Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN (43B)
* * * * * * * * * * * * * * * * * * * *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE YELLOWSTONE RIVER ABOVE AND INCLUDING ALL TRIBUTARIES OF THE YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK IN GALLATIN, PARK, SWEET GRASS AND STILLWATER COUNTIES, MONTANA.	**CASE 43B-204** 43B-W-042449-00 43B-W-042450-00 43B-W-042451-00

CLAIMANT: Thomas K. Budde and Jody L. Budde (Former Owners)
James Sievers (Present Owner)

ON MOTION OF THE WATER COURT

OBJECTOR: Double AA Corporation

MEMORANDUM AND ORDER GRANTING MOTION FOR SUBSTITUTION OF OBJECTOR AND GRANTING MOTION TO DISMISS OBJECTION TO MASTER'S REPORT

MEMORANDUM

STATEMENT OF THE CASE

BACKGROUND

These original Statements of Claims by Thomas and Jody Budde to water from Cascade Creek and its tributaries are based upon a Notice of Appropriation for water from Cascade Creek and two springs which are tributary to Cascade Creek. Each source identified in this Notice has a separate amount of water and its own priority date, by year only.

DNRC confirmed the claimed information in its examination prior to the issuance of the decree, giving each claim a priority date of December 31 for the year claimed. No issue remarks appear on the abstracts of these claims. In December of 1986 these claims

were transferred to James Sievers (Sievers)

Rembrandt Enterprises (Rembrandt) objected to the priority dates and places of use on these claims asserting that the "priority date for place of use is not substantiated by claimant's documentation."

On June 19, 1987 the parties filed Stipulations and Withdrawals of Objections on each of the claims indicating that Rembrandt mistakenly believed that these claims on Cascade Creek could adversely affect its claims on Barney Creek. The stipulated location and relationship between Cascade Creek and Barney Creek are confirmed by the Water Resources Survey (WRS), which indicates that Cascade Creek empties into McDonald Creek downstream from Barney Creek. These Stipulations and Withdrawals were signed by the attorney representing Rembrandt who also filed the original objections to these claims on behalf of Rembrandt.

On January 25, 1994 the Master's Report in this case was issued recommending that no changes be made to these claims pursuant to the Stipulations and Withdrawals of objections, except for a change in priority date to a later date on claim 43B-W-042451-00. This change was made pursuant to a priority date conflict with the Crow Indian Reservation.

On September 14, 1987 a Water Right Transfer Certificate was filed transferring Rembrandt's water rights on Barney Creek, claims 43B-W-194522-00, 43B-W-194523-00 and 43B-W-194525-00, to Double AA Corporation (Double AA) pursuant to § 85-2-403, MCA. These claims are not a part of this case and therefore evidence of this transfer did not appear in this case file. The transfer occurred three months after the Stipulations were filed and more

than six years before the Master's Report was issued. This transfer was prepared by the same attorney who represented Rembrandt.

On February 4, 1994 Double AA filed an objection to the Master's Report in this case based upon its status as purchaser of Rembrandt's properties and as successor in interest to the Rembrandt objections. Double AA alleges that Rembrandt actually withdrew from this case for economic reasons, that the priority date, place of use, and flow rate (an additional element not included on the original objection) of these claims are not in accord with historical documentation. Double AA asks that the case be reopened.

This case was referenced back to the Master on December 30, 1994. Based upon the representation by Double AA that it was the successor in interest to Rembrandt, on January 12, 1995 the Court issued an Order setting a deadline for Double AA to file a Motion for Substitution of Objector or be dismissed as a nonparty pursuant to Rules 24 and 25, M.R.Civ.P.

On February 10, 1995 Double AA filed a Motion for Substitution of Objector asking to be substituted as the objector in place of Rembrandt and asserting that it now owns the claims that will be adversely affected by Siever's claims.

On February 27, 1995 Sievers responded by filing a Motion to Dismiss Double AA's Objections to the Master's Report and a supporting brief. Sievers argues that, as an admitted successor in interest, Double AA is bound by the actions of its predecessor in interest based upon the Doctrine of Res Judicata. Sievers points out that Double AA retained Rembrandt's attorney, thereby giving

Double AA actual knowledge of Rembrandt's actions from the time of transfer and indicating that Double AA's Objection to the Master's Report is untimely. Sievers did not file an objection to Double AA's Motion For Substitution of Objector.

