

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION

\* \* \* \* \*

Minow Ranch, Inc. a Montana Corporation,

Plaintiff,

vs

Charles Carter and Charles Carter, Inc.,

Defendants,

and

Charles Carter and Charles Carter, Inc.,

Counterclaimants and Third-Party Plaintiffs,

vs

State of Montana, Department of Natural Resources and Conservation,

Third-Party Defendant

Civil DV 87-1914  
WC-90-2

FILED

AUG 14 1990

Montana Water Court


ORDER

Upon Motion by the Montana Department of Natural Resources and Conservation (DNRC), Third-Party Defendant, to Dismiss the Third-Party Complaint of Charles Carter and Charles Carter, Inc., Third-Party Plaintiffs, and after full and careful consideration thereof, said Motion to Dismiss Third-Party Complaint is hereby GRANTED, for the reasons set forth in the following Memorandum. Said Third-Party Complaint is hereby DISMISSED without prejudice.

FURTHER ORDERED, that the Petition to Modify Decree, filed by Charles Carter and Charles Carter, Inc., with the Montana Water Court is hereby DENIED, for the reasons set forth in the following Memorandum.

FURTHER ORDERED, the complaint filed by Minow Ranch, Inc., Plaintiff, and the Counterclaim filed by Charles Carter and Charles Carter, Inc., Defendant and Counterclaimant, are hereby REMANDED to the 16th Judicial District/<sup>Court</sup>, Powder River County, for consideration thereof.

Dated this 13<sup>th</sup> day of August 1990.

  
Roy C. Rodeghiero  
Water Judge  
Yellowstone Division

RECEIVED

AUG 14 1990

M E M O R A N D U M

Montana Water Court

Statement of the Case

On February 3, 1987, the Plaintiff, Minow Ranch, Inc., filed a complaint in the 16th Judicial District, Powder River County, against the Defendant Charles Carter seeking injunctive relief and damages resulting from an alleged wrongful diversion of the water of Hay Creek located in Basins 42 I and 42-J, the Powder River and the Little Powder River Basins. On April 20, 1987, the parties by Stipulation, and by Order of the District Judge, A. B. Martin, removed the case to the Montana Water Court, Yellowstone Division.

On April 20, 1987, the Defendant Charles Carter filed an Answer, Counterclaim and Petition to Modify Decree with the Montana Water Court seeking to void Minow's water rights and modify Carter's water rights as they appear in the Basin Decree. The Counterclaim sought damages from Minow.

On April 23, 1987, the water court accepted jurisdiction and assigned Judge Rodeghiero to the matter as division judge. On April 27, 1987, Judge Rodeghiero issued an Order accepting jurisdiction in the case.

On May 4, 1990, Charles Carter and Charles Carter, Inc., Defendants and Third-Party Plaintiffs filed an Amended Answer, Counterclaim, Petition to Modify and Third-Party Complaint with the water court. The Third-Party Complaint sought damages from the Montana Department of Natural Resources and Conservation for negligently establishing the water usage and priority dates within the Basin as decreed.

On June 4, 1990, the Montana Department of Natural Resources and Conservation (DNRC) filed with the water court a Motion to Dismiss the Third-Party Complaint. The Department also filed a Brief in Support of this Motion. On June 27, 1990, Carter filed a Brief in Opposition to the Motion to Dismiss and the Montana Department of Natural Resources and Conservation filed a Reply Brief on July 10, 1990. The resolution of said Motion is now before the water court.

#### Issues Presented

- I. Whether the Montana Water Court has jurisdiction to hear this water distribution controversy, or whether the District Court is the proper forum.
- II. Whether the Defendants, Counterclaimants, and Third-Party Plaintiffs, Charles Carter and Charles Carter, Inc., may petition the water court to modify the Powder River Basin Final Decree after said Decree has been issued.
- III. Whether the Montana Water Court has jurisdiction to hear the Third-Party Complaint filed by Carter against the Montana Department of Natural Resources and Conservation, or whether the District Court is the proper forum.

#### DISCUSSION

- I. The Montana Water Court is a court of limited, exclusive jurisdiction. See Hill v. Merrimac, 211 Mont. 479, 687 P.2d 59 (1984). The Court has the exclusive jurisdiction concerning the determination and interpretation of existing water rights. Mont.

Code Ann. section 3-7-501(3). In otherwords, the water court has exclusive jurisdiction to adjudicate the existing water rights of this State. In re Matter of the Activities of the Department of Natural Resources and Conservation, 226 Mont. 221, 228, 70 P.2d 1096 (1987).

The complaint filed by Minow Ranch, Inc. in the present case concerns a water distribution controversy. This aspect of this case should be before the district court. Jurisdiction of water distribution controversies is clearly with the district courts. Mont. Code Ann. section 85-2-406.

The water court accepted jurisdiction of this case based on the Stipulation of the parties and by Order of the district judge. This was in error. The water court does not have jurisdiction to hear water distribution controversies. Jurisdiction is with the district court. The water court should transfer this case back to the 16th Judicial District, Powder River County.

