Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
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IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE GALLATIN RIVER DRAINAGE AREA INCLUDING ALL TRIBUTARIES OF THE GALLATIN RIVER IN GALLATIN, PARK AND MADISON COUNTIES, MONTANA	**CASE 41H-207** 41H-W-006733-00 41H-W-030434-00 41H-W-120529-00

CLAIMANT: Coletta Jones, Douglas Aita and Diane Aita
Joan McNabb, Frederick C. Fehsenfeld
Bernarda Finnegan, Patricia Myers
Merlin Deshaw and Sheila Deshaw (Former Owners)
David L. Tinklenberg (Present Owner)

ON MOTION OF THE WATER COURT

OBJECTOR: Joan McNabb

ORDER GRANTING MOTION FOR RECONSIDERATION

On December 14, 1994, Russ McElyea, attorney for Philip Flikkema, filed a Motion for Reconsideration and requested the Court to reconsider its Order issued September 6, 1994. That Order and supporting Memorandum concluded that the Court was precluded from hearing parol or extrinsic evidence to determine the intent of the parties in regard to the Flikkema-Myers deed (Exhibit D-1, item 2).

According to the record, on February 21, 1966 John P. Dyk and Grace Dyk conveyed to Philip Flikkema and Cornelia H. Flikkema, the West one-half of the Northeast one-quarter (W½NE¼) of Section 22, Township 1 South, Range 4 East, containing 80 acres, more or less, together with the 78 inches of water that is at issue in this proceeding. This deed was recorded on April 30, 1973.

On November 18, 1975, Philip Flikkema and Cornelia H.

Flikkema conveyed the Southwest Quarter of the Northeast Quarter (SW¼NE¼) of Section Twenty-two, Township 1 South, Range 4 East to Robert P. Myers and Patricia C. Myers. Although Myers received approximately one-half of the property conveyed in 1966 by the Dyks to the Flikkemas, the Flikkema-Myers deed is silent as to the transfer of the 78 inches of water.

Flikkema asserts the intent of the parties to the Flikkema-Myers transaction was that no water rights were transferred to Myers in 1975 and seeks to submit evidence that supports this contention. The proffered evidence was discussed in the Court's Memorandum of September 6, 1994. It includes a poor quality photocopy of an Earnest Money Receipt and Agreement to Sell and Purchase signed only by Robert P. Myers, a photocopy of an affidavit of Robert P. Myers and Mr. Flikkema's testimony that no water rights were transferred in 1975.

Flikkema relies upon §28-2-905(2) MCA which states:

> This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as described in 1-4-102, or other evidence to explain an extrinsic ambiguity or to establish illegality or fraud.

Flikkema asserts at page 3 of his brief that "the extrinsic ambiguity is quite blatant. Both Flikkema and Myers have informed the Court that no conveyance of water occurred." That statement regarding Myers is not quite correct. The grantees of the Flikkema-Myers deed include Robert P. Myers and Patricia P. Myers. Patricia C. Myers opposes Flikkema's effort.

In contrast to the sales agreement and affidavit provided

by Flikkema, the record reflects that on March 10, 1982 a statement of claim in the name of Robert P. Myers and Patricia C. Myers was filed with the Department of Natural Resources and Conservation and claimed all 78 inches of the water right at issue here. This statement of claim was signed by Patricia C. Myers. The Court's microfiche copies of the claim file indicates that Robert P. Myers and Patricia C. Myers signed a water right Transfer Certificate on January 11, 1988 indicating that this water right claim was transferred to Patricia C. Myers as a result of a divorce settlement.

Patricia C. Myers urges the Court to follow the specific directions of the legislature when it enacted §89-893 R.C.M. 1947 as part of the Montana Water Use Act of 1973. In the Reply Brief of Patricia Myers at page 2, counsel asserts that the first paragraph of §89-893 R.C.M. 1947 is now 85-2-403(1) MCA, "has not been amended since enactment"[1] and currently reads as follows:

> The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority.

Myers argues that this statute is a specific statute requiring the reservation of water in a deed and that the statutes cited by Flikkema are general statutes. When a general statute and

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[1] Counsel is incorrect about the amendments. The first sentence of §89-893 R.C.M. 1947 as originally enacted begins with: "(1) The right to use water under a permit or certificate of water right shall pass with a conveyance of the land, ..." This sentence was amended to the current language at a later date.

specific statute are inconsistent, the specific statute governs. Gibson v. State Comp. Mut. Ins. Fund, 255 Mont. 336, 842 P.2d 338, 340 (1992).