On March 20, 1995 Double AA filed a Response Brief to Sievers' Motion to Dismiss Objection to Master's Report, arguing that Rembrandt entered into these Stipulations due to financial distress and to eliminate the expense of a hearing. Double AA further argues that: it had no notice of the Stipulations until the issuance of the Master's Report, yet acknowledges that Double AA received notice of the Master's Report through Rembrandt's attorney, who is also Double AA's attorney; that it is not a party to the Stipulations because it did not sign the Stipulations and the Stipulations specifically do not reference Rembrandt's heirs, assign and successors; and that Sievers' failure to object to the request to reopen the case for more than a year after the filing of the Objection to Master's Report is untimely, resulting in a waiver of Sievers' right to object.

On July 21, 1995 Sievers filed a Reply Brief to Double AA's Response Brief, arguing that he is not required to respond to the Double AA filings until Double AA is made a party and therefore, Sievers' responses are not untimely. Rather, Sievers argues that Double AA's actual notice of the Stipulations and Withdrawals at the time that they acquired Rembrandt's property makes Double AA's attempt to reopen this case untimely. Sievers further argues that the significance of Double AA's Motion for Substitution of Objector is that Double AA is requesting to stand in the shoes of the objector, which would bind Double AA to the

actions of its predecessor as surely as privity will.

The parties agreed to submit their motions based upon briefs. The Court has considered these briefs, the transfers by Rembrandt, the case and claim files and its own research of the applicable statutes and case law in arriving at its decision on these motions.

Motion for Substitution of Objector

ISSUES

1. Is Double AA a successor in interest to Rembrandt; and

2. Should Double AA be allowed to substitute as objector in this case?

DISCUSSION

1. Is Double AA a successor in interest to Rembrandt? A Successor in interest is a successive owner or one who follows another in interest. Ballentine's Law Dictionary, Third Edition, 1969. Black's Law Dictionary, Revised Fourth Edition, 1968, defines a successor as "one that succeeds or follows; one who takes the place that another has left, and sustains the like part or character."

§ 85-2-403, MCA, Transfer of appropriation right, states "(1) 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."

Double AA has admitted in its Objection to Master's Report and in its Motion for Substitution of Objector that it is a successor in interest to Rembrandt. This allegation is supported

by the Water Right Transfer Certificate filed by Rembrandt and Double AA. Sievers has not objected to this Motion. Double AA is the only party who could take the place of Rembrandt. Double AA is Rembrandt's successor in interest.

2. Should Double AA be allowed to substitute as Objector in this case? Rule 25(c), M.R.Civ.P., states:

> **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court **upon motion directs the person to whom the interest is transferred to be substituted in the action** or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(emphasis added)

Rule 25(a)(1), M.R.Civ.P., states in part:

> The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

From this Rule it is apparent that if a successor in interest wishes to become a party in a case involving his predecessor he must 1) make a motion to be substituted as a party, 2) that such motion for substitution shall be served upon the parties in the case, 3) that a motion for substitution of a party shall be made within a reasonable time, and 4) that such motion must first be granted by the court before he becomes a party to the case.

1) Requirement for a Motion for Substitution of Objector

At the time that Double AA filed its Objection to the Master's Report it was not a party of record in this case. It is the responsibility of a party, or its successor, to notify the Court of a transfer of interest. The vehicle to accomplish this for a claimant is a Water Rights Transfer Certificate. The vehicle for an objector is a Motion for Substitution of Objector.

When Double AA filed its Objection to the Master's Report it did not file a Motion for Substitution of Objector pursuant to Rule 25, M.R.Civ.P. The objection was therefore not immediately

acted upon. A year went by and still no motion. The Court issued an Order Setting a Deadline to File a Motion for Substitution of Objector or suffer dismissal as a nonparty. Double AA subsequently filed a Motion for Substitution of Objector.

2) The Motion must be served upon the parties.

There is a Certificate of Service attached to Double AA's Motion for Substitution which includes all parties to this case.

3) The Motion must be timely.

It is clear from the Rule that it is incumbent upon potential parties to act quickly after they have been informed of the pending litigation. Double AA retained the same attorney retained by its predecessor Rembrandt and therefore had actual notice of the pending litigation as early as September 14, 1987, the date that the Water Right Transfer Certificate from Rembrandt to Double AA was filed. Double AA should have filed its motion for substitution of objector immediately, especially if it disagreed with the actions of its predecessor. Instead, Double AA remained silent until the Master's Report was issued, over six years after receiving notice of this pending litigation.

