

Montana Water Court
PO Box 879
Bozeman, MT 59771-0879
1-800-624-3270 (In-state only)
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
NORTH END SUBBASIN OF THE BITTERROOT RIVER BASIN (76HB)

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, EXCEPT FOR THE MAIN)
STEM OF THE BITTERROOT RIVER, BUT)
INCLUDING ALL TRIBUTARIES OF THE)
BITTERROOT RIVER IN THE NORTH END)
SUBBASIN OF THE BITTERROOT RIVER)
DRAINAGE AREA IN RAVALLI AND)
MISSOULA COUNTIES, MONTANA.)

CASE 76HB-11
76H-W-000101-00
76H-W-118461-00

FILED

JUN 5 1997

Montana Water Court

CLAIMANT: Keith R. Swinger and Marie E. Swinger, Gary E. Collins,
MOTION OF MONTANA WATER COURT

OBJECTORS: Washington Water Power Company, Montana Power Company,
Gary E. Collins, Keith R. Swinger and Marie E. Swinger

MEMORANDUM OPINION

On July 11, 1996, Water Master Edward M. Dobson filed his report containing Findings of Fact and Conclusions of Law. This report addressed the Motion to Disqualify Counsel for Gary Collins filed by Keith Swinger and Marie Swinger (Swingers) through their attorney Jeffrey B. Hayes. On July 26, 1996, the Swingers filed timely written objections to the report. David L. Pengelly is the counsel for Gary Collins (Collins).

The parties agreed no further briefing was necessary and the Swingers waived the Rule 53(e)(2) M.R.Civ.P. hearing. See Court Minutes and Order filed August 27, 1996.

On May 30, 1997, in response to a request by the Swingers to expedite its ruling, the Court issued its Order Denying Motion

to Disqualify Counsel and advised that a Memorandum stating the Court's reasons would be issued by June 5, 1997. This is that Memorandum.

Issue

Should attorney David Pengelly be disqualified from representing Gary Collins in this matter pursuant to Rules 1.11 and 3.7, Montana Rules of Professional Conduct, 201 Mont. 1 (1982) due to David Pengelly's previous employment with the Department of Natural Resources and Conservation (DNRC) as a non-attorney?

Standard of Review

Rule 53(e)(2) M.R.Civ.P. requires this Court to accept a Master's Findings of Fact unless clearly erroneous. *See, also* Interstate Production Credit Assn. v. DeSaye, 250 Mont. 320, 323, 820 P.2d 1285 (1991). Legal conclusions are reviewed for their correctness.

Applying the clearly erroneous test to the findings in this case is unnecessary because there are no substantive findings of fact. The Water Master's report contains 31 findings of fact but they are primarily a recitation of allegations by the Swingers with a further recitation of the responses filed by Gary Collins.

Although the Swinger motion was based specifically on Rules 1.11 and 3.7, the Master made no determination as to whether David Pengelly fell within the factual purview of Rules 1.11 and 3.7. Instead the Master focused on whether an appearance of impropriety existed. As the Master's Conclusions of Law were not responsive to the initial motion and did not address the application of Rules 1.11 and 3.7 to the actual facts, they are not adopted. This Court will decide the matter de novo.

Factual Background

No evidentiary hearing was held on the motion. The facts are taken from the documents filed by Swingers in support of their motion, from those filed by Collins in opposition to the motion, from the Court's records and other sources of which the Court takes Judicial Notice. Rule 201, M.R.Evid.

David L. Pengelly was an employee of the DNRC from November 1979 through August 17, 1984. Initially, he was a Hearing Examiner for contested water right cases and operated out of Helena until January 1981 at which time he became supervisor of the Missoula Water Rights Field Office until August 17, 1984. Thereafter, he enrolled in the University of Montana School of Law. See Pengelly December 4, 1995 affidavit. Mr. Pengelly was admitted to the Bar in October 1987. See State Bar of Montana Deskbook for 1996-1997, page 388.

The final deadline for filing statements of claim during the period in question was April 30, 1982. Over 200,000 statements of claim were filed across Montana including approximately 8900 claims located within the Bitterroot River Basin (76H). Forty-five percent (about 90,000) of the 200,000 claims filed statewide were filed in April 1982.

The reason for the Swingers' motion begins with the April 30, 1982 filing of one claim by Neil and Virginia Miller (the Millers) in the Missoula DNRC Field Office. The claim was designated as 76H-W-157350-00 and asserted a right to use 100 miners' inches of Hayes Creek water. The claim was initially claimed as a decreed irrigation right with an 1885 priority date for use on 2 acres, was later changed by DNRC to a filed right,

then later amended to a decreed right with an 1871 priority date for use on 90 acres, and ultimately terminated by the Water Court in 1995. See Master's Report filed on May 17, 1995 and adopted on July 7, 1995 and the claim file.

