

Montana Water Court
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FILED

JUL 27 2016

Montana Water Court

MONTANA WATER COURT, LOWER MISSOURI DIVISION
BEAVER CREEK TRIBUTARY OF MILK RIVER - BASIN 40M

CLAIMANTS: **DBCO, LLC; Roger Ereaux;**
United States of America (US Fish & Wildlife
Service)

OBJECTOR: United States of America (US Fish & Wildlife Service)

40M 170174-00

ORDER GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

The subject of this case is claim 40M 170174-00 for a groundwater well. The claimants are DBCO, LLC and Roger Ereaux. The United States of America, Fish and Wildlife Service ("FWS" or "United States") objected to priority date, volume, and flow rate.

FWS has moved for summary judgment. The FWS motion is based on a mixture of documentary evidence and admissions made by the claimants when they failed to provide timely answers to discovery responses. The claimants asked to withdraw their admissions. That request was denied in a separate order.

The thrust of the FWS motion is that the United States owns claim 40M 170174-00. The claimants oppose the motion.

II. FINDINGS OF FACT

Claim 40M 170174-00 was filed by Martin Matovich for the Sleeping Buffalo Recreation Area. The claim was for a hot water artesian well located in the NWSWSE of Section 35, T32N, R32E with a 1923 priority date.

Newspaper accounts indicate that a wildcatter drilling for oil struck hot water instead, and that a local rancher came up with the idea of hot water pools. American

Legion Posts in Malta, Saco, and Hinsdale worked to capitalize on this opportunity and a New Deal era project known as the Legion Health Resort was born.

American Legion Post No. 79 in Saco, Montana filed a notice of appropriation for “that certain flowing well” on the SESW of Section 35. The water was “for the purposes of supplying a plunge one hundred (100) by two hundred (200) feet, which said plunge is located on the above described land and within one hundred and fifty (150) feet of the above described well.” The date of the appropriation was September 28, 1928. The American Legion’s notice of appropriation was not attached to the claim filed by the Sleeping Buffalo Recreation Area.

In May 1931, President Herbert Hoover issued an Executive Order titled Public Water Reserve No. 141, which reserved from settlement and sale “all land within 50 feet of a well drilled by the Bowdoin Oil and Gas Co. near the east line of the SE. ¼ of SW. ¼, sec. 35.”

In 1932, Congress enacted legislation setting aside the SWSE and the E2SESW of Section 35 for “the purpose of securing the proper use of the warm waters flowing from the abandoned Bowdoin well, and to other properly related recreational uses.” Act of June 30, 1932, Pub. L. No. 72-227, 47 Stat. 452.

A well log attached to the claim describes a well in the SESW of Section 35, T32N, R32E. The date of completion of the well was December 18, 1958, and the purpose of use was for recreation and health. The owner was listed as American Legion Post No. 57 from Malta, Montana. A DNRC examination worksheet states the well drilled in 1958 replaced a well drilled in 1923. Also attached to the claim was a copy of a map from the Phillips County Water Resources Survey showing the Saco Hot Springs in the S2 of Section 35.

On August 31, 1971, an entity named the Sleeping Buffalo Recreation Association authorized a resolution to dissolve itself and convey its property to the United States. On the same day, the Association quit claimed lands to the United States, including the SWSE and SESW of Section 35. The conveyance included the following language:

Together with all water and water rights, property and facilities now or hereafter installed, including all additions, replacements and (illegible) hereof, located upon the real property herein-before described, and easements therefor, together with all water and rights appurtenant thereto.

In 1974, the United States sold Harold Blick 209 acres of land, including the SWSE and SESW of Section 35. The sale was made subject to reservations to the United States of:

all the geothermal steam and associated resources in the land hereby conveyed...provided that the Grantee may make use of so much of the hot water from the existing well as is necessary for the operation and maintenance of the recreation development, at no cost. Should the existing well become inoperative or nonproductive for any reason, a replacement well may be drilled and brought into production.

In 1993, the DNRC mailed a document titled QUESTIONNAIRE FOR COMMERCIAL WATER USE CLAIMS to Sleeping Buffalo Management Co., of Saco, Montana. Such questionnaires were mailed to claimants of water rights as part of the claims examination process. Douglas Plouffe answered the questionnaire.

The commercial facility operated by Sleeping Buffalo included a golf course, pool, heating system for pool, motel, café, store, motocross track, rodeo arena, and baseball diamond. The questionnaire stated the well flowed 365 days a year and had been in operation since 1923. A topographic map attached to the questionnaire showed a feature labeled Sleeping Buffalo in the SWSE of Section 35.

III. CONTENTIONS OF THE PARTIES

The United States contends that DBCO and Ereaux entered the chain of title after the deed to Blick, which reserved ownership of the hot water well to the United States. The United States asserts that, as successors to Blick, DBCO and Ereaux only received whatever title Blick obtained from the United States. Because title to the well was reserved, Blick received no ownership interest in the well, and was therefore unable to convey title to his successors.

