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Montana Water Court

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BY *Melley Brallem*
DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

HENWOOD, et al,)	
)	
Plaintiffs,)	Cause No. 2717
)	
v.)	
)	
HODSON, et al,)	
)	
Defendants.)	

ORDER ON SARRAZIN'S MOTION FOR SUMMARY JUDGMENT

PROCEDURAL HISTORY

On August 22, 2016, Dirk S. Adams ("Adams") filed two Complaints by Dissatisfied Water User, one on behalf of Porcupine Creek Ranch, Inc. regarding water rights 43A 191679-00 and 43A 191681-00, and one on behalf of Adams/Lazy SR Ranch, LLC, regarding water rights 43A 31162-00 and 43A 113381-00. Adams also filed Dirk S. Adams Declaration in Support of Complaint by Dissatisfied Water User ("*Adams Declaration*") on the same date.

On September 12, 2016, Water Commissioner Richard Sarrazin ("Sarrazin") filed a Response ("*Sarrazin Response*") to Adams' Complaints, which included a Memorandum by DNRC Water Resource Specialist Brett Zundel addressing Montana Fish, Wildlife and Parks ("FWP") instream flow rights.

On November 3, 2016, Sarrazin, by and through counsel Breeann M. Johnson, filed a Motion for Summary Judgment and Supporting Brief ("*Sarrazin Motion*"). Sarrazin also filed The Affidavit of Richard Sarrazin ("*Sarrazin Aff.*") on the same date.

On December 19, 2016, Adams filed Dissatisfied Water User Adams' Memorandum in Opposition to Sarrazin Motion for Summary Judgment ("*Adams Memo*").

On December 27, 2016, Sarrazin filed a Reply in Support of Motion for Summary Judgment ("*Sarrazin Reply*"). Neither party requested a hearing on the motion. A hearing on the motion is waived. Rule 56(c)(2)(A), M.R.Civ.P. The Motion for Summary Judgment has been fully briefed and is now ripe for review.

1. Summary of Adams' Filings

a. Adams' Complaints by Dissatisfied Water User

The following is a summary of the allegations contained in the Complaints by Dissatisfied Water User filed by Adams.

Porcupine Creek Ranch, Inc., by Dirk S. Adams (water rights 43A 191679-00 and 43A 191681-00)

1. "He [Sarrazin] is acting as an employee of Arthun Ranch, refusing to allow our ranch to use the oldest right on the Shields River, so that he can benefit Arthun Ranch."
2. "We have the oldest rights on the Shields River and Sarrazin is refusing to allow us to use them."

Dirk S. Adams/Lazy SR Ranch, LLC (water rights 43A 31162-00 and 43A 113381-00)

1. "He [Sarrazin] is acting as an employee of Arthun Ranch, refusing to allow us to divert our water and refusing to provide proper notice."
2. "The Lazy SR owns the oldest right on the Shields River and the ditch rider, who is grossly unqualified, is refusing to let us use it."

b. Adams Declaration

The following is a summary of the allegations contained in the Dirk S. Adams Declaration the Complaints by Dissatisfied Water User.

1. "[T]here was no notice provided to Adams or any other member of staff of the Lazy SR Ranch about appointment of ditch rider."
2. FWP has instream rights that Sarrazin is not recognizing or enforcing.
3. Section 85-5-107, MCA requires the water commissioner to keep a daily record of the water distributed. "This, I believe, Mr. Sarrazin has not done."
4. Court should appoint impartial and competent water commissioner who has the time.

In addition to the four points outlined above, Adams made the following requests in his Declaration:

1. The Court hold a hearing on the Complaints by Dissatisfied Water User.
2. The Court invite FWP to the hearing.
3. The Court remove Sarrazin as a "ditch rider".
4. The Court amend its Order 1 by revising it so that it is in the form recommended to the District Courts.
5. The Court instruct the District Court Clerk to issue a letter to upper Shields River water users in form found in Guide for District Court Judges.
6. The Court withdraw its Order 2.

c. Adams Memo

The following is a summary of the requests contained in the Adams Memo. In the alternative to holding Sarrazin in contempt, Adams requests the Court order the following:

1. That this Court deny Sarrazin's Motion for Summary Judgment.
2. That this Court order all requests for water commissioners to be noticed to water users on the Upper Shields River Basin 14 days before the Court hears any such application.
3. All requests from a minority user of the water rights on the Upper Shields River Basin for a particular water commissioner be accompanied by a sworn affidavit from the minority user explaining why a particular recommendation is made and whether that recommended person has any business, familial, or other affiliations with said minority water user.

