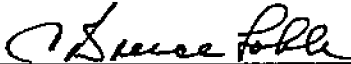


Memorandum.

DATED this 13^R day of July, 1992.



C. Bruce Loble
Chief Water Judge

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motion was claimants' failure to answer the United States' Request for Admissions which were received by claimants by certified mail on December 9, 1991 (Attachment D to USA brief). The Requests addressed the perfection, use and abandonment of the above captioned claims. The motion was also supported by claimants' failure to answer the DFWP interrogatories mailed on November 12, 1985. (Attachment B to USA brief) Copies of the United States Request for Admissions and Interrogatories and its Request for Production of Documents, all dated December 6, 1991, were provided the Court along with copies of the DFWP interrogatories.

A four page Order for Hearing on Motion for Summary Judgment was entered by the Court on April 6, 1992. This Order was unusually lengthy because it directed the claimants' attention to some of the many Montana Supreme Court decisions on Motions for Summary Judgment and on the effect of failing to respond timely to discovery requests. The Order further suggested that claimants might wish to discuss the matter with an attorney prior to the hearing.

At the request and by agreement of the parties, the originally scheduled hearing date was vacated and a hearing was held on the Motion for Summary Judgment on May 19, 1992 at 10:00 A.M. in the Powell County Courthouse, Deer Lodge, Montana before C. Bruce Loble, Chief Water Judge. Ben Sinerius appeared on behalf of the claimants¹ and Jody Miller, Special Assistant, U. S. Attorney

¹Although not essential for the determination of the issues in this case, Attachments E, F and G to the USA brief indicate that

appeared for the United States of America. The Montana Department of Fish, Wildlife and Parks (DFWP) did not appear. DFWP's attorney, G. Steven Brown, did advise the Court by telephone that DFWP would not be present at the hearing.

The hearing lasted less than thirty minutes. The United States of America presented a short synopsis of its position. The claimants presented no evidence or argument to refute the pending motion. Ben Sinerius mostly asserted that the claimants were being deprived of their Constitutional right to trial by jury. Ben Sinerius asserted that the proceedings were in direct violation of the Constitution and stated that:

"No state shall make any law that abridges the privileges of a citizen of the United States and this is a law that does exactly that. **And for that reason I did not answer no questions** and I had asked for a jury trial. I want to save all motions for a jury trial for this summary judgment that is to come out of this court. I want all motions reserved before a jury so a jury can decide what they hear."
(Emphasis supplied by the Court)

The Court denied the request of Mr. Sinerius for a jury trial. Rule 1.II(1) of the Supreme Court adopted Water Right Claim Examination Rules specifies that the "[R]ight to trial by jury does not exist in adjudication of water rights." Following the Court's denial of the request, Ben Sinerius continued to assert his right to a jury trial. The Court again denied the request and strongly suggested to Mr. Sinerius that he respond to the summary judgment

the claimant corporations may no longer exist. It is possible that Ben Sinerius is doing business under the the assumed business names of the claimant corporations.

motion of the United States.

In response to the motion, Mr. Sinerius asserted that the motion was "completely out of line." The first reason advanced by Mr. Sinerius was that no damages were asserted to exist and without damages no judgment could be entered. The second reason advanced was that the claimants did not abandon the water rights as he has been in litigation with the United States Forest Service over a road that had been built for the mine. The third reason advanced was that the mining claim was located for mineral, including any mineral in water. These arguments are not responsive to the pending motion.

Under the "no damages" reasoning first advanced by Mr. Sinerius, no objection to a water right claim on the basis of abandonment could ever exist. If a water right is not being used or was abandoned by a claimant then no other water user is ever likely to be suffering any current damages. Any damages that are likely to occur to another water user will be in the future when an "abandoned" water right is put to use. The time to file objections to water right claims in this decree has expired. Therefore, the question of abandonment must be resolved now regardless of present damages.

Under the second reasoning advanced by Mr. Sinerius i.e. the mine road litigation, the litigation appears to have taken place after July 1, 1973. (See Attachments A through G of the United States' Status Report and Brief in Support of Request for Judicial Notice and the Order Taking Judicial Notice entered on

December 10, 1991) This post 1973 litigation is not relevant to our consideration here. The issue is whether the claimed water rights were abandoned prior to July 1, 1973.

The third reasoning advanced by Mr. Sinerius i.e. that the location of mineral includes the location of any mineral in the water, is too vague to make a response. The sense of the Court is that Mr. Sinerius had an arcane theory in mind when he made this argument. However, Mr. Sinerius presented no authorities to the Court to explain what was meant by this argument or what its impact on the pending motion should be. Without more than was presented at the hearing, the Court can't speculate what was meant by Mr. Sinerius.