Courts have held that a Motion to Intervene in similar circumstances is untimely with only four and a half months between the time movant received notice of pending litigation and the date he filed his motion to intervene. See McCauley v. Carey, Order Denying Motions to Intervene and For Extensions of Time to File Objections to Master's Reports, Case 41E-38, Montana Water Court, 9/19/94. However, when prompted by this Court, Double AA did file its Motion for Substitution of Objector within the time period set by the Court.

4.) The Motion must be granted by the Court before a transferee becomes a party to the case.

A valid Water Right Transfer Certificate is on file for the Rembrandt claims to Barney Creek water from Rembrandt to Double AA. Double AA admits in its Objection to Master's Report and in its Motion for Substitution of Objector that it is a successor in interest to Rembrandt. There is also the fact that Sievers has not objected to Double AA's Motion for Substitution of Objector. In spite of the untimeliness of its Motion for Substitution of Objector, Double AA should be substituted as objector in this case.

Objection to Master's Report and
Motion to Dismiss Objection to Master's Report

ISSUES

1. Who may object to Master's Reports?
2. Is Double AA's Objection to Master's Report timely?
3. Are the Stipulations valid, and if so, who is bound?
4. Did Double AA waive its right to object to the Master's Report and the Stipulations?
5. Is Double AA estopped from objecting to the actions of its predecessors, and if so, to what extent?
6. Did Sievers waive his right to object to Double AA's Motions?
7. Does the Doctrine of Res Judicata apply to the actions of Double AA?

DISCUSSION

1. Who may object to Master's Reports? Objections to Master's Reports are governed by Rule 1.II., Water Right Claim Examination Rules and by Rule 53, M.R.Civ.P. Rule 1.II.(4) Water Right Claim Examination Rules and Rule 53(e)(2), M.R.Civ.P., state: "Within ten (10) days after being served with notice of filing of the master's report, any **party** may file with the Water Court and serve upon other parties appearing before the water master written objections to the report."
(emphasis added)

At the time that Double AA filed its Objection to the Master's Report, it was not a party to the case and therefore had no right to object. However, Double AA is now being made a party on it's Motion for Substitution of Objector.

2. Was Double AA's Objection to the Master's Report timely? Double AA filed it's Objection to Master's Report within the ten days proscribed by the above Rules.

3. Are the Stipulations valid, and if so, who is bound by them? Double AA wishes to have the case reopened because it does not agree with the Stipulations entered by its predecessor and does not believe it should be bound by the Stipulations.

A stipulation is defined as "the name given to any agreement made by the attorneys engaged on opposite sides of a cause, (especially if in writing,) regulating any matter incidental

to the proceedings or trial, which falls within their jurisdiction. Such, for instance, are agreements to extend the time for pleading, to take depositions, **to waive objections**, to admit certain facts, to continue the cause." (emphasis added) Black's, supra. The Stipulations in the instant case are signed by the parties' attorneys, for the purpose of waiving Rembrandt's objections to Sievers' water right claims.

Black's goes on to identify two types of stipulations, the first being those relating to merely procedural matters and "the second, those which have all the essential characteristics of mutual contract." The Stipulations in the instant case include procedural matters, the withdrawal of Rembrandt's objections, and substantive facts, the reason for and the waiver of Rembrandt's objections.

In Jensen v. State, Dept. Lab & Ind. (1986), 221 Mont. 42, 47, 718 P.2d 1335, the Supreme Court held that a stipulation entered into by the parties concerning a material fact "should be viewed as a contract or agreement that is to be interpreted pursuant to contract principles." Waiver of objection is a material fact. Rembrandt waived its objections to these water right claims.

A District Court ruling to the contrary in Webb v. Wolf (1988), 230 Mont. 322, 325, 749 P.2d 531, was overruled for failing to accept a stipulated debt amount. The Supreme Court quoted Spaulding v. Stone, (1912), 46 Mont. 483, 487, 129 P.327, 328, "The purpose of such a stipulation is to relieve the parties from the necessity of introducing evidence as to the ultimate fact covered by it. If the fact is material, the court is, as to it, bound by the stipulation. It amounts to a special finding." Rembrandt's waiver of objections to Sievers' water right claims is material and this Court is thus bound to accept these Stipulations.