To support this assertion, the United States relies on the deeds from Sleeping Buffalo Recreation Association to the United States, and the deed from the United States

to Blick. The United States also references numerous admissions made by the claimants arising from their failure to answer discovery requests.

These admissions include an acknowledgment that the Blick deed did not convey any right to the use of geothermal water, and that claimants did not acquire water right 40M 170174-00 via the Blick deed.

The claimants' response consists primarily of general assertions that many of their admissions are untrue, and that genuine issues of material fact would exist if those admissions could be withdrawn. The claimants also reference the 1928 notice of appropriation filed by American Legion Post No. 79. They contend this notice of appropriation predates FWS's evidence of ownership and establishes a factual controversy by proving that the United States' claims to the water are in second position.

IV. ISSUE

1. Is the United States entitled to summary judgment on the issue of ownership?

V. PROCEDURAL HISTORY

The case has undergone numerous twists and turns since the parties filed objections to the original Master's Report. Although objections to Master's Reports are reviewed pursuant to Rule 53, M. R. Civ. P. and related case law, the parties have significantly expanded the issues through both their objections and their development of new issues subsequent to those objections.

After objections to the Master's Report were filed, the Court committed the case back to the Master for further proceedings. After multiple failed attempts at settlement, the Court exercised its prerogative to preside over this case directly.

A new scheduling order was issued, discovery was allowed, and the parties have since proceeded with the intention of litigating all matters relevant to the water right at issue, rather than confining themselves to the objections initially filed to the Master's Report. That procedural history has brought the parties and the Court to the point of summary judgment.

VI. APPLICABLE LAW

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. A material fact is one that involves a claim or objection “to the extent that it requires resolution by the trier of fact.” *Hopkins v. Superior Metal Workings Sys.*, 2009 MT 48, ¶ 5, 349 Mont. 292, 203 P.3d 803 (citing *Arnold v. Yellowstone Mountain Club*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137). 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 is able to 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.*

VII. ANALYSIS

1. Is the United States entitled to summary judgment on the issue of ownership?

Part One: The Conveyance from Sleeping Buffalo to the United States

The first question is whether the United States has established the absence of a genuine issue of material fact regarding its acquisition of claim 40M 170174-00. Answering this question requires a review of the chain of title. The August 31, 1971 deed from the Sleeping Buffalo Recreation Association conveyed all the property of the Association to the United States, including all water and water rights. The property

conveyed included a hot springs resort that used an artesian hot water well. At least two wells were used to operate the resort, with the first drilled by Bowdoin Oil and Gas Company, and the second, a replacement well, drilled by the American Legion Post in Malta.

Various American Legion Posts in the area played a role in the early operation of the resort, and a 1928 notice of appropriation was filed by American Legion Post No. 79 in Saco, Montana. Although there has not been a complete chain of title for land or water submitted by either side, there is no evidence showing that title to claim 40M 170174-00 was conveyed to a third party before Sleeping Buffalo Recreation Association quit claimed its assets to the United States in 1971.

Had such evidence existed, the claimants could have used it to raise an issue of fact regarding ownership. Without such evidence, the logical conclusion is that Sleeping Buffalo Recreation Association owned claim 40M 170174-00, and that title to that claim was conveyed to the United States as part of the transaction in 1971.¹

The claimants assert that the 1928 notice of appropriation by the American Legion in Saco rebuts the United States' claim of title because it "predates all of FWS's evidence of ownership of the water" and that if the notice is valid "the US claims to water would be in second position... ." Claimants' Response in Opposition to Objector's Motion for Summary Judgment at 8, May 11, 2016. This assertion would only be true if there were evidence showing a conveyance of the American Legion water right to a third party prior to the transaction between Sleeping Buffalo Recreation Association and the United States in 1971. The existence of such evidence could have created a genuine issue of fact regarding ownership by establishing at least the potential for privity of title between the claimants and the American Legion Post in Saco *without* intervening ownership by the United States.

¹ The record also contains some discrepancies regarding the location of the well. Some documents place the well in the SW of Section 35, while others place it in the SE. The record also indicates that the original well has been re-drilled on at least one occasion. Despite these differences, there is no evidence that the claimants are asserting title to one well and the United States is asserting title to another. It appears that not more than one geothermal well at a time has historically been used to operate the hot springs resort.

The law of summary judgment requires that all reasonable inferences from the evidence be made in favor of the non-moving party. Inferences are based on facts established by evidence, and are therefore different from hypothetical alternatives unconnected to facts. Without additional facts, the American Legion notice of appropriation does not lead to a reasonable inference that the United States' ownership is subordinate to the claimants'.

The reasonable import of the record as a whole is that the American Legion was asserting a claim to the Bowdoin well, that Sleeping Buffalo Recreation Association was a successor to the American Legion, and that its claim to the well was conveyed to the United States. And, while it is possible to imagine alternative inferences based on alternative facts, those facts have not been supplied here. 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." *Lee*, ¶ 26. Reasonable inferences cannot be drawn in favor of the claimants when no facts have been provided to support them.

