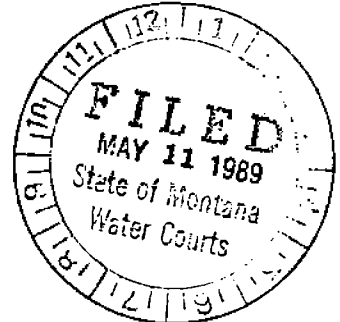


IN THE WATER COURTS OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,)
WITHIN THE MUSSELSHELL RIVER DRAINAGE)
AREA ABOVE ROUNDUP, INCLUDING ALL)
TRIBUTARIES OF THE MUSSELSHELL RIVER)
ABOVE ROUNDUP IN WHEATLAND, GOLDEN)
VALLEY, MEAGHER, FERGUS, MUSSELSHELL,)
SWEET GRASS, PARK, YELLOWSTONE, AND)
STILLWATER COUNTIES, MONTANA.)

CASE NO. 40A-48C



CLAIMANTS: Eugene and Lois Schaff, Warren A. Sillivan
Reuben C. Pitsch, Betty and Chris P. Schaff

OBJECTORS: Larry and Joy Schanz, Harry Vandervoort,
Eugene Schaff, Reuben C. Pitsch, Alvin W. Zinne
MT Department of Natural Resources & Conservation

MEMORANDUM OPINION

Several of the claimed water rights consolidated into this case were the subject of an earlier dispute which was resolved by a series of proceedings beginning in the district court and culminating in a Montana Supreme Court decision entitled 79 Ranch, Inc., v. Pitsch, 204 Mont. 426, 666 P.2d 215 (1983). At the first status conference in case 40A-48C, Water Master Kathleen Cullen decided that, as a preliminary matter, the Water Court must determine to what extent it is bound by the Supreme Court's factual and legal determinations regarding the underlying rights in resolving the objections filed against the claims in the general adjudication.

Procedural Background

In 1977, 79 Ranch, Inc. and Harry Vandervoort filed a

lawsuit against Reuben Pitsch in the District Court of the 14th Judicial District, Golden Valley County. In the lawsuit each party asserted water rights on Big Coulee Creek. Trial began in the district court on April 24, 1979, and District Judge LeRoy McKinnon entered findings of fact and conclusions of law on October 24, 1979. The case was appealed to the Montana Supreme Court which remanded for further findings. See 79 Ranch v. Pitsch, 631 P.2d 690 (Mont. 1981). After a second appeal, the Supreme Court determined that 79 Ranch and Vandervoort each established a water right but that Pitsch and his predecessors in interest abandoned three rights and failed to perfect another. 79 Ranch v. Pitsch, 204 Mont. 426, 666 P.2d 215 (1983) The case was remanded to the district court which entered judgment in accordance with the 79 Ranch decision on August 23, 1983.

The district court lawsuit was pending during the entire claim filing period for the statewide general adjudication under Title 85, Chapter 2, Mont. Code Ann. Consequently, the parties filed claims in the general adjudication which were identical to those they had made in the district court litigation. Of the claims in the present case, claims 40A-W-045632-00 through 045635-00 filed by Pitsch and claims 40A-W-025116-00 and 044714-00 filed by Eugene and Lois Schaff (79 Ranch, Inc.) represent claims that were also made before the district court. These claims have received numerous objections which raise, among other things, the same issues that were considered and decided in the earlier lawsuit.

The Parties' Contentions

The parties have exhaustively briefed issues related to the preclusiveness of 79 Ranch in this case. They have focused on the res judicata and collateral estoppel effects of the prior judgment. Pitsch contends that the prior judgment and decree is not binding in the general adjudication but is, at the most, merely prima facie evidence of the facts it states. Vandervoort, the Schaffs and the Montana Department of Natural Resources and Conservation (DNRC) contend that, although prior decrees do not bind persons not party or privy thereto, Pitsch's claims in the general adjudication are precluded insofar as they were raised and decided in the prior litigation. Vandervoort and the Schaffs further argue that, because Pitsch's claims were held abandoned or nonperfected in the prior decree, Pitsch cannot now assert these claims against any party to the general adjudication.