However, in Marriage of Hill (1994), 265 Mont. 52, 58, 874 P.2d 705, the Supreme Court held: "This Court has previously held that a court can rely on the terms of a stipulation provided the stipulation is not contrary to law, court rule, or public policy." The Stipulations in the instant case amount to contracts to relieve the parties from the necessity of introducing evidence as to the ultimate fact covered by these Stipulations, which state

that the objections were made in error. The recitations in the Stipulations are confirmed by the WRS. There is nothing in the Stipulations that appear contrary to law, court rule, or public policy.

The current objector wishes to rescind these Stipulations which it alleges were made due to economic duress. The Court must look to contract principles for guidance in dealing with this allegation.

The Supreme Court cites the general rule from § 7520 and § 10517, Revised Codes of Montana, 1932, in Hosch v. Howe et al (1932), 92 Mont. 405, 16 P.2d 699, stating:

"(§ 7520) The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." This statute has survived unchanged in § 28-2-904, MCA.

The Supreme Court goes on in Hosch to state the exceptions to the general rule:

"(§ 10517) When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings. 2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in § 10521, or to explain an extrinsic ambiguity, or to establish illegality or fraud." This section, commonly referred to as the parol evidence rule, has survived unchanged in § 28-2-905, MCA and is further refined in Martin v. Laurel Cable TV, Inc. (1985) 215 Mont 229, 233, 696 P.2d 454.

"In essence, when the terms of parties' agreement are reduced to writing, the writing is considered to contain all the terms, thus representing the entire transaction. No evidence can be admitted of the terms other than the writing itself. The rule, however, is a rule of exceptions: (1) when pleadings put in issue

an alleged mistake; (2) when parties dispute the validity of the agreement itself; (3) when circumstances under which the agreement was made or to which it relates or other evidence explain an extrinsic ambiguity; or (4) when circumstances establish illegality or fraud, then the trial court may deem parole evidence admissible."

(1) The pleadings in this case do not claim a mistake within the Stipulations. (2) The objector appears to be disputing the validity of these agreements, but has failed to provide any support for this allegation. (3) There is no evidence in the record to support an ambiguity in the circumstances surrounding these Stipulations. (4) The objector has not plead illegality or fraud. In applying the parole evidence rule to the instant case, none of the exceptions fit. Therefore the general rule applies and the parties are bound by these Stipulations.

In Martin v. Community Gas and Oil Co. Inc. (1983), 205 Mont. 394, 398, 668 P.2d 243 the Court stated: "Generally, when a contract is reduced to a writing that is plain and unambiguous, the intent of the parties is to be ascertained from that writing alone, if possible. Section 28-3-303, MCA."

The Stipulations in this case, one for each claim, state:

> 1. That Rembrandt Enterprises filed an objection to the above claim relying on information that Cascade Creek was a tributary of Barney Creek and the Cascade Creek claim by Thomas L. Budde and Jody L. Budde would have an adverse effect on the claim filed by Rembrandt Enterprises on the waters of Barney Creek.
>
> 2. That Barney Creek is a tributary of McDonald Creek which flows into the Yellowstone River, and Cascade Creek is a tributary of McDonald Creek. The waters of Cascade Creek and McDonald Creek do not intermingle.
>
> 3. That upon signing of this stipulation by both parties, Rembrandt Enterprises will file a "Withdrawal of Objection" with the Water Courts thereby concluding this litigation."

Withdrawals of Objections were attached to each Stipulation.

Clearly the words of these Stipulations show that it was the parties intention that the objections were made in error and should be, and were therefore, withdrawn.

Martin v. Community Gas goes on to say "Ambiguity only

exists when a contract taken as a whole in its wording or phraseology is reasonably subject to two different interpretations." The objector in this case has not alleged a different meaning for the wording of the Stipulations.

Because the language of these Stipulations is clear and unambiguous it is the "duty of the trial court to apply the language as written, to the facts of the case and decide accordingly. § 1-4-101, MCA." Martin v. Community Gas, supra. This Court is therefore bound to accept these Stipulations.

"The role of the Judge is to construe an instrument according to its terms or its substance, not to insert or omit terms. § 1-4-102, MCA. The judge, however, may consider circumstances surrounding the execution, including the situation of the subject of the instrument and of the parties, to place himself in a position to interpret the language. § 1-4-102 and 28-2-905(2), MCA. In construing terms, evidence is admissible to show a local, technical, or otherwise peculiar signification used and understood by the parties. Section 1-4-107, MCA." Martin v. Laurel Cable TV, supra.