II. The Defendants, Charles Carter and Charles Carter, Inc., have Petitioned the water court to modify the Powder River Basin Decree. The Preliminary Decree for this basin was issued by the water courton May 7, 1981. The basin was properly noticed, and opportunities for objection, and hearings on existing water right claims was provided as legislatively determined. On May 31, 1983, after hearings on objections the Powder River Final Decree was issued. Neither Charles Carter, nor Charles Carter, Inc. filed objections to the Minow Ranch, Inc. claims. Carter has now asked the water court to declare void certain Minow Ranch claims, and to modify certain Carter claims.

Carter has questioned the status of the existing Powder River decree. Whether the decree is actually a "final" or "preliminary" decree at this stage seems irrelevant. Carter alleges that the decree issued by the water court is based on erroneous or negligently obtained information provided to the water court by the DNRC and Minow. Amended Answer, Petition to Modify Decree, and Third-Party Complaint, p. 3. He alleges that his claims are prior in right to Minow, and that the decree does not accurately reflect the respective priorities of the water rights.

The problem with Carter's position is that he failed to object to Minow's claims or his own. He did not avail himself of the statutory procedures and remedies, provided. Mont. Code Ann. section 85-2-233. Also, from the record available, no avenue of appeal has been pursued. It appears as though Carter has finally realized there may be a problem with the decree, and has now entered court to try to obtain relief.

The legislature has addressed the problem. Mont. Code Ann. section 85-2-237 states as follows:

"The water judges shall by order reopen and review, within the limits set forth by the procedures described in this section, all preliminary or final decrees that have been issued by the water courts but have not been noticed throughout the water division."

Mont. Code Ann. section 85-2-237(1) (1989)

This statutory framework provides for objections, hearings and modifications of decrees. See Mont. Code Ann. sections 85-2-237(2)(5)(6)(7). This avenue of relief is available to Carter as no Orders to Reopen and Review have been

issued by the water court. It is important to note that this section applies retroactively to all preliminary and final decrees issued by the Montana water court prior to April 21, 1989. See Compiler's Comments, 85-2-237; Section 4, Ch. 586, L. 1987.

Therefore, even though Carter did not object to any claims at the Preliminary Decree stage, he still has an avenue of relief available. Carter may object to the Powder River Decree under the statutory procedures provided in 85-2-237. Accordingly, the petition to modify the decree should be dismissed as statutory procedures are available

III. The water court should dismiss Carter's Third-Party Complaint against the Montana Department of Natural Resources and Conservation (DNRC) for lack of subject matter jurisdiction. As discussed in Section I of this memorandum, the water court is a court of limited exclusive jurisdiction. The claim should be dismissed without prejudice and brought into the proper forum. Namely the district court, which is a court of general jurisdiction and the proper forum to hear the allegations of Carter which sound of tort.

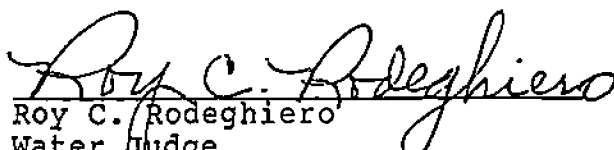
Carter contends that the water court has subject matter jurisdiction. Brief in Opposition, p.2. Carter cites Mont. Code Ann. section 85-2-216 in support of this position. This section was merely intended to transfer ongoing district court cases, involving the adjudication of existing water right to the proper water judge. It does not confer jurisdiction upon the water court to hear the third-party complaint against the Montana Department of Natural Resources and Conservation.

### Conclusions

The water court shall transfer the water distribution aspect of this case back to the 16th Judicial District, Powder River County. The water court shall also grant the Montana Department of Natural Resources and Conservation's Motion to Dismiss the third-party complaint for lack of subject matter jurisdiction.

The petition to modify the Powder River Decree shall likewise be denied. Carter did not object to either his own claims or to those of Minow. He did not avail himself of the statutory procedures or remedies. The legislature has provided relief for this type of circumstance. Mont. Code Ann. section 85-2-237 provides Carter with an opportunity to object to his own claims and to those of Minow. Upon such objection there will be an opportunity for hearing to modify the Powder River Decree. This opportunity will be available upon an order reopening and reviewing the Powder River Decree.

Dated this 13<sup>th</sup> day of August 1990.

  
Roy C. Rodeghiero  
Water Judge  
Yellowstone Division



CERTIFICATE OF SERVICE

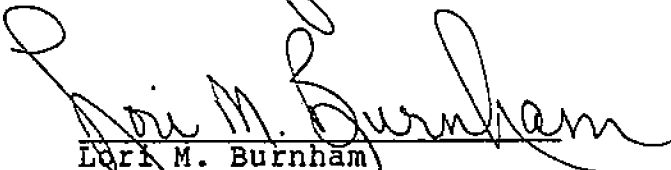
I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above ORDER and MEMORANDUM was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Gary L. Day, Attorney  
P. O. Box 728  
Miles City, MT 59301

William J. Krutzfeldt, Attorney  
1200 Pleasant Street  
Miles City, MT 59301

Tim D. Hall, Attorney  
Dept. of Natural Resources  
1520 East Sixth  
Helena, MT 59620

DATED this 14th day of August, 1990.

  
Lori M. Burnham  
Clerk of Court  
Montana Water Court