Discussion

To assess whether the prior judgment and decree in 79 Ranch have any preclusive effects upon this general adjudication, the nature of the prior decree and the statutory authority upon which it is based must first be examined. Provisions of the 1973 Water Use Act suggest substantial reasons for distinguishing and treating differently district court water right decrees entered prior to 1973 and district court judgments entered in private water disputes after the 1973 commencement of the statewide general adjudication.

The statutory authority for entry of water rights decrees by the district courts changed significantly after July 1, 1973, the effective date of the Water Use Act. 1973 Mont. Laws Ch. 452. By passage of the Act, the Montana Legislature put into place a structure for a statewide general adjudication which was to be accomplished in the district courts and initiated by the DNRC. Section 46 of the Act expressly repealed the statutes which provided authority for entry of in personam water right decrees by the district court. Among those statutes repealed was section 89-815 R.C.M. 1947 which provided that the district court could "in one judgment settle the relative priorities and rights of all the parties" who had diverted water from the same source. Also repealed were provisions for establishing rights on formerly decreed sources in the district court. See, e.g. Sections 89-829 through 842 R.C.M. (1947).

The Water Use Act also contains a mechanism whereby the district court may fashion limited remedies to resolve immediate water distribution disputes on those sources not yet finally decreed in the general adjudication. Section 32(2) of the Act provides that:

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to sections 6 through 15 of this act, the department may, in its discretion within a reasonable time begin proceedings to determine existing rights in the source, in accordance with this act. If the department does not proceed to obtain a determination of existing rights, the district court shall settle only the controversy between the parties.

This section was amended in 1975, and this amended

version was in effect when the district court lawsuit involving Pitsch, 79 Ranch and Vandervoort was filed:

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to sections 89-870 through 89-879, any party to the controversy may petition the district court for relief. The department shall be served with process in any proceeding under this subsection and shall, within a reasonable time thereafter, notify the court whether it intends in its discretion, within a reasonable time, to begin proceedings to determine existing rights in the source, in accordance with this act. The department may, if it declines to commence proceedings to determine existing rights in the source, intervene as a party in the proceeding. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the department's decision whether to determine existing rights in the source, or the department's decision to intervene as a party, as the case may be. If the department does not proceed to obtain a determination of existing rights, the district court shall settle only the controversy between the parties.

1975 Mont. Laws, Ch. 485, Sec. 12 (codified at Sec. 89-896(2) R.C.M. 1947)

With repeal by the Water Use Act of its statutory authority to enter in personam water rights decrees, the district court's only authority after 1973 for addressing water allocation disputes outside the general adjudication appears to lie in Section 32(2). Nowhere in the Water Use Act is it contemplated that existing water rights would continue to be determined by in personam decrees like those entered by the district courts prior to 1973. In section 7 of the Act, for example, the DNRC was

required to gather "court decrees adjudicating water rights in a proceeding commenced prior to the effective date of this act" as part of the data to be used to determine existing rights. Section 89-871(1) R.C.M. 1947. No mention is made or instruction given regarding use of post-1973 in personam decrees in the general adjudication.

The limited scope of Section 32(2) and the nature of the remedies it provides strongly suggest that the district court retained no authority to determine and decree existing water rights outside of the general adjudication. Instead, when disputes arose concerning rights not yet finalized in the general adjudication, the district court was to resolve "only the controversy between the parties" and fashion only that "injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo" pending consideration of the claimed rights within the general adjudication. Section 89-896(2) R.C.M. 1947.

In 1979 the Montana Legislature extensively revamped the statewide adjudication process. 1979 Mont. Laws Ch. 697. A water court system was created, and ongoing matters relating to the general adjudication were transferred to water judges. Mont. Code Ann. Sec. 85-2-216. Jurisdiction over matters pertaining to the determination and interpretation of existing water rights is to be exercised exclusively through the water divisions. Mont. Code Ann. Sec. 3-7-501(1).