4. That all decisions to appoint a water commissioner be noticed to all water users.
5. That weekly the water commissioner shall post at readily accessible public place in Wilsall the water commissioner's report on his activities of that week.
6. That any requirement that any water user be required to install a measuring device in the user's diversion be applied to all diversions for all users in the Upper Shields River Basin in the same month of the same year.

APPLICABLE LAW

As this action is the result of the Complaints by Dissatisfied Water User filed by Adams, a review of the statutory framework regarding water commissioners, including Complaints by Dissatisfied Water User, will provide the foundation for the analysis and discussion of the issues addressed in this Order.

1. Water Commissioners

The Montana Water Use Act governs water use in Montana. MCA, Title 85. The Act provides for the appointment, by the District Courts, of water commissioners who have the authority to admeasure and distribute the water rights in a source affected a decree of a court of competent jurisdiction. Section 85-5-101(1), MCA. Section 85-2-406, MCA vests the District Courts with supervisory authority over the distribution of water. A District Court's "supervisory authority includes the supervision of all water commissioners" and "supervision must be governed by the principle that first in time is first in right." Section 85-2-406, MCA.

In the exercise of the District Court judge's discretion, it is their duty to appoint one or more water commissioners upon the application of the owners of at least 15% of the water rights affected by a decree. Section 85-5-101(1), MCA. If the petitioners are unable to obtain the application of at least 15% of the water rights affected and they are unable to obtain water to which they are entitled, the District Court judge may appoint a water commissioner. Section 85-5-101(1), MCA.

Water commissioners appointed by a District Court are not employees of the judicial branch, a local government, or a water user. Section 85-5-101(6), MCA.

A water commissioner has the authority, and it is their duty, "to admeasure and distribute to the users of water the stored and supplemental water stored and as released by the department of natural resources and conservation under provisions of Title 85, Chapter 1, to be diverted into and through a stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply in the same manner and under the same rules as decreed water rights are admeasured and distributed." Section 85-5-105, MCA.

Water commissioners must keep a daily record of the amount of water distributed to each water user, unless the district judge orders a different schedule. Section 85-5-107(1), MCA. The commissioners record "must show in detail the total amount of water distributed to each water user during the month or the season and the cost of distributing the water, based upon the water commissioner's daily salary, other costs of the water commissioner by the district judge, and the proportionate amount of water distributed." Section 85-5-107(1), MCA.

A water commissioner's authority, for the purpose of carrying out the provisions of Title 85, Chapter 5, Parts 1 through 3, includes "the authority to enter upon any ditch, canal, aqueduct, or other source for conveying the waters affected by the decree and to visit, inspect, and adjust all headgates or other means of distributing the waters." Section 85-5-108, MCA. A water commissioner also has "the same powers as a sheriff or constable to arrest any person interfering with the distribution made by the commissioner, to be dealt with according to law." Section 85-5-108, MCA.

The water commissioner's duties typically end at the point of diversion; once water is distributed to a water user's point of diversion the water commissioner does not deal with how that water is further used/moved/distributed through a water user's ditch system. A water commissioner's appointment may include the authority to distribute water in a ditch if the ditch is owned by a partnership, tenants in common, or a corporation, and any partner, tenant in common, or stockholder petitions the court. Section 85-5-401, MCA. A water commissioner's appointment may also include the authority to distribute water in a ditch, in the exercise of the judge's discretion, after a

final decree if at least 10% of the owners of the waters of a ditch petition the court for a water commissioner to distribute water from the ditch. Section 85-5-407, MCA.

