovery. DeBuff filed his motion for partial summary judgment seeking dismissal of claim 40A 184518-00 on the basis of non-perfection or abandonment.

UNDISPUTED FACTS

The following facts are undisputed:

Historical Background

1. Claim 40A 184518-00 is based on a notice of appropriation filed by Wyllys A. Hedges. The notice claimed water from a certain spring described in the notice as "Myers Spring." The notice described the priority date as the "first day of April 1886." The notice was filed for record in Fergus County on August 25, 1906. (Doc. 55.00, Ex. C).

2. The 1949 Water Resources Survey ("WRS") for Wheatland County reviewed the area now decreed as the point of diversion and place of use for claim 40A 184518-00. The WRS field notes and mapping do not document irrigation use as of the date the survey took place in 1948.

3. John Mattson purchased the property where the spring is located in about 1964. At that time the property was generally known as the "Giltinan place," named for Mattson's predecessor John Giltinan.

4. Mattson put the property into a corporation called Swimming Woman Ranch. Mattson owned the property from about 1964 to the early 1980s, either directly or through the corporation.

5. David Paugh is Mattson's grandson. Paugh recalls his grandfather irrigating the property.

6. Paugh acquired control of the property from Mattson by acquiring a majority interest in Swimming Woman Ranch.

7. On March 2, 1982, Paugh filed a statement of claim on behalf of Swimming Woman Ranch for what is now water right claim 40A 184518-00. The statement of claim describes the use of water from Myers Springs for irrigation use.

8. Paugh leased and later sold the property to Harold DeBuff. Harold DeBuff is Daniel DeBuff's brother. Prior to selling the property, Paugh enrolled some of the property in CRP.[2]

9. While Paugh operated the property, he did not ever irrigate out of the "West Spring." Instead, Paugh used it to water stock.

10. DeBuff also supports his motion with deposition testimony from a witness named Larry Berg. (Ex. 5). Berg's father owned property adjacent to the so-called Giltinan place as of 1979. At some point Berg acquired property that now is adjacent to the Glennie property. Berg has knowledge of Harold DeBuff's agricultural practices and testified he has no recollection of irrigation from the spring source for claim 40A 184518-00.

11. Daniel DeBuff acquired the property north of the Glennie's property, which Daniel DeBuff refers to as the "Living Springs" place. (Ex. 6). Daniel DeBuff does not have a recollection of irrigation on the Glennie property.

[2] Presumably, this refers to the conservation reserve program administered by the Farm Service Agency, part of the U.S. Department of Agriculture.

12. Neil Glennie is Bruce Glennie's brother. Neil Glennie's deposition excerpt indicates some general recollection of ditches and irrigation from springs on the Glennie property in the 2002 to 2005 time frame. (Ex. 7). Neil Glennie also stated he was not as familiar with the western spring and did not personally do any irrigating from it.

13. Bruce Glennie purchased his property from Harold DeBuff in 2002.

14. According to Bruce Glennie, some of the property he purchased was under CRP contracts from about 1986 to 2022. (Ex. 8). Bruce Glennie's deposition also indicates he used the spring for subirrigation of fields used to grow hay.

15. The parties also rely on testimony from two expert witnesses. Mark Brooke provided testimony on behalf of Bruce Glennie. Brooke's testimony indicates he was able to discern evidence of irrigation ditch networks on aerial photographs.

16. DeBuff supports his motion with two reports prepared by Pat Riley, the other expert, who testified for DeBuff. As part of his deposition testimony, Riley concurred when asked if his opinion was "no irrigation whatsoever with respect to claim 518." (Ex. 14, at Depo. p. 81, lines 16-19). However, Riley also stated in a report that "I could find no indication of current or recent irrigation." (Ex. 13, at DeBuff 000030).

Water Court Proceedings

17. The statement of claim claimed a flow rate of 40 miner's inches (1.00 cfs or 448.8 gpm) of irrigation of a claimed 180.00 place of use in portions of Sections 3 and 10, Township 9 North, Range 17 East in Wheatland County.

18. The Water Court issued the Preliminary Decree for the Musselshell River, above Roundup Basin (Basin 40A) on June 7, 2017. The Water Court included water right claims 40A 184511-00 and 40A 184518-00 in the Preliminary Decree.