In 1984, the Miller claim was the subject of administrative hearings before the DNRC resulting from an application to sever/sell a portion of the Miller water right claim to Randolph V. Peterson. See, generally, §85-2-402 MCA. Swingers, Collins and others objected to the Miller application. In preparation for a hearing on the application, Mr. Pengelly corresponded with the Swingers by letters dated September 19, 1983 (Movants's Exhibit C) and January 10, 1984 (Movants's Exhibit I), met with Swingers and other parties, and prepared a Memorandum dated June 7, 1984 with five attachments regarding a field investigation (Movants's Exhibit D). According to the DNRC Proposal for Decision issued in 1985 (Movants' Exhibit G) Mr. Pengelly appeared as "staff expert" at a hearing or hearings in Missoula in 1984 regarding the Miller water right claim. The scope of Mr. Pengelly's involvement in these hearings is unknown as the Swingers did not include a complete copy of the DNRC's Proposal for Decision as Movants Exhibit G. The Miller application was denied by DNRC in 1985.

On July 7, 1987 the Montana Supreme Court issued an order adopting Water Right Claims Examination Rules. On June 6, 1988 the Water Court ordered the DNRC to examine the claims in the Bitterroot River Basin under the new claims examination rules. Each claim was to be examined for incomplete or inaccurate information in accordance with the Water Right Claim Examination

Rules originally adopted by the Montana Supreme Court on July 7, 1987.

In preparation for the issuance of the Temporary Preliminary Decree in the North End Subbasin of the Bitterroot River (Basin 76HB) the DNRC examined all the claims filed in the subbasin including those claims filed by Miller, Collins and the Swingers. See Finding of Fact 8 in the Court's Findings of Fact and Conclusions of Law on the North End Subbasin of the Bitterroot River Basin (76HB) dated September 28, 1992.

With respect to the Collins claim, the claim examination worksheet indicates that examination was initiated by Peter J. Langen, Water Right Analyst, by a letter to Mr. and Mrs. Collins dated January 7, 1988 and completed on January 18, 1988. A DNRC review abstract was completed on August 14, 1989.

With respect to the Swingers claim, the claim file reveals that the earliest claimant contact for claim examination work began in 1988 and was completed by John Westenberg on June 6, 1989. Two letters from the Swingers directed to Mr. Westenberg during this period are in the file. At the request of Mrs. Swinger, Mr. Westenberg conducted a Field Investigation of the Swinger property on or about June 16, 1988. He filled out a Field Investigation Form on June 17, 1988. A DNRC review abstract was completed on August 14, 1989.

With respect to the Miller claim, the claim examination worksheet indicates that examination began in 1987 and was completed by June 6, 1989 by John Westenberg. A DNRC review abstract was completed on August 14, 1989 and September 9, 1989.

Mr. Pengelly left the DNRC in 1984. He was not involved

in the actual claim examination work on any of the three claims in this case.

The Temporary Preliminary Decree for the North End Subbasin of the Bitterroot River Basin (76HB) was issued September 16, 1992. Mr. Collins and the Swingers, each appearing *pro se*, filed objections to each others' claims and to the Miller claim.

David L. Pengelly filed his Notice of Appearance as counsel of record for Gary E. Collins on February 9, 1995.

From 1995 on, the 31 findings of the Master provide an excellent statement of the case and frame the arguments nicely. They are referenced here for those purposes only.

Discussion

The issue of disqualification was presented under Rules 1.11 and 3.7 Montana Rules of Professional Conduct. Swingers had the burden to prove those rules were applicable to this case.

Mr. Pengelly requested an evidentiary hearing on the motion. He offered the Swingers the opportunity to take his deposition at their expense so that the Court could then determine whether he was a necessary witness. Swingers strongly resisted any hearing. See Swinger Request to Consider Motion Without Oral Argument Hearing filed January 18, 1996. No hearing was held. Swingers did not depose Mr. Pengelly.

A motion to disqualify an attorney from proceeding in a case is a serious matter. The motion needs to be firmly resolved so that the case can move to completion. The Swingers' insistence that no hearing take place on their motion requires the Court to rely on written information and documentation presently before it and eliminates the opportunity for the parties to engage in

vigorous cross examination.

Rule 1.11(a) states in pertinent part that "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee."