A ditch rider is typically employed under contract by private parties who co-own a ditch or ditch system and is responsible for distributing the water in the private ditch/ditch system. A ditch rider does not deliver water from the source; this is the water commissioner's responsibility. However, the term "water commissioner" and "ditch rider" are sometimes mistakenly used interchangeably, and are in many of the filings in this case, despite being separate and distinct.

It is the duty of a water commissioner not to apportion or distribute any water through the ditch if the water user fails to place or maintain a proper measuring device. Section 85-5-302, MCA. Section 85-5-302, MCA states in pertinent part that, "All persons using water from any stream or ditch for which a water commissioner is appointed are required to have suitable headgates at the point where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch." Additionally, a commissioner who fails to perform any of the duties imposed by order of the District Court judge can be found guilty of contempt of court. Section 85-5-109, MCA.

2. Complaint by Dissatisfied User

Section 85-5-301, MCA sets forth the procedures under which a water user may file a complaint if they are dissatisfied with the method of distribution of the waters of a stream and if they are claiming to be entitled to more water than they are receiving.

Section 85-5-301, MCA, reads as follows:

85-5-301. Complaint by dissatisfied user. (1) A person owning or using any of the waters of the stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters of the stream or ditch by the water commissioner or water commissioners and who claims to be entitled to more water than the person is receiving or to a right prior to that allowed the person by the water commissioner or water commissioners may file a written complaint, duly verified, setting forth the facts of the claim.

(2) Upon receipt of the complaint, the judge shall fix a time for the hearing of the petition and shall direct that notice be given to the parties interested in the hearing as the judge considers necessary. At the time fixed for the hearing, the judge shall hear and examine the complainant and other parties who appear to support or resist the claim and examine the water commissioner or water commissioners and witnesses regarding the charges contained in the complaint.

(3) Upon the determination of the hearing, the judge shall make findings and issue an order that the judge considers just and proper. If it appears to the judge that the water commissioner or water commissioners have not properly distributed the water according to the provisions of the decree, permit, certificate, or change in appropriation right, the judge shall give the proper instructions for distribution of the water.

(4) The judge may remove any water commissioner and appoint a new water commissioner if the judge determines that the interests of the parties in the waters mentioned in the decree, permit, certificate, or change in appropriation right will be best served by appointing a new water commissioner. If it appears to the judge that the water commissioner has willfully failed to perform the water commissioner's duties, the water commissioner may be proceeded against for contempt of court, as provided in contempt cases. The judge shall make an order regarding the payment of costs of the hearing that the judge determines is just and proper.

In a dissatisfied water user complaint proceeding under § 85-5-301, MCA, the question before the court "is whether the water commissioner is distributing water to the respective users according to the applicable decree." *Eldorado Coop Canal Co. v. Hodge*, 2016 MT 145, ¶ 15, ___ Mont. ___, ___ P.3d __ (citing *Fellows v. Office of Water Commr.*, 2016 MT 169, ¶ 16, 365 Mont. 540, 285 P.3d 448). Under Section 85-5-301, MCA, the remedies available to a dissatisfied water user include the following:

- The judge shall give proper instructions for distribution of the water if it appears to the judge that the water commissioner has not properly distributed the water according to the provisions of the decree, permit, certificate, or change in appropriation right. Section 85-5-301(3), MCA.
- The judge may remove a water commissioner and may appoint a new water commissioner if the judge determines the interests of the parties in the waters mentioned in the decree, permit, certificate, or change in appropriation right will be best served by appointing a new water commissioner. Section 85-5-301(4), MCA.

- If it appears to the judge that the water commissioner has willfully failed to perform the water commissioner's duties, the water commissioner may be proceeded against for contempt of court, as provided in contempt cases. Section 85-5-301(4), MCA.
- The judge shall make an order regarding the payment of costs of the hearing that the judge determines is just and proper. Section 85-5-301(4), MCA.