In summary, the United States has provided evidence establishing its acquisition of title to claim 40M 170174-00 via the deed from Sleeping Buffalo. The claimants have not provided any evidence to the contrary, and have not met their burden of establishing a genuine issue of material fact regarding ownership.

Part Two: The Conveyance from the United States to Blick

The second question is whether the United States conveyed claim 40M 170174-00 to Blick when it sold him the Sleeping Buffalo Resort in 1974. If such a conveyance occurred, there would again be the possibility of a genuine issue of material fact regarding ownership.

The language of the Blick deed reserved to the United States "all the geothermal steam and associated resources in the land hereby conveyed...provided that the Grantee may make use of so much of the hot water from the existing well as is necessary for the operation and maintenance of the recreation development, at no cost."

The issue is whether the phrase “geothermal steam and associated resources in the land” was clear enough to effectuate a reservation of water rights in favor of the United States. Standing alone, this language could be construed as something less than a reservation of all water rights appurtenant to the land. If this case involved a dispute over an irrigation right diverted from a creek rather than a well, it could be argued that this language did not reserve such a right.

However, this case is about a hot water well, not an irrigation right. The factor tipping the balance in favor of a reservation is the next phrase in the deed which refers to hot water, an existing well, and a recreational development. Looking at the reservation language as a whole, its intent was not only to reserve the hot water well, but to authorize its subsequent use by the Grantee at no cost.

Faced with this deed, the obligation of the claimants was to provide evidence showing that a reservation of the water right they are now claiming did not occur, that they are claiming a different right, that they are outside the chain of title encompassed by the deed, or that their claim of ownership is viable for some other reason. The claimants did not provide evidence showing a genuine issue of material fact on any of these issues, nor does a review of the record as a whole suggest such evidence exists, or that it may be forthcoming.

The Impact of the Claimants' Admissions

The United States sent discovery requests to the claimants which included requests for admissions. The claimants did not provide timely answers, and the admissions were deemed admitted. The claimants filed a motion asking that their admissions be withdrawn and requesting additional time to respond. Their request was denied.

The United States' summary judgment motion included numerous citations to the claimants' admissions. Most of these admissions simply affirmed what the record already shows. As an example, the claimants admitted the 1971 deed from Sleeping Buffalo to the United States conveyed all water rights appurtenant to the lands described in the deed. This admission is a restatement of the deed and does not add anything new to the analysis of the summary judgment motion before the Court. Even without the

claimants' admissions, the record shows that there are no genuine issues of fact regarding ownership of claim 40M 170174-00.

VIII. CONCLUSION AND ORDER

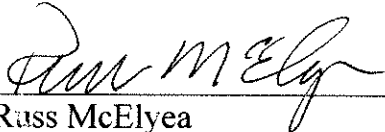
The evidence provided by the United States supports its claim to ownership of water right 40M 170174-00. The record establishes that the United States became the owner of this right through operation of deeds, and that it is therefore entitled to summary judgment as a matter of law. Even looking at the record in a light most favorable to the claimants, they have not provided any evidence raising a genuine issue of material fact regarding ownership, nor have they shown that summary judgment is precluded as a matter of law.

Accordingly, the United States' motion for summary judgment is GRANTED. The United States is the owner of water right 40M 170174-00, and DBCO and Roger Ereaux have no ownership interest in that right. A Post Decree Abstract of Water Right Claim has been attached to this Order to confirm the correction to the ownership of the right. The caption and service list have been updated to remove DBCO, LLC and Roger Ereaux as owners.

The Court has not been asked to interpret rights to use of 40M 170174-00 pursuant to the Blick deed, and nothing in this order should be construed as an opinion on that issue.

A separate scheduling order will be issued to address remaining issues in this case.

DATED this 27th day of July, 2016.



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Note: Caption and Service List Updated 7/26/2016

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BEAVER CREEK, TRIBUTARY TO MILK RIVER
BASIN 40M**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40M 170174-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

***Owners:** US DEPT OF INTERIOR, FISH AND WILDLIFE SERVICE
PO BOX 25486
DENVER FEDERAL CENTER
DENVER, CO 80225

Priority Date: DECEMBER 31, 1923

Type of Historical Right: USE

Purpose (use): COMMERCIAL

Purpose Clarification: HOT SPRINGS RESORT

***Flow Rate:** 400.00 GPM

***Volume:** 645.00 AC-FT

Source Name: GROUNDWATER

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSWSE	35	32N	32E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSE	35	32N	32E	PHILLIPS
2			S2SW	35	32N	32E	PHILLIPS
3			N2NW	2	31N	32E	PHILLIPS

Remarks:

THIS APPROPRIATION OF WATER TAKES GROUNDWATER FROM THE BEAVER CREEK, TRIBUTARY TO MILK RIVER DRAINAGE (BASIN 40M). THIS USE MAY POTENTIALLY AFFECT WATER RIGHTS IN THE MILK RIVER, BETWEEN FRESNO RESERVOIR & WHITEWATER CREEK DRAINAGE (BASIN 40J). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.