

As Ordered by this Court on September 25, 1989 Sherry L. Gray filed copies of all the deeds concerning the transfer of the property now owned by Sherry L. Gray, covering all owners from Reuben LeBaron to present.

Based upon a review of the claim files, case file, exhibits and testimony, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT

1. William J. and Jeanne F. Hauck objected to the ownership, priority date, period of use, source, point of diversion, volume and flow rate of this Sherry L. and Baron M. Gray domestic claim.

2. This claim was called in on Motion of the Water Court due to the gray area remark concerning the priority date.

3. The source is a spring arising in the NE quarter of section 17, township 14N, range 22W.

4. The spring is conveyed by pipeline to the William J. and Jeanne F. Hauck property, Lot 6 in the NWSE of section 8, township 14N, range 22W. In 1960 Reuben LeBaron asked the Haucks if he could run a pipeline off their pipeline to his cabin for his personal domestic use. Permission was given to LeBaron to use the Hauck pipeline to convey water to LeBaron's cabin and a pipeline was put in.

5. Following is a recitation of the transfers which have occurred from F. A. and Mary Masen through Baron M. and Sherry L. Gray:

A. Warranty Deed dated October 17, 1912 between F.A. and Mary Masen and C. L. Taylor conveying:

The South half of the Southwest quarter (S1/2 of the SW1/4) and Lots numbered Seven (7) and Eight (8) of Section Eight(8) in Township Fourteen(14) North of Range Twenty two(22) West of Montana Principal Meridian (except right of way for Couer d'Alene branch of N. P. Railroad) Together with water right as claimed and filed E.C. Sturman, Book "E" Water Rights, page 384, Clerk and Recorders office, Missoula County, Montana (emphasis added)

B. Warranty Deed Dated November 19, 1913 between C.L. and Irene F. Taylor and E.J. and Florence LeBaron conveying:

The South half (S1/2) of the South-west quarter (S1/2 S.W.1/4) and Lots seven(7) and eight(8) of Section eight(8) in Township Fourteen(14) North of Range Twenty-Two(22) West of the Montana, Principal Meridian, (except right of way Coeur d'Alene Branch Northern Pacific Railroad, together with all water, water rights, ditches and flumes thereunto belonging. (emphasis added)

C. Warranty Deed dated May 7, 1935 between Edgar J. and Florence J. LeBaron and Reuben LeBaron conveying:

The South half of the Southwest quarter (S1/2 SW1/4) and Lots Seven(7) and eight(8) of Section Eight(8) in Township fourteen(14) North of Range Twenty two(22) west of the Montana Meridian in Montana containing 125.24 acres, according to the government survey thereof. Together with all and singular the tenements, hereditaments and appurtenances. (emphasis added).

D. Warranty Deed dated July 14, 1960 between Reuben LeBaron and William J. and Alice Colleen Shaw conveying

South Half Southwest Quarter (S1/2SW"), and Lots 7 and 8, Lot 6 and South Half Southeast Quarter (S1/2SE1/4) of Sec. 8, all in T. 14N., R.22W, less any easements or rights of way heretofore granted. Together with all and singular the hereinbefore described premises, together with all tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining....(emphasis added)

E. Warranty Deed dated July 7, 1968 (4:44 pm) between William J. and Alice Colleen Shaw and John R. and Mary L. Stevenson conveying

An individual one-half interest in and to the following: Lot 8, and the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section 8, Township 14 North, Range 22 West, less right of way together with all water and water rights appertaining thereto. (emphasis added).

F. Warranty Deed dated July 7, 1968 (4:46 pm) between William J. and Alice Colleen Shaw and John R. and Mary Stevenson conveying:

An undivided one-half interest in and to the following:
Lot 8, and the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section 8, Township 14 North, Range 22 West, less right of way. Together with all water and water rights appertaining thereto.

G. Warranty Deed dated June 14, 1973 between William J. and Alice Colleen Shaw and John R. and Mary L. Stevenson and John E. and Patricia L. Roemer conveying

A tract of ground located in S1/2 Section 8 T.14N., R22W., P.M., Montana more particularly described as follows: Commencing at the SW corner of Section 8, T.14N., R.22W., P.M., Montana: thence N.63°00'07"E, 1476.38 feet to true point of beginning; thence N 1°14'53" W, 661.00 feet to the Southwest corner of a tract surveyed by this surveyor in February 1971; thence N 89°55'00"E, 660.00 feet along the said Southerly boundary to the Southeast corner of said tract; thence S.01°03'38"E, 661.00 feet; thence S. 89°53'42"W, 669.18 feet to the true point of beginning containing 10.081 acres more or less, being surveyed and monumented, subject to any right-of-ways that may exist; and also subject to the Sellers granting access to said property over an existing road, more or less, being subject to minor course revision with future sales, rights of access is granted to the above tract along a strip of ground 60 feet in width symmetrical to the following described centerline; beginning as a point on the East line of the above described tract, and point being S 02°03'38"E, 267.25 feet from the northeast corner of said tract; thence N.58°18'19"E, 289.43 feet; thence N11°43'38"E, 264.88 feet; thence N42°25'38"E, 135.08 feet; thence W.05°53'10"E, 167.37 feet; thence N47°31'06"E, 263.44 feet; thence N30°43'05"W, 192.55 feet to the centerline of the existing County Road, the above described centerline approximates the centerline of an existing road and is

subject to change with future lotting. All according to a survey plat of the above property of record in 33 of Micro Records at page 1662 of the records in the office of the County Clerk and Recorder of Missoula County, Montana.