The above noted remedies are the only relief available to a water user filing a dissatisfied water user complaint under § 85-5-301, MCA. Any other matters beyond the question of whether the water commissioner is distributing water to existing water right holders pursuant to decree are outside the scope of the proceedings provided for by § 85-5-301, MCA. § 85-5-301, MCA; see also *In re Kelly*, 2010 MT 14, ¶ 31-33, 355 Mont. 86, 224 P.3d 640 (citing *Baker Ditch Co. v. Dist. Ct. of Eighteenth Jud. Dist.*, 251 Mont. 251, 256, 824 P.2d 260 (1992)).

STANDARD OF REVIEW

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 M.R.Civ.P. 56(c)]. To determine the existence or nonexistence of a genuine issue of material fact, the Court looks to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USSA Cas. Ins. Co.*, 2001 MT 59, ¶ 4, 304 Mont. 356. All reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 25. The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Lee*, ¶ 25. 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 as to any material fact remains in dispute, the burden then 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. *Lee*, ¶ 26.

The power of the Court to render summary judgment in favor of the moving party includes the power to render summary judgment for the non-moving party provided the case warrants that result. *Hereford v. Hereford*, 183 Mont. 104, 598 P.2d 600 (1979).

DISCUSSION

Having reviewed the statutory framework regarding water commissioners and outlined the allegations and requests for relief set forth by Adams, this Master now turns to address Sarrazin's Motion for Summary Judgment.

1. Appointment of Water Commissioner

On July 27, 2016, Sarrazin was appointed Water Commissioner for the Upper Shields River and Upper Shields Canal by Order of the Montana Sixth Judicial District on July 27, 2016. Sarrazin has been the water commissioner for the Shields Valley for 10 years. *Sarrazin Response*, ¶ 1. Adams has owned land on the Shields River for around 30 years. *Adams Decl.*, ¶ 5. Adams takes issue with the form of the District Court's Order Appointing Water Commissioner, as well as the lack of notice of the Order. Adams contends the Order does not follow the form provided on the Montana Courts website. However, the form Adams references, found in the Enforcement – District Court Guide, is template for District Court judges to use and is not mandated by statute. There is no statutory requirement under the laws governing the appointment of water commissioners for the District Court to serve an Order Appointing Water Commissioner upon affected water users. MCA, Title 85, Ch. 5. Additionally, the Order is a public document, available through the Clerk of District Court.

There is no statutory requirement for a water commissioner to serve the Order appointing them water commissioner on affected water users. MCA, Title 85, Ch. 5. While there is no statutory mandate, Sarrazin notes that customarily once a water commissioner is appointed, they normally call or contact affected users. *Sarrazin Motion*, at 7. Between July 27, 2016 and August 5, 2016, Sarrazin started contacting Upper Shields River and Upper Shields Canal water users to inform them that he had been appointed as the Water Commissioner for those sources. *Sarrazin Aff.*, ¶ 5. Sarrazin

contacted Adams by telephone to discuss Adams' junior water rights. *Sarrazin Aff.*, ¶ 10; *Adams Decl.*, ¶ 4(d).

Adams contends that, "it is a violation of the U.S. Constitution and the Montana Constitution not to provide notice to persons whose property is directly affected by a Court Order." *Adams Decl.*, ¶ 4(a). He also contends that, "when the government tampers with property rights, including water rights, the persons affected are entitled to notice. *Adams Memo*, at 1-2. Adams then states that, "the fact that the statutory provisions regarding the appointment of a water commissioner, do not explicitly call for notice means nothing, as it does not forbid notice and other provisions of law, including the state and federal constitutions require notice," citing *Luppold v. Lewis*, 172 Mont. 280, 563 P.2d 538 (1977). *Adams Memo*, at 2. However, *Luppold v. Lewis* addressed who should be given notice of a hearing in a dissatisfied water user proceeding, not who should be given notice of the appointment of a water commissioner.

Adams also notes the Montana Courts website also, "provides a form for the District Court Clerk to send a notice to every water user advising them of the appointment of a ditch rider and of the water user's right to object to such appointment and to obtain a hearing on that objection. (emphasis added)." *Adams Decl.*, ¶ 4(c). However, that form is a sample of a letter the District Court Clerk may use to inform water users of their portion of the costs of water distribution at the end of a water commissioner's term of appointment. The letter has nothing to do with the initial appointment of the water commissioner and nothing in the Montana Water Use Act's laws governing water commissioners affords a water user the right to notice of a water commissioner's appointment, a right to file an objection, and have a hearing on the appointment. MCA, Title 85, Ch. 5.