Section 32(2) of the 1973 Water Use Act was carried forward in the 1979 amendments with only the minor changes

necessary to conform it to the new adjudication scheme:

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant such injunctive or other relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree.

Mont. Code Ann. Sec. 85-2-406(2).

These changes made by the 1979 amendments reinforce the conclusion that after 1973 the district courts were without authority to determine and decree existing water rights outside the structure of the general adjudication. Clearly district court judges cannot determine existing water rights because that jurisdiction is now exclusively exercised by water judges within the scope of the general adjudication. Yet the district courts, not the water divisions, retained the authority to address water distribution controversies under section 85-2-406. Section 85-2-406, therefore, provides no authority to the district court to determine and decree existing rights. Instead, the district court is to remedy only the immediate controversy between the parties by rendering an interim decision regarding water allocation pending issuance of final decrees in the general adjudication. See. e.g., Cate v. Hargrave, 209 Mont. 265, 271, 680 P.2d 952 (1984) (The district court addressed only those matters raised in the complaint and pretrial order of a 406 action leaving further delineation of the rights to the Water Court).

In light of this limited purpose of section 85-2-406 and its predecessors, there are compelling reasons not to accord any binding affect to the factual determinations made by the district court. But see In re adjudication of existing rights within the Sage Creek Draining area, Master's Report at 4-16 (July 18, 1985) (Master concluded that previous 85-2-406 action had preclusive effects in the general adjudication of Basin 40G). Because section 85-2-406 actions cannot result in a decree of existing rights and provide only interim relief to resolve immediate controversies, the evidence before the district court is likely to be less complete than that before the Water Court in the general adjudication. The district court cannot, for example, draw upon the expertise of the DNRC to examine claims and perform field investigations. Due to their specialization, their more comprehensive view of water use within the entire river basin, and the quality of evidence available to the Water Court, the water judges may be better prepared to assess the evidence and determine more accurately the extent of claimed water rights.

Further, applying the doctrines of res judicata and collateral estoppel to judgments entered by the district court in 85-2-406 actions may frustrate the comprehensiveness of the general adjudication. No notice of a private action under section 85-2-406 is provided to other water users in the basin. According any degree of binding effect or prima facie status to factual determinations made by the district court may unfairly

piecemeal the general adjudication with respect to water users who were not party to the prior section 85-2-406 action. Additionally, because of delays inherent in a complex general adjudication, some parties may seek to have their relative rights adjudicated in the district courts under the guise of a water distribution controversy. If the resulting in personam judgments were held binding in the general adjudication with respect to parties to the section 85-2-406 action, responsibility for portions of the general adjudication would be improperly shifted to the district courts.

For the foregoing reasons, I conclude that the district court's authority to hear the case culminating in 79 Ranch was necessarily founded upon the predecessor of section 85-2-406. After 1973 the district court was without authority to determine and decree existing rights outside of the general adjudication. The factual determinations in 79 Ranch based upon the record made before the district court were in the nature of interim relief to remedy the immediate water allocation controversy between the parties pending issuance of a final decree in the general adjudication. These factual determinations have no binding effect on the Water Court in the general adjudication.

A different conclusion is reached, however, regarding the bindingness of the Montana Supreme Court's legal determinations in 79 Ranch. Pitsch argues that the court reversed long-standing Montana law regarding abandonment by holding that long periods of continuous nonuse raise a rebuttable

presumption of abandonment. He contends that this rule did not exist prior to 1973 and cannot be applied to an "existing right" as defined by 85-2-102(8) in the general adjudication. This argument is not persuasive. In 79 Ranch, the Montana Supreme Court interpreted the law as it existed before 1973, and the Water Court as a lower court is bound to apply that interpretation if the facts it finds so warrant.

The rulings contained in this opinion will be incorporated into the Master's Report to the Water Judge in case 40A-48C.

DATED this 11th day of May 1989.

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Water Master

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