Although Flikkema asserts that an extrinsic ambiguity exists, no definition or citation to authority beyond the statute was provided and the task of researching that topic was left to the Court. In Pacific Indemnity Co. v. California Electric Works, 84 P.2d 313 (1939) the California District Court of Appeal, Fourth District Court construed a California statute remarkably similar to §28-2-905(2). That Court stated at page 320, supra, that:

> The statutory use of the words "extrinsic ambiguity" in section 1856 of the Code of Civil Procedure we understand to have the same meaning as latent ambiguity. A latent ambiguity is an uncertainty which arises, not by the terms of the instrument itself, but is created by some collateral matter not appearing in the instrument. [Citation omitted.]
> When the intention of a party is clearly expressed, and a doubt exists, not as to the intention, but as to the object, to which the intention applies, it is, in the same language, called a latent ambiguity. [Citations omitted]
> ....
> The rule, therefore, is that if there is any reasonable room for doubt as to what the contract means or as to what the exact words thereof apply to, then parol evidence is properly admitted.

Based upon admittedly non exhaustive research it appears that there are at least two views on receiving parol evidence. The "four corners" rule, which excludes extrinsic evidence if the contract is clear, was termed the "older view" in Federal Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 621 (7th Cir. 1989).

The Water Court followed the "four corners" rule in its September 6, 1994 Order.

In *Ambiguity in Contract-Extrinsic Evidence*, 40 ALR3d 1384, 1389 the "four corners" rule is described as the "traditional" and "prevailing view at present" but that "a few modern cases have allowed the introduction of extrinsic evidence showing the existence of an ambiguity." The illustrative cases cited by ALR as representing the apparent shift from the traditional view, involve the interpretation of California, Michigan, New Jersey, New Mexico and Washington law. Additionally, in Licciardi v. Kropp Forge Div. Emp. Ret. Plan, 797 F.Supp. 1375, 1381 (N.D.Ill. 1992), it was noted that Illinois also employs the doctrine of "extrinsic" or "latent" ambiguity and quoting Black's Law Dictionary 102 (3d ed. 1933), says the doctrine comes into play:

> where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation of a choice among two or more possible meanings.

Although the §28-2-905(2) "extrinsic ambiguity" language has been in the statute books apparently since 1877 and the statute repeatedly cited, this writer could not find a case in which the Montana Supreme Court has construed the actual extrinsic ambiguity language in a manner similar to the California or Illinois Courts previously cited or at all for that matter. The closest reference was found in Ellingson Agency v. Baltrusch, 228 Mont. 360, 366, 742 P.2d 1009 (1987), in which the Court asserted that "[t]herefore, a

latent ambiguity exists, and parol evidence is necessary to determine the intention of the parties." The Court cited §28-3-301 MCA and not 28-2-905(2) as its authority.

Many of the Montana cases citing §28-2-905 or its predecessor statutes appear to be more expansive than constrictive in permitting a court to review extrinsic evidence as part of its decision making process. See, for example, Fillbach v.Inland Construction Corporation, 178 Mont. 374, 379, 584 P.2d 1274 (1978); Woodward v. Castle Mountain Ranch, Inc. 193 Mont. 209, 220, 631 P.2d 680 (1981); and Martin v. Community Gas and Oil Co. Inc., 205 Mont. 394, 400, 668 P.2d 243 (1983) (Review of extrinsic evidence was permissible to determine that ambiguity in contract did not exist.) See also the parol evidence discussion found at 44 Montana Law Review 197, 201 (1983).

Under the circumstances here and pursuant to §28-2-905(2), extrinsic evidence may be introduced in this proceeding. Such introduction is subject always, of course, to proper objection under the Montana Rules of Evidence. By this ruling, the Court is not foreclosing the argument advanced by Myers that §85-2-403 is controlling. The purpose of receiving the extrinsic evidence is to place this court and the reviewing court, if any, in the position of those whose language is to be interpreted.

The Motion for Reconsideration is **GRANTED**. The Court is persuaded that parol or extrinsic evidence to determine the intent of the parties in regard to the Flikkema-Myers deed may be

received. The ruling to the contrary in the Court's Order of September 6, 1994 is **RESCINDED**.

DATED this 17th day of April, 1995.

C. Bruce Loble
Chief Water Judge

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