While Adams takes issue regarding notice of Sarrazin's appointment and the types of forms used by the Court, he does not contest, nor provides a factual basis, to deny that Sarrazin was duly appointed as the water commissioner for the Upper Shields River and Upper Shields Canal by the Sixth Judicial District Court. Therefore, there is no genuine issue of material fact regarding Sarrazin's appointment as water commissioner.

2. Distribution of Water

As noted above, the question before the court in a dissatisfied water user proceeding “is whether the water commissioner is distributing water to the respective users according to the applicable decree.” *Eldorado Coop Canal Co.*, 2016 at ¶ 15.

The water right 43A 31162-00, owned by Dirk S. Adams, is an irrigation right from the Shields River with an April 25, 1883 priority date and is diverted into Big Canal and Adams Pump Site. The water right 43A 113381-00, owned by Dirk S. Adams and Anita L. Adams, is an irrigation right from the Shields River with a June 10, 1883 priority date and is diverted into Upper Swandal Ditch, Middle Swandal Ditch, and Lower Swandal Ditch. Both water rights are two of the most senior irrigation rights from the Shields River.¹ See Upper Shields River above Elk Creek (43A) Enforcement Project Manual, 2016 Tabulations, Red Book (prepared for the Montana Sixth Judicial District by the Montana Water Court and the Department of Natural Resources and Conservation).

The water rights 43A 191679-00 and 43A 191681-00, owned by Porcupine Creek Ranch, Inc., are irrigation rights from the South Fork, Shields River with May 20, 1902 priority dates and are diverted into Vandyck-Pepper ditch. These water rights on the South Fork, Shields River are junior to water rights 43A 31162-00 and 43A 113381-00, and numerous other intervening water rights.

Underlying the Montana Water Use Act is the doctrine of prior appropriation. Under this doctrine, “water rights are exercised in accordance with their order of priority, starting with the earliest (senior) rights and progressing to the later (junior) rights, until the water is all appropriated.” Ted J. Doney and C. Bruce Loble, *Basic Water Montana Water Law*, <http://courts.mt.gov/Portals/113/water/guides/basiclaw2010.pdf>, (last updated 2010). Around August 1, 2016, Sarrazin made a preliminary assessment of water availability in the Upper Shields and Upper Shields Canal in order to determine the amount of water available for distribution. *Sarrazin Aff.*, ¶ 8. Sarrazin determined water availability was low and that junior water users would need to be shut off. *Sarrazin Aff.*, ¶ 8. He then began the process of notifying junior water users that he would be shutting

¹ Water right 43A 193075-00, owned by Gordon L. and Jaqueline J. Bright, also has an April 25, 1883 priority date.

off their water. *Sarrazin Aff.*, ¶ 8. Shutting off junior water users in order to satisfy senior water users when water becomes short is precisely the duty Sarrazin had as the water commissioner under § 85-5-105, MCA. After determining water availability in the Upper Shields and Upper Shields Canal was low, Sarrazin had the authority under § 85-5-105, MCA to shut off junior water users. Here, both Sarrazin and Adams agree that Sarrazin shut off Adams' Porcupine Creek Ranch, Inc. junior water rights (water rights 43A 191679-00 and 43A 191681-00), the authority for which is clearly delineated by § 85-5-105, MCA. *Sarrazin Aff.*, ¶ 13-14, *Adams Decl.*, ¶ 4(h).

With respect to the FWP's instream water rights, those rights have 1978 priority dates making them junior to all existing pre-1973 water rights, including Adams, Porcupine Creek Ranch, Inc., and Lazy SR Ranch, LLC's water rights. Therefore, the FWP instream water rights are not relevant to the distribution of the Adams, Porcupine Creek Ranch, Inc., and Lazy SR Ranch, LLC water rights.

