

IN THE WATER COURTS OF THE STATE OF MONTANA

YELLOWSTONE DIVISION - POWDER RIVER BASIN

* * * * *

IN THE MATTER OF THE ADJUDICATION)	<u>Powder River Preliminary Decree</u>
OF THE EXISTING RIGHTS TO THE USE)	
OF ALL THE WATER, BOTH SURFACE AND)	Water Right Declarations
UNDERGROUND, WITHIN THE POWDER)	#5117-01, 5117-02, 7791-02
RIVER DRAINAGE AREA, INCLUDING ALL)	and 8375-01
TRIBUTARIES OF THE POWDER RIVER IN)	
CARTER, CUSTER, FALLON, PRAIRIE &)	<u>Burlington Northern, Inc.,</u>
POWDER RIVER COUNTIES, MONTANA.)	<u>Objector</u>
)	

MEMORANDUM

The Powder River Preliminary Decree includes four water rights that were developed and claimed by individual appropriators on land leased from Burlington Northern, Inc. The Preliminary Decree issued those rights in the name of the individual appropriator. Burlington Northern, Inc. filed an objection to those rights maintaining that as owner of the land, titled to the water right vested in Burlington Northern, Inc.

There are no facts in dispute. As a consequence these objections raise one question for consideration by this Court;

Does the right to use water appropriated by individuals and used in part on Burlington Northern, Inc. lands vest in the individual appropriator or the owner of the land, Burlington Northern, Inc.?

While there are no factual disputes regarding these water rights, in coming to a conclusion regarding these issues it is helpful to understand briefly the facts surrounding these water rights.

Water rights #5117-01 (5117-03), #5117-02 (5117-05), and #7791-02 (7791-01) are part of a larger irrigation development. The water was appropriated by a lessee of Burlington Northern, Inc., who utilizes the majority of the water on his privately-owned properties. Number 5117-01, #5117-02, and #7791-02 represent leased Burlington Northern, Inc. lands that were conducive to irrigation in conjunction with the appropriator's development.

Water right #8375 consists of a stockwater reservoir that was appropriated by Dan Gaskill and lies on the border of Burlington Northern, Inc. and Gaskill's property.

It is clear that each of these appropriators developed these water rights in conjunction with use of the water on adjacent private properties.

While the Objector argues that the water right is appurtenant to the land, the doctrine of appurtenancy may turn more on the intent of the appropriator than on his title to the underlying land. Hays v. Buzard, 31 Mont. 74, 82, 77 P. 423 (1904). One may appropriate water on land with intentions that comprehend use on land other than the place of the original appropriation. The Montana Courts have reasoned that the appropriation of water does not necessarily create an inference that the water shall become appertunant to the land. Such a position would result in hesitancy on the part of potential developers to appropriate water on leased lands. It discourages the risk of development for fear that the ultimate owner of the land may reap the benefit without incurring any costs or risks. As the Court declared in

Hays, supra at Page 82;

If this could be so, then by using a water right upon leased lands the owner would incur the risk of losing it. The right was originally acquired upon the public domain. If the title to the land in no wise affects the title to the water right, the fact that it has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance. "One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior appropriator." Smith v. Denniff, 24 Mont. 82 (1904).

As a result the Montana Courts have recognized that one may appropriate water resulting in a vested water right without holding title to the associated land.

This line of thought prevails in Montana. In Smith v. Denniff, 24 Mont. 20, 50 P. (1900), the Court explored at great lengths the consequences of appropriating water on lands to which one did not hold title. The appropriator in Smith diverted water from the public domain for use on land legally in his possession but not owned by him. The Court stated in pertinent part;

...the legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for the bona fide intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated. Smith, supra at Page 29.

In Sayre v. Johnson, 33 Mont. 15, 20, 81 P. 389 (1905), Sayre purchased a water right contemplating use of a portion of the water on State-leased lands. The Court found that such a purchase was permissible on the premise that the law did not require that an appropriator of water own the land in fee simple

upon which water was to be used. In accord, Toohey v. Campbell, 24 Mont. 13, 17 (1900); St. Onge v. Blakely, 76 Mont. 1, 14, 245 P. 532 (1926); Warren v. Sencal, 71 Mont. 210, 228 P. 71 (1924); Galahan v. Lewis, 105 Mont. 294, 300, 72 P.2d 1018 (1937); 89-806 R.C.M. 1947 (Former statutory provision recognizing that persons with only a possessory interest in land may secure a water right).

Furthermore fundamental principles of the Appropriation Doctrine do not forever tie water rights to their original place of use. The Appropriation Doctrine provides flexibility for a party to change a place of use, point of diversion, sever or sell a water right if there is no adverse affect upon a party. See generally Head v. Hale, 38 Mont. 302, 208, 100 P. 222 (1909); Galiger v. McNulty, 80 Mont. 339, 357, 260 P. 401 (1927); Thrasher v. Mannix & Wilson, 95 Mont. 273, 276, 26 P.2d 370 (1933); Wheat v. Cameron, 64 Mont. 494, 501, 210 P. 761 (1922); Whitcomb v. Murphy, 94 Mont. 562, 565, 23 P.2d 980 (1933).

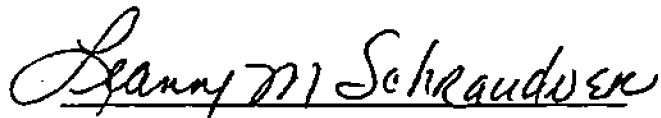
The existing case law regarding the changes of a water right is codified in 85-2-403(1) M.C.A. 1978. That statute permits the severance of water from "appurtenant" lands. To adopt the position that the Objector argues would tie the title of land to the title of a water right and as a result eliminate flexibility and efficient utilization of water, forever binding the water right to adjacent land, circumventing one of the fundamental principles of the Appropriation Doctrine.