The objector in this case has given no authority or evidence to support a different circumstance surrounding these Stipulations. The Court can find nothing in the language of these Stipulations which is either technical or of otherwise peculiar significance with which to attach a meaning other than the obvious. This Court must construe these Stipulations according to their terms.

The Court has, however, also reviewed § 28-2-1711, MCA, when party may rescind, which states:

> A party to a contract may rescind the same in the following cases only:
> (1) if the consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud, or undue influence exercised **by or with the connivance of the party as to whom he rescinds** or of any other party to the contract jointly interested with such party;
> (2) if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;
> (3) if such consideration becomes entirely void from any cause;
> (4) if such consideration, before it is rendered to him,

> fails in a material respect from any cause; or (5) if all the other parties consent.

(emphasis added)

(1) The objector has alleged economic duress as a reason to invalidate the Stipulations, but supplied no evidence of same. There have been no allegations that Sievers was aware of, or "connived with" Rembrandt to accomplish the duress alleged. (2), (3) and (4) do not apply because consideration is not an issue in this case. (5) Sievers, by his Motion to Dismiss Objection to Master's Report, definitely has not consented to the rescission of these Stipulations. Rescission is therefore improper in this case.

Under the Rules of Contract, the Stipulations in this case are binding on the parties and the Court properly accepted and is bound by them as well.

Now, who are the parties that are bound by these Stipulations? Double AA argues that because it did not sign these Stipulations and because there is no clause in the Stipulations binding the heirs, assigns and successors it is not bound by the Stipulations. Double AA provides no evidence or authority in support of this allegation, probably because there are none. To the contrary, § 28-2-905, MCA, supra, specifically includes successors in interest as parties to written agreements:

> When extrinsic evidence concerning a written agreement may be considered. (1) Whenever the terms of a written agreement have been reduced to writing by the parties, it is to be considered as containing all of those terms. Therefore, there can be between the parties and their representatives or **successors in interest** no evidence of the terms of the agreement other than the contents of the writing except in the following cases: .....

(emphasis added)

The Supreme Court also rejected a similar argument in Baker v. Berger, (1994), 265 Mont. 21, 28, 873 P.2d 940, wherein it stated "Appellant's argument that he and Laura's successors are not bound by the 1960 agreement because they are not parties to it is likewise without merit. Generally, contracts made by a decedent are specifically enforceable against the decedent's personal representatives, heirs, devisees and assigns." The Court bases this reasoning on § 27-1-421, Compelling performance of successor in interest in title - obligations respecting real property, MCA,

which states:

> Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value, and except that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation.

This section is the codification of the terms privity and privies, which are defined by Black's as:

A) "Privies, Those who are partakers or have an interest in any action or thing, or any relation to another. (3) Privies in estate: as grantor and grantee, lessor and lessee, assignor and assignee, etc. In the sense that they are bound by the judgement, are those who acquired an interest in the subject-matter after the rendition of the judgement."; and

B) "Privity. Mutual or successive relationship to the same rights of property. Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest."

The Stipulations in the instant case involve obligations in respect to real property, namely the water rights associated with the property. Double AA, as a successor in interest, is claiming directly under Rembrandt, the party signing the Stipulations. The Stipulations have been determined to be valid, and therefore the parties, including Double AA, and the Court are bound to accept the Stipulations. Double AA is bound by the actions of its predecessor.

4. Did Double AA waive its right to object to the Stipulations? Double AA claims it had no knowledge of the actions of its predecessor prior to the issuance of the Master's Report, yet admits that it, a nonparty, received notice of the Master's Report through Rembrandt's attorney, who is also Double AA's attorney. This same attorney signed the Stipulations and Withdrawals on behalf of Rembrandt three months prior to the transfer to Double AA. These Stipulations and Withdrawals were properly filed with the Court and have been a matter of record since their filing. A review of Double AA's Water Right Transfer Certificate shows that this same attorney who prepared the transfer

documents also prepared or signed the Stipulations and Withdrawals by Rembrandt.