Adams asserts Sarrazin had no authority to require Adams to have a measuring device in the Big Ditch to access his water. *Adams Memo*, at 2. As Sarrazin was duly appointed as the water commissioner for the Upper Shields River and Upper Shields Canal by the Sixth Judicial District Court, under § 85-5-302, MCA, Sarrazin had the authority to deny the distribution of water, regardless of priority, to any water user who did not have a proper measuring device. Adams also argues that Sarrazin did not have the authority to deny Adams water on the grounds he did not have a measuring device, while at the same time letting other water users receive water without measuring devices. As it is the duty of a water commissioner under § 85-5-302, MCA to not apportion or distribute any water to a water user who fails to place or maintain a proper measuring device, this Master agrees with Adams that this duty should be applied equally to all water users.

During the August 19, 2016 meeting between Sarrazin and Adams, Sarrazin informed Adams that he needed to have a measuring device at the head of the diversion for his senior water right. *Sarrazin Aff.*, ¶ 14. In his Affidavit, Sarrazin states, "however, since he did not currently have a measuring box I offered to have him come with me to estimate the amount of his senior water right so that he could continue to use it as long as

water was available. Mr. Adams refused to discuss the matter any further and ended the meeting.” *Sarrazin Aff.*, ¶ 14. Under § 85-5-302, MCA, Sarrazin had the authority to refuse to distribute water to any water user who failed to install or maintain a proper measuring device. As the non-moving party, Adams may not rely merely on denials, speculation, or conclusory statements, but must set forth specific facts in order to establish that a genuine issue of material fact exists regarding Sarrazin’s authority and distribution of Upper Shields River and Upper Shields Canal water. He has not done so. Therefore, no genuine issues of material fact exist regarding Sarrazin’s authority and distribution of water from the Upper Shields River and Upper Shields Canal.

3. Relief Requested

As discussed above, the relief available to a dissatisfied water user under § 85-5-301, MCA is limited. Adams makes six requests in his Declaration and an additional six request in his Memo. *Adams Decl.*, ¶ 8, *Adams Memo*, at 3. Sarrazin argues the remedies sought by Adams are either outside the scope of relief that may be pursued under a dissatisfied water user complaint or they are moot. *Sarrazin Motion* at 9-10. Sarrazin’s appointment as water commissioner ended on September 23, 2016. *Clerk of District Court, June Little Letter*, (filed September 26, 2016), *Sarrazin Aff.*, ¶ 19. Consequently, the remedies available under § 85-5-301, MCA, either giving instruction to the water commissioner, removing the water commissioner, and/or appointing a new water commissioner are no longer available and are thus moot.

Adams also requests the water commissioner post weekly at a public place in Wilsall a report on his activities of that week. While § 85-5-107(1), MCA requires a water commissioner to keep a daily record of the amount of water distributed to each water user (unless the district judge orders a different schedule), the statute does not require the water commissioner to post this daily record in a public place. Section 85-5-107(1), MCA. Additionally, the remedies sought by Adams regarding future notice of petitions for, and appointment of, water commissioners are outside scope of the remedies available under § 85-5-301, MCA.

Adams also requests “that any requirement that any water user be required to install a measuring device in the user’s diversion be applied to all diversions for all users in the Upper Shields River Basin in the same month of the same year”. *Adams Memo*, at 3. Under § 85-5-302, MCA all water users “are required to have suitable headgates at the point where a ditch taps a stream and shall also, at some suitable place on the ditch and as near the head as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the waters flowing in the ditch.” Therefore, any future water commissioner must adhere to this statutory mandate in requiring all water users to have suitable measuring devices before distributing water to them.