The Objector contends that water rights must be viewed as fixtures inuring to the benefit of the lessor. While a purchaser of lands may be entitled to the improvements of a lessee he is not necessarily entitled to a water right. There must be an intent by the appropriator to permanently attach the water to the place of use. First State Bank v. McNew, 33 N.M. 414, 269 P. 56 (1928).

There has been no showing that these rights were intended to attach permanently to Burlington Northern, Inc. lands, and in fact it is quite probable that the appropriators anticipate the use of this water on adjacent private lands if irrigation is for some reason discontinued on Burlington Northern, Inc. lands. These appropriators have a right to change their point of diversion or place of use pursuant to 85-2-402 M.C.A. 1978.

IN CONCLUSION, this Court finds that title to the water rights vest in the appropriators of the water, regardless of title to the land where the water is originally utilized. As such the water rights in dispute shall remain in the name of the individual appropriator as issued in the Powder River Preliminary Decree.

Respectfully submitted this 4th day of March, 1983.



Leanne M. Schraudner
Water Master
Yellowstone Division

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TRIBUTARIES OF THE POWDER RIVER IN)	<u>Burlington Northern, Inc.,</u>
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POWDER RIVER COUNTIES, MONTANA.)	
_____)	

Pursuant to Title 85, Chapter 2, M.C.A. 1978, the objections to the above-captioned water right declarations were submitted on Briefs on February 28, 1983. The Objector, Burlington Northern, Inc., is represented by Ronald Waterman, Attorney at Law. No other parties of interest submitted Briefs for consideration by the Court.

STATEMENT OF THE CASE

The Powder River Preliminary Decree was issued on May 6, 1981. The Objector, Burlington Northern, Inc., filed objections to the above-captioned rights on September 1, 1981. Pursuant to the stipulations filed with the Court on November 29, 1982 and February 18, 1983, the Court finds that all issues of fact have been fully resolved. The objections turn solely on the following issue of law:

Where an appropriation of water is made by a lessee and used on a portion of the lessor's land, does title to the water right vest in the lessee or the owner of the land, Burlington Northern, Inc.?

FINDINGS OF FACT

I.

Pursuant to stipulation, the above-captioned water rights are used in part on lands owned by Burlington Northern, Inc.

II.

These water rights were appropriated by individual appropriators or their predecessors in interest who used these water rights on Burlington Northern, Inc., lands and on adjacent privately owned lands.

III.

The source of water, priority date, flow rate, volume, period of use, place and means of diversion, and place of use are accurate as issued in the Powder River Preliminary Decree.

CONCLUSIONS OF LAW

I.

Pursuant to 85-2-233 M.C.A. 1978, this Court has jurisdiction over this controversy.

II.

The place of use of the above water rights is located on Burlington Northern, Inc. lands and used in conjunction with privately owned land.

III.

The appropriators of the water rights are individual lessees or their predecessors in interest.

IV.

In accordance with Montana law, title to a water right vests in an appropriator regardless of ownership of land.

V.

The burden lies on the Objector to establish intent on the part of the original appropriator to make the right appurtenant to the land.

VI.

There being no such evidence that the right is appurtenant, the water right as issued in the Powder River Preliminary Decree in the names of the individual appropriators shall remain unchanged and the ownership shall be decreed as follows:


- The Court finds no right for declaration #5117-01 as it is a duplicate of water right #5117-03 which is issued in the name of Fluss Ranch, Inc.

- The Court finds no right for declaration #5117-02 as it is a duplicate of water right #5117-05 which is issued in the name of Fluss Ranch, Inc.

- The Court finds no right for declaration #7791-02 as it is a duplicate of water right #7791-01 which is issued in the name of Robert J. Hardy.

- The Court finds no right for declaration #8375-01 as it is a duplicate of water right #8375-03 which is issued in the name of Thomas Gaskill.

The above Findings of Fact, Conclusions of Law and Memorandum are submitted this 4th day of March, 1983.


Leanne M. Schraudner
Water Master
Yellowstone Division

ORDER

After having reviewed the Water Master's Findings of Fact, Conclusions of Law and Memorandum regarding the water right declarations at issue, the Court hereby

ORDERS that pursuant to 85-2-234(1) M.C.A. 1978, that the Powder River Preliminary Decree remain unchanged in accord with

these Findings of Fact, Conclusions of Law and Memorandum and that water right declarations #5117-01, 5117-02, 7791-02 and 8375-01 as decreed in the Powder River Preliminary Decree be adopted and affirmed in the Powder River Final Decree.

DATED this 8th day of March, 1983.

/s/ J W W Kesaley
~~Judge Jack D. Shanstrom~~
Water Judge
Yellowstone River Division

NOTICE

Pursuant to 85-2-235 M.C.A. 1978, appeal of this decision may be made to the Supreme Court of the State of Montana. Appeal may only be made after conclusion of all hearings in the Powder River Basin and the Final Decree has been entered.

cc: Ronald Waterman
Attorney at Law
P.O. Box 1715
Helena, MT 59624

Fluss Ranch Company
Box 492
Terry, MT 59349

Robert J. Hardy
Powderville
Montana 59345

Thomas Gaskill
Epsie
Montana 59317

Sandra Trucano
Clerk of the District Court
Powder River County Courthouse
Broadus, MT 59317

Walter Rolf
DNRC Field Office
P.O. Box 276
Miles City, MT 59301