In Gullicksen v. Shadoan, (1950), 124 Mont. 56, 62, 218 P.2d 714, involving a contract for the removal of timber the Court states: "While this unacknowledged and unrecorded instrument was good and valid as between the Blenders and the Shadoans, it was not such as to an innocent purchaser of the land without notice thereof." Double AA is not an innocent purchaser without notice. Double AA had actual notice of the actions of its predecessor in September of 1987.

Waiver is the voluntary, intentional relinquishment of a right. McGregor v. Cushman/Mommer, (1986), 220 Mont. 98, 110, 714 P.2d 536. One assumes that when a party is represented by counsel that a resulting stipulation, as in the instant case, is entered into intentionally and voluntarily. Rembrandt intentionally and voluntarily entered into Stipulations waiving its objections to the claims in this case. Double AA, with notice of these Stipulations, waited for over six years before objecting to these Stipulations. If there is any error in these Stipulations, Double AA has acquiesced for over six years.

Acquiescence in error takes away the right of objecting to it. § 1-3-207, MCA, which was restated in Goodman Realty v. Monson, (1994), 267 Mont. 228, 234, 883 P.2d 121:

"This Court reaffirms the longstanding rule of law that a person who is not acting under mistake or fraud and who acquiesces in an error loses his right to object to the error." Double AA alleges the invalidity of these Stipulations, not that there is a mistake contained therein. If Rembrandt just wanted out of the case, a simple Withdrawal of Objections would have sufficed. Double AA has acquiesced in the actions of its predecessor for over six years with no excuse.

While there is no specific rule setting a reasonable time in such situations, the statute of limitations for injuries involving property is two years. § 27-2-207, MCA. Cases have held that where litigation is already pending, a matter of months between notice and filing may be unreasonable. See Carey v. McCauley, supra. Over six years between notice and objection in an active case is clearly untimely. Therefore Double AA's Objection

to the Stipulation is clearly untimely.

5. Is Double AA estopped from objecting to the actions of its predecessors, and if so, to what extent? Double AA claims to be a successor in interest for purposes of getting into this case, and then turns around and claims it is not a successor in interest, but rather a third party in relation to the Stipulations. This attempt by Double AA to take inconsistent positions is barred by judicial estoppel.

"Judicial estoppel may arise when a person has taken a position or asserted a fact under oath in a judicial proceeding contrary to the position he is taking in the present litigation... The rule's purpose is to suppress fraud and prevent abuse of the judicial process **by deliberate shifting of positions to suit the exigencies of a particular action**, and it will not be applied when the previous act or statement is uncertain or based on undetermined facts, but only when it is clear and certain." Brown v. Small, (1992), 251 Mont. 414, 418, 825 P.2d 1209.
(emphasis added)

"The doctrine of judicial estoppel binds a party to his or her judicial declarations, and precludes a party from taking a position inconsistent with them in a subsequent action or proceeding. . . This Court has applied the doctrine to estop a party from controverting admissions in the party's pleadings and to estop a party from controverting admissions in an affidavit. . . Stated simply, it is a rule which 'estops a party to play fast-and-loose with the courts.' (citing Rowland v. Klies, (1986), 223 Mont. 360, 367, 726 P.2d 310) Just as surely, the doctrine is applicable in this case where a party cannot take the opposing view point when he has induced another to stipulate to his position and drop his arguments for that opposing position." Brown v. Small

"The elements of judicial estoppel are:

1.) the estopped party must have knowledge of the facts at the time the original position is taken;
2.) the party must have succeeded in maintaining the original position;
3.) the position presently taken must be actually inconsistent with the original position; and
4.) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party."

Fiedler v. Fiedler, (1994), 266 Mont. 133, 139, 879 P.2d 675.

The Court points out in Fiedler: "Throughout the lengthy duration of this litigation and until he presented evidence at trial to argue that the properties were held as tenancies in common, Joseph Fiedler has consistently maintained that the properties involved in this action are partnership properties."

"There is nothing in the record to indicate that Joseph Fiedler did not have knowledge of all the facts at the time he took his original position and clearly he succeeded in maintaining that position. This position was taken early on in the litigation and James Fiedler stipulated to this position at that time. Clearly, all the elements for judicial estoppel are present and Joseph Fiedler cannot now argue that this should be an action in partition of real property and not a partnership dissolution proceeding."