It has not been established whether this description includes all of the Shaw property in the south half of section eight not already conveyed to Stevensons and Roemer (lot 8 and SWSW of Section 8) or just a portion of that remaining area.

H. Contract for Deed dated May 25, 1973 between John E. and Patricia L. Roemer, John R. and Mary L. Stevenson and Baron M. and Sherry L. Gray conveying

A tract of ground located in the SW1/4, Section 8, T.14N, R.22W., Principal Meridian, Montana, more particularly described as follows:

A Tract of ground located in the SW 1/4, Section 8, T.14N., R.22W., Principal Meridian, Montana, more particularly described as follows:

Commencing at the S 1/4 corner of Section 8, T.14N., R.22W., Principal Meridian, Montana; thence N00°18'17"W, 1285.70 feet along the N-S mid-section line of Section 8 to a point on the North boundary of a tract known as "H"; thence S89°55'W, 691.92 feet to the northwest corner of said tract "H"; said point being the northeast corner of a tract known as "C" and the southeast corner of a tract surveyed in February, 1971; thence N00°05'W, 765.5+ feet along the East boundary of that tract surveyed in February, 1971 to a point on the southerly bank of the Clark Fork River; thence N73°36'E, 165.5 feet along said southerly bank; thence N64°02'E, 588.0 feet along said southerly bank to a point on the N-S mid-section line of Section 8; thence S00°18'17"E, 1068.6+ feet along the said N-S mid-section line, to the true point of beginning, containing 14.34 acres, more or less, being surveyed and monumented according to this attached exhibit, excluding therefrom any areas for easements and right-of-way that may exist or as shown on this exhibit.

Together with the right in common with others to use water from a spring situated on the SE 1/4 SE 1/4 of Section 8: Township 14N, R. 22 W., for domestic water to serve one domicile per 10 acres. (emphasis added)

6. The chain of title stated in Finding of Fact 5 does not include any reference to Section 17 where the spring actually arises or to that spring.

7. The Contract for Deed dated May 25, 1973 between the Roemers and Stevensons and the Grays specifically conveyed the right to use water from a spring in the SESE Section 8, Township 14 North, Range 22 West. No other water rights are specified. Sherry Gray testified that her understanding was that the spring specifically mentioned in the Contract for Deed was another, larger spring not the spring claimed herein.

CONCLUSIONS OF LAW

I

The Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. sec. 85-2-233.

II

It is not known whether Rueben LeBaron's use of the water was a bona fide water right to which he held title or a permissive use, a license to use the Hauck's water right.

III

The Warranty Deed dated July 14, 1960 between Reuben LeBaron and William J. and Alice Colleen Shaw conveys the water rights appurtenant to Lot 7, the location of LeBaron's cabin. If LeBaron's use was a bona fide water right, then this would have been conveyed as an appurtenance.

If LeBaron's use was a license to use the Hauck's water right, this would not have been conveyed because a licensee does not acquire a possessory interest in the subject of the license which the licensee can transfer to another party.

Kuhlman v. Rivera, 216 Mont. 353, 357, 701 P.2d 982 (1985).

IV

The Warranty Deed dated June 14, 1973 between William J. and Alice Colleen Shaw and John R. and Mary L. Stevenson and John E. and Patricia L. Roemer conveys the appurtenances, which would include the appurtenant water rights. As stated in Conclusion III above, if Reuben LeBaron's use of the spring was a bona fide water right, then it was conveyed.

V

The Contract for Deed dated May 25, 1973 between John E. and Patricia L. Roemer, John R. and Mary L. Stevenson and Baron M. and Sherry L. Gray conveys the specific right to use water from a spring in the SESE of Section 8, Township 14 North, Range 22 West. Sherry Gray testified that this refers to another spring and that she always assumed the water for the cabin from the spring in Section 17 came with the cabin.

In Castillo v. Kunnemann, 642 P.2d 1019, 197 Mont. 190 (1982), the Montana Supreme Court stated:

Section 28-3-702, MCA, provides as follows:

"All things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom unless some of them are expressly mentioned therein, in which case all other things of the same class are considered to be excluded."

Under the provisions of the above-quoted statute, the water right not specifically mentioned would be excluded. Furthermore, such an interpretation effectuates the intent of the parties. In *Lensing v. Day and Hansen Security Co.*, supra, this court said at pp. 384-385, 215P.999:

"In a conveyance of a water right or any other property, it is the parties, so far as the same has been lawfully expressed, which must control the courts in a construction of the instrument by which the property is conveyed. The general rules of construction of legal documents apply to the instrument now under consideration. The fact that a water right is involved does not add to or in any way change those rules."

Applying well established rules of construction, and the provisions of section 28-3-702, MCA, quoted above, we now hold that respondent Kunneemann effectively reserved his Grannis water right and the related Grannis ditch right.

As only the spring in Section 8 was mentioned, no other water rights, even those which are appurtenant, were transferred from Roemers and Stevensons to the Grays. If Reuben LeBaron had a bona fide water right for domestic use from the spring arising in Section 17 which was appurtenant to the property, it was not transferred from the Stevensons and Roemers to the Grays because it was not specifically mentioned.

VI

As the Grays were not conveyed a water right for domestic use from the spring arising in Section 17, their claim for such use, 76M-W-006451-00 shall be dismissed, and shall not appear in the Preliminary and Final Decrees of the Clark Fork River between the Blackfoot River and the Flathead River.

DATED this 2 day of March, 1990.


Kathryn W. Lambert
Water Master

Sherry L. Gray
Box 207
Alberton, MT 59820

William J. and Jeanne Hauck
28835 Southside Road
Alberton, MT 59820