19. The Preliminary Decree describes claim 40A 184518-00 as a filed right to use groundwater from a spring that is an unnamed tributary of Timber Creek in Wheatland County for irrigation use. The decree abstract for the claim describes its various elements, as decreed by the Court. These elements include a priority date of April 1, 1886 and 140.00 acre place of use in the same claimed sections.

20. The decree abstract also identifies Glennie as the claim owner. The abstract contains one issue remark:

> THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE SWNESW SEC 3 TWP 9N RGE 17E WHEATLAND COUNTY.

21. On September 11, 2017, DeBuff filed timely objections to both claims in the Water Court. No one else objected to claim 40A 184518-00. DeBuff's objection to the claim included alleged abandonment.

Summary Judgment Motion

22. DeBuff's pending summary judgment motion is limited to claim 40A 184518-00. The motion asks the Court to dismiss the claim on the basis that there is no evidence of it being validly perfected for irrigation use under Montana law and the claim is abandoned.

ISSUE

Should the Court dismiss claim 40A 184518-00 on the basis of non-perfection or abandonment?

DISCUSSION

A. Summary Judgment Standard.

Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). A material fact is one that involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co*., 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court must view the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co*., 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *Id.*

Where the moving party is able to demonstrate that no genuine issue exists as to

any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee*, ¶ 26. Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 14, 353 Mont. 252, 255, 220 P.3d 395, 399.

B. Application.

DeBuff raises two sets of arguments as to why the Court should dismiss claim 40A 184518-00. First, DeBuff argues the claim was never properly perfected because the notice of appropriation was not timely filed. Second, DeBuff argues Glennie cannot overcome a presumption of abandonment that follows a long period of non-use. The Court addresses each argument in turn.

1. *Non-perfection*.

DeBuff first contends the Court should dismiss claim 40A 184518-00 because it never was perfected. DeBuff argues that because the claim is for use of water on the "first day of April 1886," it was subject to an 1885 statute that required that a notice of appropriation be filed with the county clerk and recorder within 20 days of the date the appropriator put water to beneficial use. (DeBuff Opening Br. at 8, *citing* R.C.M. § 89-810 (1947, *repealed* 1973)). As DeBuff sees it, the claim never was perfected because Wyllys Hedges did not sign and record the notice of appropriation until April 25, 1906.

Glennie does not dispute the facts underlying DeBuff's argument, but instead argues DeBuff is wrong on the law. As authority, Glennie cites two decisions that rejected arguments similar to those made by DeBuff. First, in *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17 (Jan. 31, 2013), the Court reversed the decision of a water master who had held a notice of appropriation filed outside the time limit contemplated by the 1885 statute could not be used as evidence to support a claimed priority date. The Court ruled such notices should be automatically excluded based on the timelines set in the 1885 statute. Although the case involved the issue of priority rather than non-perfection, it does stand for the proposition that even a defectively filed notice of appropriation has some potential evidentiary value.

The Water Court reached a similar result in the companion case *In re Danreuther*

Ranches, Case 41O-209, 2013 Mont. Water LEXIS 5 (Jan. 31, 2013). In *Danreuther*, an objector sought summary judgment, arguing a notice of appropriation that did not comply with the 1885 statute was inadmissible and its lack of admissibility overcame the prima facie status of a claim, shifting the burden of proof to the claimant. The water master agreed, but the Water Court reversed, ruling that the 1885 statute does not bar the use of notices of appropriation that failed to comply with statutory deadlines. The Water Court concluded that admissibility of the notice must be evaluated under current rules of evidence, and the objector did not overcome the prima facie status of the claim.[3]

Based on these cases, DeBuff's argument about the untimely filing of the notice of appropriation does not overcome the prima facie status of claim 40A 184518-00. The notice itself – even if improperly filed – is not conclusive evidence that Glennie and their predecessors failed to put water to beneficial use, which is DeBuff's burden on a non-perfection argument. *Hoon v. Murphy*, 2020 MT 50, ¶ 33, 399 Mont. 110, 460 P.3d 849. In other words, DeBuff is not precluded from arguing non-perfection at a hearing, but an improperly filed notice of appropriation does not establish non-perfection as a matter of law.

2. *Abandonment*.