4. Undisputed Material Facts

Based on the record and foregoing analysis, this Master finds the following material facts are undisputed:

1. Sarrazin was duly appointed Water Commissioner for the Upper Shields River and Upper Shields Canal by the Montana Sixth Judicial District on July 27, 2016. *Order Appointing Water Commissioner*, at 1 (filed July 27, 2016)
2. Sarrazin contacted Adams to inform him that Adams’ junior water rights would need to be shut off. *Sarrazin Aff.*, ¶ 10.
3. On August 19, 2016, Sarrazin met with Adams at Adams’ property, accompanied by Park County Deputy Sheriff Jason Hopkin, and shut off Adams’ Porcupine Creek Ranch, Inc. junior water rights (43A 191679-00 and 43A 191681-00). *Sarrazin Aff.*, ¶ 13-14, *Adams Decl.*, ¶ 4(h).
4. On August 19, 2016, Adams filed two Complaints by Dissatisfied Water User and supporting Declaration.
5. Sarrazin’s appointment as Water Commissioner for the Upper Shields River and Upper Shields Canal ended on September 23, 2016. *Clerk of District Court, June Little Letter*, (filed September 26, 2016), *Sarrazin Aff.*, ¶ 19.

Sarrazin, as the moving party, has carried his burden of demonstrating a complete absence of genuine issues of material fact. Having done so, the burden shifted to Adams to set forth specific facts, not merely denials, speculation, or conclusory statements, to

establish that genuine issues of material fact do indeed exist. Adams has not met this burden. Therefore, this Master finds there are no genuine issues of material fact in this case.

5. Judgment as Matter of Law

Once it has been found that no genuine issues of material fact exist, it must then be determined whether the facts entitle the moving party to judgment as a matter of law. M.R.Civ.P. 56(c). Sarrazin argues the remedies sought by Adams are either outside the scope of relief that may be pursued under a dissatisfied water user complaint or are moot. *Sarrazin Motion* at 9-10. Sarrazin's appointment as water commissioner ended on September 23, 2016. *Clerk of District Court, June Little Letter*, (filed September 26, 2016), *Sarrazin Aff.*, ¶ 19. Consequently, the remedies available under § 85-5-301, MCA (giving instruction to the water commissioner, removing the water commissioner, and/or appointing a new water commissioner) are no longer available and thus moot. Additionally, the remedies sought by Adams regarding future notice of petitions for, and appointment of, water commissioners is outside scope of those remedies available under § 85-5-301, MCA. Because the remedies sought by Adams under this dissatisfied water user complaint are either moot or outside scope of those remedies available under § 85-5-301, MCA Sarrazin is entitled to judgment as a matter of law.

6. Request for Attorney Fees

Sarrazin has requested that should the Court find in his favor, that the Court issue an Order, pursuant to § 85-5-301(4), MCA, that Adams pay Sarrazin's reasonable attorneys' fees and costs up to and through a Final Order by the Court. *Sarrazin Motion*, at 11; *Sarrazin Reply*, at 3. As noted above, the District Court "judge shall make an order regarding the payment of costs of the hearing that the judge determines is just and proper." Section 85-5-301(4), MCA. Because Section 85-5-301(4), MCA specifically states the "judge shall make an order regarding the payment of costs of the hearing," this Master declines to rule on the request for attorneys' fees. The determination of any attorneys' fees and costs will be left to the sound discretion of Judge Gilbert.

CONCLUSION

There are no genuine issues of material fact in this matter and Sarrazin is entitled to judgment as a matter of law. Summary judgment in favor of Sarrazin is therefore appropriate.

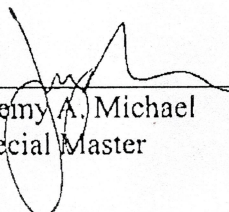
Therefore, it is

ORDERED that Sarrazin's Motion for Summary Judgment is **GRANTED**;
ORDERED that Adams' dissatisfied water user complaints are **DISMISSED**;
ORDERED that a hearing on this matter is not necessary and will not be held.

RECOMMENDATIONS

In addition to the foregoing, this Master recommends the District Court require any future water commissioners to file a copy of their daily record of distribution with the Court on a monthly basis during the term of their appointment. Section 85-5-107(1), MCA states water commissioners, "shall file a summary of the record with the clerk of the court monthly or seasonally, at the discretion of the district judge during the judge's term of service," and therefore, the District Court judge is given the discretion to require monthly filing of the daily record of distribution.

DATED this 12 day of MAY, 2017.



Jeremy A. Michael
Special Master

cc: Breeann M. Johnson, Atty
Dirk Adams
Montana Water Court

} mcd 5-12-17
MB