

DA 21-0593

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 134N

LANCE MILLION,

Claimant, Objector,
and Appellant,

v.

STATE OF MONTANA,

Objector and Appellee.

APPEAL FROM: Montana Water Court, Case No. 43D 0029 R 2019
Honorable Russ McElyea, Chief Water Judge

COUNSEL OF RECORD:

For Appellant:

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For Appellee:

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Submitted on Briefs: June 15, 2022

Decided: July 5, 2022

Filed:


Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Lance Million appeals an October 28, 2021 order by the Water Court. The Water Court's order adopted the report of a Water Master recommending that Million's claim to a water right in Carbon County should be dismissed. We affirm.

¶3 Million owns Water Right Claim No. 43D 43389-00. Million's uncle filed the claim in 1981. The 1981 statement of claim declares a beneficial use for fish and wildlife, and it describes a fishing pond in a certain location in Carbon County. Attached to the claim was a notice of appropriation filed by Ida Beall in 1939 that listed a 1912 date of appropriation.

¶4 Claim statements like Million's serve as evidence of "existing water rights," or rights to use water that date to the years before 1973, when the Montana Legislature passed the Water Use Act. *See* §§ 85-2-102(13), -227, MCA. The Water Use Act established a system whereby the Water Court adjudicates, basin by basin, the validity and priority of existing water rights. *See* § 3-7-224(2), MCA. As part of that process, the Department of Natural Resources and Conservation (DNRC) examines claims prior to the Water Court issuing a decree or water rights adjudication. *See* § 85-2-243, MCA; W. R. Adj. R. 12(a).

¶5 When a DNRC claims examiner reviewed Million’s claim, she looked for evidence of the pond in aerial photographs from 1951, 1953, 1962, 1978, and 1996. The pond was only present in the 1996 photo and did not appear to have existed at any time prior to 1973, as would be necessary for it to qualify as an “existing right” for a pre-Water Use Act beneficial use. Thus, DNRC placed several issue remarks on Million’s claim. One issue remark read “existence of the claimed reservoir cannot be confirmed with available data.”

¶6 Million filed an objection to his claim with the Water Court, seeking to have the issue remarks removed before the Water Court proceeded into a final decree on the basin. Following § 85-2-248, MCA, a Water Master for the Water Court first sought to have DNRC and Million resolve the issue remarks together. When they still could not agree, the Water Master attached the State of Montana to the case, through the Attorney General’s office, and held a trial at which to resolve the matter of the contested issue remark. *See* § 85-2-248(7)-(8), MCA.

¶7 At the trial, the DNRC examiner who had reviewed Million’s claim testified about the lack of evidence for a pond in the pre-1973 aerial photographs she observed. The State moved to admit the aerial photographs as evidence for the Water Master to consider, and Million objected on the grounds of foundation and hearsay. The Water Master overruled the objections and considered the aerial photos. Million testified, but he could not speak to personal knowledge of the pond’s existence prior to 1973 because he was not yet alive at that time. Another neighbor in the area also testified; he described hunting on the property as a teenager in the late 1960s and recalled the existence of more than one pond, asserting that the larger, more southerly pond at issue in Million’s case existed then.

¶8 Million also attempted to call another witness, a resident of the area who was born in 1945 and would testify about alleged pre-1973 construction of Million’s reservoir. But Million had not disclosed this witness prior to the hearing, so the State objected. Million characterized the witness’s testimony as “rebuttal” of the State’s evidence from DNRC, but the State noted that undisclosed rebuttal witnesses are only permitted to respond to “new matter offered by the adverse party.” *Massman v. Helena*, 237 Mont. 234, 243, 773 P.2d 1206, 1211 (1989). Observing that the reservoir’s pre-1973 existence was the central matter in the case and not newly raised in the hearing, the Water Master sustained the State’s objection.

¶9 After the trial, the Water Master issued a report concluding that Million’s claim had not been perfected prior to 1973 and should thus be dismissed. The Water Court issued an order on October 28, 2021, affirming the Water Master’s report and dismissing Million’s claim. Million appeals. He raises several issues with the Water Court’s decision: (1) whether the Water Court should have confined its inquiry to the *present* existence of the reservoir; (2) whether the aerial photo evidence from DNRC should have been admitted; and (3) whether his additional witness should have been permitted to testify.