Under Montana law, when an "appropriator or his successor in interest abandons or ceases to use the water for its beneficial use, the water right ceases." *Id*.; *see also, Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist*., 2022 MT 19, ¶ 7, 407 Mont. 278, 502 P.3d 1080. The test to determine whether a water right is abandoned focuses on the intent of the appropriator. *E.g., Featherman v. Hennessy,* 42 Mont. 535, 113 P. 751, 753 (1911); *Thomas v. Ball*, 66 Mont. 161, 213 P. 597 (1923). The Supreme Court has refined the abandonment standard as applied to existing (*i.e.* pre-July 1, 1973) water rights by assuming a long period of water nonuse creates a rebuttable presumption of intent to abandon the water right. *79 Ranch,* 204 Mont. at 432–33. The burden rests with the party asserting abandonment to prove a sufficiently long period of continuous nonuse

[3] The claims at issue ultimately reached the Montana Supreme Court in *Danreuther Ranches v. Farmers Coop. Canal Co*., 2017 MT 241, 389 Mont. 15, 403 P.3d 332.

to create this rebuttable presumption. *In re Klamert*, 2019 MT 110, ¶ 15, 395 Mont. 420, 426, 443 P.3d 379, 384. If presumption is established, the burden shifts to the appropriator to prove a lack of intent to abandon. *City of Deer Lodge*, 254 Mont. at 16. Ultimately, whether a water right is abandoned is a question of fact that depends on the "conduct, acts, and intent of the parties claiming the usufruct of the water." *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813 (quotation omitted).

DeBuff's abandonment argument is based on the theory that the undisputed facts establish a sufficiently long period of non-use to shift the burden to Glennie to prove lack of intent to abandon, which Glennie fails to do. Specifically, DeBuff argues the referenced deposition testimony shows that "between at least 1948 and up to at least July 1973, there is no evidence supporting any use of water under 40A 184518-00 for irrigation purposes." (Opening Br. at 10). DeBuff also argues Glennie cannot rebut the presumption because flows from the spring source are incapable of providing sufficient water for irrigation.

Glennie responds by arguing some of the undisputed facts post-date the 1973 enactment date of the Water Use Act and are therefore irrelevant. This assertion is incorrect. The Water Court has jurisdiction to determine a water right claim abandoned, even if the basis to do so involves evidence post-dating 1973. Sections 85-2-227(3), MCA; 3-7-501(4), MCA; *In re Champion Int'l Corp.*, Case 76HB-62; 1999 Mont. Water LEXIS 2 (Mar. 19, 1999); *see generally*, § 85-2-227(2) "[r]elevant evidence under this part may include admissible evidence arising before or after July 1, 1973").

Glennie also responds by citing several instances where the facts are not quite as undisputed as DeBuff asserts. For example, Glennie notes that Paugh's deposition includes testimony that he personally observed his grandfather Mattson operating his ditches and "shift water around" so as to "make use of whatever was there." (Doc. 54.00[4], Ex. 4 – Paugh Depo., at 10). Glennie also references the testimony of expert witness Mark Brooke who interpreted aerial photographs as depicting an "irrigation ditch

[4] Doc. 54.00 is DeBuff's motion and opening brief, including exhibits 1-12.

network." (Doc. 55.00[5], Ex. B – Brook Depo., at 35-36). Bruce Glennie testified about subirrigation and his brother Neil also recalled irrigation ditches on the property. Additionally, DeBuff concedes that some of the Glennie property was put into "CRP" at some point in time, including the period from about 1986 to 2022. (Opening Br. at 5). Although the parties do not provide much discussion about the effect of enrolling land in CRP, the Court notes it may constrain the period of alleged nonuse. *See*, § 85-2-404(3) (discussing effect of ceasing water use in connection with conservation set-asides).[6]

While Glennie's responses to DeBuff's non-use arguments are fairly sparse, the evidence is presented as part of a response to a motion for summary judgment where Glennie need only establish the presence of disputed material facts. The Court must view the facts Glennie raises in the light most favorable to Glennie as the non-moving party. Whether Glennie ultimately will prevail at trial is uncertain. However, for purposes of DeBuff's motion, Glennie identifies sufficient material facts as to water use to preclude summary judgment on the issue of abandonment.

ORDER

For the foregoing reasons, DeBuff's motion for summary judgment is DENIED. By separate order the Court will set a conference to discuss the schedule for further proceedings.

ELECTRONICALLY SIGNED AND DATED BELOW.

[5] Doc. 55.00 is the Foundational Affidavit for Glennie's exhibits.
[6] Unlike § 85-2-404 subparts (1) and (2), subpart (3) is not limited to existing rights after a final decree.

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