The first issue to decide is whether this rule applies to current lawyers who were not lawyers at the time of their public employment. Both parties cite the Comments to Rule 1.11. These Comments discuss the rule in terms of a lawyer having successive clients - i.e. a public agency client and then a private client - or prohibiting lawyers from representing adverse interests. By implication, the Comments support the view that the Rule does not apply to non-lawyer public employees.

Additionally, Mr. Pengelly presented an affidavit from David J. Patterson, a Professor at the University of Montana School of Law. Professor Patterson is Special Counsel to the Montana State Bar Ethics Committee and Liaison to the Commission on Practice of the Supreme Court of Montana and a past chair (1975-1992) of the Montana State Bar Ethics Committee. Professor Patterson states unequivocally that Rule 1.11 is intended to regulate attorneys who formerly practiced as attorneys on behalf of a public agency. This affidavit is persuasive as it is from someone very knowledgeable in the ethics field. Accordingly, Rule 1.11 is not applicable to David L. Pengelly because he was not an attorney at the time of his public employment.

Even if the rule did apply to a non-lawyer public employee, Mr. Pengelly's participation as a public employee does not meet the Rule's test of personal and substantial participation.

Part of Swingers' assertion is that Mr. Pengelly's mere presence in the Missoula Field Office during the claim filing period should disqualify him. Being present in the DNRC office when the claims were filed in 1982 is not sufficient personal and substantial participation to justify Mr. Pengelly's disqualification.

Mr. Pengelly's review of the Miller claim and appearing as an expert in a DNRC administrative hearing regarding the Miller claim does not rise to a level of personal and substantial participation in the Collins and Swinger claims. Mr. Pengelly's review of the Miller claim required him to look at the Collins and Swinger claims (and other claims on the source) but it is clear that his look was just an incidental review to identify the other claims in the source. His September 19, 1983 letter and his June 7, 1984 Memorandum report only what was contained in the claim files or readily determined from an aerial photo review. He made no substantial review of the Collins or Swinger claims to determine their accuracy, presented no expert opinion on their validity and made no effort to review their contents for claims verification purposes.

Contrary to the conclusion of the Master, Mr. Pengelly's work at the DNRC did not begin the DNRC analysis that ultimately resulted in six issue remarks being placed on the abstract of the Swinger water right claim. The Swinger claim was examined under rules adopted by the Montana Supreme Court after Mr. Pengelly left the DNRC. The issue remarks were placed on the abstract in accordance with those 1987 rules.

The first issue remark is a "decree exceeded" remark.

When the Swingers filed their claim in 1979, they claimed a "use" right. In their November 30, 1979 letter transmitting their statement of claim to the DNRC, Swingers enclosed twelve exhibits as evidence of their claim. One exhibit was a Notice of Appropriation by George Bennett claiming a July 8, 1926 priority date. Mr. Pengelly reported the 1926 priority date in his June 7, 1984 field investigation memorandum. This priority date was amended in 1988 by the Swingers. In their May 26, 1988 letter to DNRC, the Swingers first indicated their wish to revise their priority date to 1871. On June 16, 1988 the Swingers appeared before John Westenberg and formally amended their claim to a decreed right with a priority date of May 1, 1871. The decree exceeded remark and also the last issue remark about the priority date being in question results from the Swingers amending their claim to a decreed right four years after Mr. Pengelly left the DNRC.

The issue remark suggesting that the Swinger claimed flow rate exceeds the 96 gpm capacity of the system is the result of the 1988 John Westenberg field investigation. Mr. Westenberg estimated a flow rate of 96 gpm based upon the apparent existence of 14 3/16" Rain Bird sprinkler heads and 2 lawn sprinklers, each having a rated or measured flow rate of 6 gpm. The issue remark about 5.5 acres being under irrigation also results from the 1988 field investigation.

The issue remarks stating that the 1959 Water Resource Survey shows 0.00 acres irrigated and a 1979 aerial photo shows 4 acres irrigated is from the 1988 claim examination performed by John Westenberg. Rule 2.VII(2) of the 1987 Claims Examination

Rules mandate DNRC use at least two data sources to examine any claimed acreage. Mr. Westenberg used the 1959 Water Resource Survey and a 1979 USDA aerial photo (1079-109) as the two data sources.

Mr. Pengelly's work at the DNRC had nothing to do with the addition of these issue remarks to the Swingers' claims. He should not be disqualified under Rule 1.11(a).

Rule 1.11(b) prohibits a lawyer acquiring "confidential government information" while a public employee from representing a private client under certain circumstances. Confidential government information is defined in Rule 1.11(e) in pertinent part to mean information which "the government is prohibited by law from disclosing to the public" and "which is not otherwise available to the public." The DNRC has no confidential government information in its office other than personnel files. See R. Curtis Martin affidavit. Mr. Pengelly acquired no confidential government information while a public employee and should not be disqualified under Rule 1.11(b).