In accordance with Rule 36(a) of the Montana Rules of Civil Procedure, the Montana Supreme Court has deemed a matter admitted when a party fails to answer a Request for Admissions within 30 days and neither requests, nor is granted an extension by the Court. See Rogers v. Relyea, 184 Mont. 1, 9, 601 P.2d 37 (1979). Here, the record discloses that claimants failed to answer the Requests and claimants did not request and have not been granted an extension by the Court. In fact, Mr. Sinerius stated at the hearing that he did purposely "answer no questions" because of his Constitutional argument. Mr. Sinerius must pursue his Constitutional argument at a higher level.

The Supreme Court has found summary judgment to be proper when based upon a failure to timely respond to Requests for Admissions. All-States Leasing v. Top Hat Lounge, 198 Mont. 1, 4,

649 P.2d 1250 (1982). In All-State Leasing, supra, 198 Mont. at pages 4 and 5 the Montana Supreme Court stated as follows:

"Under Rule 56(c), M.R.Civ.P., summary judgment is proper only if the record discloses no genuine issues of material fact. The initial burden is on the party moving for summary judgment to show that no genuine issues of material fact exist. Once the moving party has met its burden, the party opposing the motion must come forward with substantial evidence raising a genuine issue of material fact. Rumph v. Dale Edwards, Inc. (1979), Mont. 600 P.2d 163, 36 St.Rep. 1022; Harland v. Anderson (1976), 169 Mont. 447, 548 P.2d 613.

* * *

Under Rule 36(a), M.R.Civ.P., a matter is deemed admitted if the request for admissions is not answered within thirty days after service of the request. In Morast v. Auble (1974), 164 Mont. 100, 519 P.2d 157, the central and controlling factual issues of the case were deemed admitted for failure to make a timely reply under Rule 36(a). Moreover, in Morast we also stated that "admissions obtained by the use of Rule 36 may show that there is no genuine issue as to any material fact and justify the entry of a summary judgment under Rule 56." Morast, 519 P.2d at 160, quoting 8 Wright & Miller, Federal Practice and Procedure: Civil section 2264. See also, State of North Dakota v. Newberger (1980), Mont., 613 P.2d 1002, 37 St.Rep. 1119."

Accordingly, the unanswered Requests for Admissions establish the following uncontested facts for each captioned water right claim in this case:

- a. Any and all water rights for the water claims in Case Number 76G-144 have been abandoned under Montana law.
- b. Water claimed for the water claims in Case Number 76G-144 has never been used.

- c. Water claimed for the water claims in Case Number 76G-144 has not been used for mining or domestic purposes since 1930.
- d. Ditches or other means of conveyances for the water claims in Case Number 76G-144 have not been used or maintained since 1930.

The primary Montana decision on the abandonment of water rights is 79 Ranch Inc. v. Pitsch 204 Mont. 426, 666 P.2d 215 (1983) which states at pages 431 and 433 of 204 Mont. as follows:

"Abandonment of a water right is a question of fact. . . Forty years of nonuse is strong evidence of an intent to abandon a water right, and, in effect, raises a rebuttable presumption of abandonment.

* * *

To rebut the presumption of abandonment, there must be established some fact or condition excusing long periods of nonuse, not mere expressions of desire or hope."

The most recent Montana Supreme Court decision on abandonment of water rights was issued on July 2, 1992 and held that the City of Deer Lodge, Montana had abandoned two decreed water rights out of Cottonwood Creek. The evidence in that case revealed that two municipal water rights had not been beneficially used since the late 1940s. The period of nonuse was shown to be in excess of twenty-three years as of July 1, 1973. The Supreme Court relied on the 79 Ranch case cited above and stated at pages 6 and 7 of its Opinion that "...twenty-three plus years of continuous nonuse raised a rebuttable presumption that Deer Lodge had abandoned the water rights" and that Deer Lodge failed to present sufficient evidence to rebut the presumption of abandonment. (See

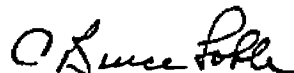
Cause No. 92-092, Opinion issued July 2, 1992)

This Court has determined on the basis of the unanswered Requests that water claimed under the above captioned water claims in Case Number 76G-144 has not been used for mining or domestic purposes since 1930. This forty plus years of continuous nonuse raises a rebuttable presumption of abandonment. Claimants had the opportunity, either before or during the May 19, 1992 hearing, to present evidence and to raise genuine issues of material fact to rebut this presumption. Claimants failed to avail themselves of that opportunity.

The case law is explicit and the citations abound that the burden shifts to the party opposing a motion for summary judgment to present material and substantial facts to oppose the motion and that the Court is under no duty to anticipate proof to establish material and substantial issues of fact. Larry C. Iverson Inc. v. Bouma 195 Mont. 351, 373, 374, 639 P.2d 47 (1982). The moving parties are entitled to judgment as a matter of law.

Water right claims 76G-W-090377-00, 76G-W-090701-00, 76G-W-090971-00, 76G-W-210721-00, 76G-W-210722-00 and 76G-W-210723-00 have been abandoned and are terminated. They shall not appear in the Preliminary and Final Decrees of the Clark Fork River Basin above the Blackfoot River (Basin 76G).

DATED this 13th day of July 1992.



C. Bruce Loble
Chief Water Judge

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