

LOWER MISSOURI DIVISION - JUDITH RIVER BASIN (41S)
* * * * *

Montana Water Court

IN THE MATTER OF THE ADJUDICATION	)	Case No. 41S-69
OF THE EXISTING RIGHTS TO THE USE	)	41S-W-142219-00
OF ALL THE WATER, BOTH SURFACE AND	)	41S-W-144220-00
UNDERGROUND, WITHIN THE JUDITH	)	41S-W-142221-00
RIVER DRAINAGE AREA, INCLUDING ALL	)	41S-W-142222-00
TRIBUTARIES OF THE JUDITH RIVER IN	)	41S-W-142225-00
JUDITH BASIN AND FERGUS COUNTIES,	)	41S-W-142226-00
MONTANA.	)	41S-W-142227-00
_____	)	41S-W-142228-00
	)	41S-W-142230-00

CLAIMANT: Estate of Elizabeth K. Pittman

OBJECTOR: Montana Department of Fish, Wildlife and Parks

ORDER ADOPTING MASTER'S REPORT AND MEMORANDUM

Pursuant to Montana Code Annotated, Section

85-2-233(4), the above entitled case was assigned to Water Master Kathryn L. W. Lambert. On October 11, 1990, the Water Mater issued a report containing Findings of Fact and Conclusions of Law. Copies of the report were served upon the parties. On October 22, 1990, an objection was filed to the Master's Report by Robert L. Johnson, Attorney for claimant Estate of Elizabeth K. Pittman. On October 26, 1990, an Objector's Response to Claimant's Objections to Master's Report was filed by the Montana Department of Fish, Wildlife and Parks. Neither party made application to the Water Court for action upon the Master's Report and upon the objections thereto by requesting that a hearing or oral argument be held.

Rule 53(e)(2) M.R.Civ.P. requires a Court to accept a Master's Findings of Fact unless clearly erroneous. The Court has reviewed carefully the Water Master's Findings and

Conclusions and the objection and response filed. The Court has listened to the two tapes of the June 1, 1988 hearing and read the post hearing briefs of counsel. The Court cannot conclude that the Master's Findings of Fact are clearly erroneous. Once the Findings of Fact are determined not to be erroneous, then the Master's ultimate Conclusions of Law represent a correct application of the law to the facts and should not be disturbed.

Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court adopts the Master's Report and

ORDERS that changes recommended in the Master's Conclusions of Law be made to the abstract of claim(s) listed above as they appear in the Temporary Preliminary Decree of the Judith River Basin (41S).

MEMORANDUM

Counsel for claimant valiantly tries to persuade the Court that the 12.96 cfs (518.4 miners inches) claimed in the Statements of Claim at issue here have not been abandoned. Claimant asserts that there exists unimpeached testimony established at the Hearing that gold mining was uneconomical from World War II to the middle or late 1970's, a period of approximately 34-38 years. The objectors presented evidence that at least 50-75 years have elapsed since extensive placer mining has been done on these claims.

The Montana Supreme Court case of 79 Ranch, Inc. v. Pitsch, 204 MT 426, 666 P2nd 15(1983) is controlling on this Court. The 79 Ranch opinion was issued over the very strong dissent of two judges who assailed the asserted destruction of

the long standing rule that "non-use standing alone is not sufficient to establish abandonment of a water right". See 79 Ranch supra, 204 MT at 438, 439 and 443. Particularly instructive is Judge Ettien's dissent. District Judge Ettien was sitting in place of Chief Justice Haswell. Judge Ettien's dissent discussed at length the immense impact that the majority opinion could have on those mining claims which have not operated for periods of up to fifty, sixty or seventy years, but which had potential, given the right economic conditions. Ibid. 204 MT at 441-443. It is apparent that the Montana Supreme Court was well aware of the implications that its decision might have on water rights appurtenant to mining claims and with that awareness, however, the Court ruled as it did.

In the 79 Ranch case, the evidence showed at least 40 years of continuous non use of water rights. The Court held that such a long period of non use was strong evidence of an intent to abandon the water rights. The Court further held that, in effect, such a long period of continuous non use raised the rebuttable presumption of an intention to abandon and that the burden of proof was shifted onto the non user to explain the reasons for non use. 79 Ranch, supra, 204 MT at 432, 433. In the instant case there has been extensive non use of water for periods of time exceeding 40 years. As a result, the burden of proof shifted to the claimant, as the non user, to explain the non use. The claimant's explanation of economic nonviability and stockwater use was inadequate and therefore, claimant failed to rebut the presumption of abandonment.

The economic argument presented by claimant here was addressed at the Supreme Court and found inadequate in the 79 Ranch case at pages 433 to 434 of 204 Mont. as follows:


"Here, Pitsch argues that his predecessors in interest did not have sufficient funds to irrigate. Such a broad claim, unsupported by more specific evidence, is not sufficient to rebut the presumption of abandonment. In response to this same argument the Colorado Court has stated: ...Considering the large demands for all of the appropriatable water in this state. . . , it might be said that nearly every abandoned water right could have its non-use justified by the economics that might prevail sometime in the future for use of this water. . . . This gleam-in-the-eye philosophy is not consistent with the protection and preservation of existing water rights." (Citations omitted) C F & I Steel Corporation, 515 P.2d at 458."

The same argument advanced by claimant, unsupported by more specific evidence, is not persuasive in the instant case.

The stockwatering argument of claimant is similarly unpersuasive. Claimant did not provide the Court with any authority suggesting that stock use of water evidences an intent not to abandon a water right used for mining purposes. In fact, the existence of claimant's stock water rights (41S-W-142217-00 and 41S-W-142218-00) demonstrates that the mining claim water rights were not used for stock watering purposes. Therefore, Conclusion of Law IX contained within the Master's Report is correct.

Accordingly, this Court adopts the Master's Report in whole.

DATED this 15th day of February, 1991.


C. Bruce Loble
Chief Water Judge

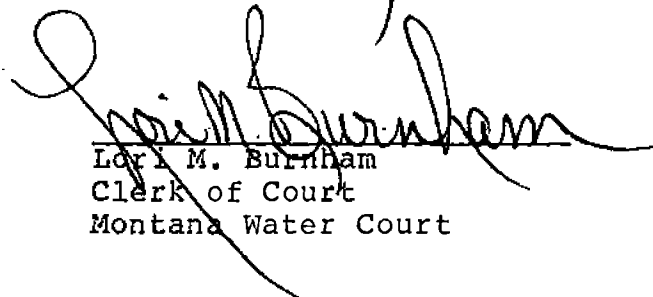
CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER ADOPTING MASTER'S REPORT AND MEMORANDUM was duly served upon the persons listed on the attached by depositing the same, postage prepaid, in the United States mail.

Estate of Elizabeth K. Pittman
Robert L. Johnson, Attorney
Suite 507, Montana Building
Lewistown, MT 59457

G. Steven Brown, Attorney
Dept. of Fish, Wildlife & Parks
1420 East Sixth Avenue
Helena, MT 59620

DATED this 1st day of February, 1991.



Lori M. Burnham
Clerk of Court
Montana Water Court