Rule 3.7 generally provides that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. All the information cited by Mr. Pengelly in his work on the Miller claim was taken from public records or provided by the Swingers and is available to the Swingers without the need to call Mr. Pengelly as a witness. Mr. Pengelly is not a necessary witness.

The cases cited by Swingers in support of their motion are all criminal cases and the facts are not remotely similar to facts in this case. Consequently, those cases are not applicable

here.

Even if they were applicable, the Master apparently did not consider the principles of law enunciated therein. For example, in Turbin v. Superior Court, 165 Ariz. 195, 797 P.2d 734 (Ariz. App. 1990) the court held that when an Arizona court considers a motion for disqualification based upon the appearance of impropriety, it must consider several factors including (1) whether the motion was made for purposes of harassment; (2) whether the party seeking disqualification will be damaged if the motion is not granted; (3) whether alternative solutions exist; (4) whether the possibility of public suspicion outweighs any benefits that might accrue due to continued representation; and (5) the existence of prejudice. In U.S. v. Brothers, 856 F. Supp. 370, 375 (M.D. Tenn. 1972) the Federal Court cited several cases for the proposition that a "court cannot paint with broad strokes" when dealing with ethical principles, that "the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent," and that "motions to disqualify counsel are disfavored."

The Master did not engage in a painstaking analysis of the facts, precise application of precedent or consider the factors outlined in Turbin prior to issuing either of his reports. He may have been precluded from gathering additional facts beyond what is in the record because of the Swingers' insistence that no hearing take place and the turbulence created by the withdrawal of Swingers' attorney.¹ Had he done this analysis, he would have

¹ Following the filing and briefing of the Motion to Disqualify, the Swingers and their attorney, Jeffrey Hays, had a falling out. In their January 18 request, Swingers imply that the Motion to Disqualify and the affidavit signed by Marie Swinger was filed by their former attorney at his insistence and not theirs.

concluded that the Swingers simply failed to carry their burden of proof under Rules 1.11 and 3.7.

Accordingly, the Draft Master's Report filed on April 16, 1996 and the Master's Report filed on July 11, 1996 are not adopted by this Court and shall have no value as precedent. David Pengelly is not a necessary witness in this case.

Sanctions

Soon after Swingers filed their Motion to Disqualify, Collins filed a Motion for Rule 11 Sanctions for their doing so. The Court is tempted to grant sanctions against the Swingers and their counsel. Professor Patterson's affidavit stating that Rule 1.11(a) is not applicable because Mr. Pengelly was not an attorney during his DNRC employment indicates that Swingers and their counsel may not have made a reasonable inquiry to determine whether Rule 1.11(a) was applicable.

The further assertion that Mr. Pengelly obtained confidential government information while a DNRC employee and should be disqualified under Rule 1.11(b) is without any merit. Given Montana's strong Constitutional provision on the public's Right to Know, confidential government information, as defined in Rule 1.11(e), is rare throughout state government and, except for personnel files, is nonexistent at the DNRC Missoula Water Resources Regional Office. Unsupported allegations of collusion do not change that fact.

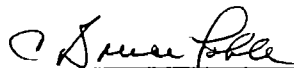
However, the Water Master initially concluded in his Draft Master's Report, albeit without a detailed analysis, that Mr.

Furthermore, the Swingers assert that Mr. Hays prepared affidavits which they refused to sign. Mr. Hays, in his affidavit filed January 19, 1996 states that the Swingers insisted that he sign and file motions, affidavits and other papers which he refused to do.

Pengelly should be disqualified. The Master's initial conclusion concerning the appearance of impropriety precludes a finding that the entire Motion to Disqualify is so groundless that it deserves Rule 11 sanctions. The Collins Motion for Rule 11 sanctions is **DENIED.**

It appears that this case is ready for hearing. A scheduling conference will be held by telephone conference call on June 25, 1997 at 3:00 p.m. to set a hearing date.

DATED this 5th day of June, 1997.



C. Bruce Loble
Chief Water Judge

Keith R. and Marie E. Swinger
6055 Bitterroot Road
Missoula, MT 59801

Jeffrey B. Hays, Attorney
301 S. Third Street, Suite 103
Hamilton, MT 59840

Gary E. Collins
6000 Hayes Creek Road
Missoula, MT 59803

David Pengelly, Attorney
PO Box 8106
Missoula, MT 59807