"As part of the Special Master's proposal adopted by the District Court, the proceeds of the sale of the Wisconsin properties are to be distributed to Joseph Fiedler. His argument relating to the fact that the property has not yet been sold is meritless. As noted above, Joseph Fiedler stipulated in 1988 to the procedures to be followed concerning this property. Moreover, by stipulating to this procedure, Joseph Fiedler waived any future argument to treat the matter differently absent allegations to support setting aside or relief from the stipulation."

"The purpose of a stipulation is to relieve the parties from the necessity of introducing evidence about the ultimate fact covered by it (citing Webb v. Wolf) If the stipulation is material, the parties and the court are bound by it. We conclude that Joseph Fiedler is bound by his stipulation made in 1988. . ."

Judicial estoppel, or estoppel on the record, is equally applicable to a party like Double AA who seeks to take a position contrary to his predecessor's Stipulations in the same case.

However, judicial estoppel has often been characterized as harsh or odious and not favored in the law and should therefore be applied with great care and the equity must be strong in its favor. 28 Am Jur 2d, Estoppel and Waiver, § 3. Double AA is estopped from pursuing a position contrary to Rembrandt's waiver of objections by the Stipulations filed in 1987. Rembrandt objected to the elements of priority date and place of use. Rembrandt did

not object to flow rate. However, Double AA's objection to flow rate was filed untimely and will not be addressed at this stage of the adjudication.

6. Did Sievers waive his right to object to Double AA's Motions? When Double AA filed its Objection to Master's Report it was not a party to this case. Sievers was under no obligation to respond to the motions of a nonparty. Double AA has only just now been made a party to this case by this Order pursuant to Rule 25(c), M.R.Civ.P. Sievers filed its Motion to Dismiss Double AA's Objection to Master's Report a mere seventeen days after Double AA filed its Motion for Substitution of Objector. Sievers Motion is clearly timely.

7. Does the Doctrine of Res Judicata apply to the actions of Double AA? The parties have argued res judicata based upon McIntosh v. Graveley, (1972) 159 Mont. 72, 79, 495 P.2d 186. In McIntosh the Court states: "Such collateral attack and attempted **relitigation** of matters concluded in the decree Quigley v. Victor Gold Mining Company, supra, is not permissible. **That decree and the issues litigated and determined therein** are res judicata and binding on the parties in the **instant suit**, all of whom claim their respective rights herein through predecessor parties in that earlier litigation."
(emphasis added)

Res judicata requires a prior litigation. This case is the **first** case, in the **first** stage of the adjudication, the Temporary Preliminary Decree. The Court has not yet adopted the Report by the Master. There is no prior litigation. Therefore res judicata does not apply to this case. However the doctrine very well may apply if Double AA attempts to relitigate these issues at the next decree stage.

The Court notes that in none of Double AA's Motions has it alleged that its water right claims have been affected by those of Sievers, only that they will be affected. It appears that Double AA has confused present or future controversy with historical use. As counsel must surely be aware, the adjudication of existing water rights deals with the use, and effects of the use, of water prior to July 1, 1973. § 85-2-102(10) and 221, MCA.

"Owners of property have the right to be foolish as well

as wise, prodigal as well as provident; and, whichever they are, it is the business of the courts to enforce their contracts freely made and plainly expressed." Gullicksen v. Shadoan, supra.

"Commercial stability requires that parties to a contract may rely upon its express terms without worrying that the law will allow the other party to change the terms of the agreement at a later date." (citing Baker v. Bailey, (1989), 240 Mont. 139, 143, 782 P.2d 1286, 1288) Sherrodd v. Morrison-Knudsen, (1991) 249 Mont. 282, 286, 815 P.2d 1135.

Or, as the claimant in this case stated in his Reply Brief to Double AA's Response Brief: "If a successor in interest is not bound by their predecessors' in interest actions, then the Montana Water Courts will never be able to adjudicate the waters of Montana."

ORDER

The Court has reviewed carefully the case and claim files, the pertinent water right transfers, the Objections, Motions, Briefs and its own research of applicable statutes and case law. Pursuant to this Memorandum and Rule 2, Uniform District Court Rules, it is:

ORDERED that Double AA Corporation's Motion for Substitution of Objector is GRANTED;

ORDERED that Sievers Motion to Dismiss Objection to the Master's Report is hereby GRANTED; and

ORDERED that Double AA Corporation's Objection to the Master's Report is hereby DISMISSED.

DATED this 2nd day of October, 1995.

Carol Brown

Carol Brown
Water Master

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