¶10 When the Water Court issues an order reviewing the factual and legal conclusions in a Water Master’s report, we review the Water Court’s order *de novo*, “to determine whether it correctly applied the clear error standard of review to the Master’s findings of fact and whether its conclusions of law were correct.” *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, ¶¶ 25-26, 375 Mont. 327, 328 P.3d 644. We apply to the Water Court the same standards we apply to district court decisions, and we review

evidentiary rulings and orders regarding trial administration for abuse of discretion. *Teton Coop. Reservoir Co. v. Farmers Coop. Canal Co.*, 2015 MT 208, ¶ 9, 380 Mont. 146, 354 P.3d 579; *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, ¶ 23, 341 Mont. 467, 178 P.3d 102; *Skelton Ranch*, ¶ 28.

¶11 Million's first argument about the scope of the Water Court's inquiry relies on a misconstruction of DNRC's issue remark and misapprehends the character and the purpose of claims for existing water rights. Million argues that because the remark DNRC placed on his claim read "existence of the claimed reservoir cannot be confirmed," the Water Court should have confined itself to consider only whether the reservoir exists *now* and should not have inferred the obvious—that DNRC's remark regarded the *historical* existence of the reservoir. Million argues that canons of statutory construction should prevent the Water Court or this Court from reading additional words into the remark, such as "existence of the claimed reservoir [prior to 1973] cannot be confirmed with existing data." But Million's argument warrants little credit.

¶12 As noted above, the very definition of an "existing water right," which Million's claim filing functions to document, is a right to beneficial use of water predating 1973. Section 85-2-102(13), MCA. DNRC's claims examination process focuses on assisting the Water Court in verifying the accuracy of filed claims for "existing rights," and the issue remarks that DNRC provides relate to discrepancies between things like claimed dates of appropriation and evidence of actual appropriation. When DNRC has trouble verifying the "existence" of claimed water use, it is inherently referring to such use in the period before 1973 and not in the present day.

¶13 Million’s next argument attempts to exclude the historical aerial photographs of his property from the evidence considered by the Water Court, which would leave the court only with the contrary indications from Million’s claim as filed and one witness’s childhood memory. The DNRC claims examiner had prepared her report pursuant to an order from the Water Court, a process which is typical in the Water Court’s adjudication of claims and provided for by statute. *See* § 85-2-243, MCA (“Department assistance to water judges”); W. R. Adj. R. 12(a) (“The water court may at any time direct the department to provide such information and assistance as may be required by the water court to adjudicate claims of existing rights[.]”).

¶14 The aerial photos from DNRC’s report derived from an online United States Geological Survey database, a typical source for DNRC claims examiners. The claims examiner who reviewed Million’s claim annotated the photographs with markings to indicate landmarks and the claimed place of use. The Water Court admitted both unannotated and annotated versions of each photograph. Million objected to the annotated photographs on the grounds that they constituted hearsay within hearsay, and he objected to the unannotated photographs for lack of foundation.

¶15 On the admissibility of DNRC data, Water Rights Adjudication Rule 13(a) reads as follows:

In any proceedings before the water court, any investigative reports, data, or other written information produced or promulgated by the department during examination or under the direction of the water court pursuant to § 85-2-243, MCA, shall be admissible without further foundation and not subject to the hearsay objection in situations where the department is not itself a party. Due provisions shall be made by the water

court to allow any party to cross-examine the department employee who provided the assistance under § 85-2-243, MCA, and to controvert the report, data, or other information by other evidence.

¶16 Relying on this rule, the Water Master overruled Million's objections. Million argued that because the State had been brought in to intervene, pursuant to § 85-2-248(7), MCA, this case had become one in which the DNRC *was* "itself a party" and thus could not rely on the lenience provided by W. R. Adj. R. 13(a). The Water Master disagreed, and the Water Court affirmed, noting that DNRC becomes a party only when the agency itself objects to a Water Court decree, pursuant to § 85-2-233(1), MCA, not when it has provided information under § 85-2-243, MCA, as was the case here. The Water Court observed that § 85-2-248(6), MCA, requires the informational assistance of DRNC in "all proceedings" to resolve issue remarks, so to negate Rule 13(a) in matters, like Million's, that went to a hearing would undercut the rule's very purpose of ensuring the Water Court could review DNRC data.

¶17 Furthermore, at the hearing, the Water Master proceeded to address Million's evidentiary objections on their merits. The Water Master noted that the aerial photographs qualified as originals under Montana Rule of Evidence 1001, being accurate printouts of computer-stored data. The Water Master also found that the State had laid an adequate foundation, through the DNRC witness, to admit the annotated and unannotated aerial photos. The Water Master noted that while annotations on a photograph could qualify as hearsay, the unannotated original photographs would not. *See* Mont. R. Evid. 801 (defining hearsay as requiring a "statement"—an "oral or written assertion" or nonverbal conduct

intended as an assertion). The Water Master also found that the annotations on the photographs could be admissible under a catchall exception to the hearsay rule for statements that do not meet an enumerated exception but have “comparable circumstantial guarantees of trustworthiness.” Mont. R. Evid. 803(24). Because the claims examiner who made the annotations was on the stand and available for cross-examination, the Water Master noted that there was little reason to doubt the trustworthiness of the assertions made by the annotations, and that Million had the opportunity to cross-examine the declarant regarding any such doubts. In its order, the Water Court affirmed the Water Master’s evidentiary decisions.

¶18 We review a Water Court’s evidentiary rulings for abuse of discretion. *Little Big Warm Ranch, LLC v. Doll*, 2018 MT 300, ¶ 8, 393 Mont. 435, 431 P.3d 342. “The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.” *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 92, 312 Mont. 52, 57 P.3d 836. We cannot conclude that the Water Court abused its discretion here. The Water Master’s decision to admit the aerial photos comported with the longstanding and common practice by which the Water Court considers DNRC data, and the Water Master’s decision regarding Million’s foundational and hearsay objections was well supported by the evidentiary rules. Furthermore, the nonexistence of Million’s reservoir in the unannotated photographs alone was readily apparent. Thus, even if there was a hearsay issue with DNRC’s markings or the applicability of Water Rights Adjudication Rule 13(a), ample admissible evidence supported the Water Master’s findings such that considering

the extra information provided by the claims examiner would hardly render a substantial injustice. The Water Court's evidentiary decision regarding the aerial photographs is affirmed.

¶19 Finally, Million argues that the Water Court abused its discretion by refusing to admit the testimony of his undisclosed witness. Pursuant to the Montana Rules of Civil Procedure and the Water Court's scheduling orders, Million and the State had disclosed the witnesses that would be appearing at the Water Master's hearing; this witness list was finalized in the Water Court's pretrial order, and it did not include the neighbor whose testimony Million later attempted to present. Million framed this witness's testimony as "rebuttal" testimony. Rebuttal witnesses do not necessarily have to be disclosed ahead of trial, but a previously undisclosed rebuttal witness is only permitted to testify about "that which tends to counteract new matter offered by the adverse party." *Massman v. Helena*, 237 Mont. 234, 243, 773 P.2d 1206, 1211 (1989).

¶20 Million's purported "rebuttal" witness was going to testify about the existence of the reservoir prior to 1973. This was not a "new matter" that arose from the State's presentation. It was the central topic of the hearing and the matter at the heart of DNRC's issue remark that Million objected to in filing this case. The case that Million put forward, relying on his uncle's claim statement as evidence of his existing water right, was about this very matter. Evidence that arises from a party's "case-in-chief is not 'new matter' to be counteracted with rebuttal evidence." *Travelers Indem. Co. v. Andersen*, 1999 MT 201, ¶ 36, 295 Mont. 438, 983 P.2d 999. The Water Court did not abuse its discretion in declining to admit Million's undisclosed witness.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶22 The Water Court's October 28, 2021 order is affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE