Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
SHIELDS RIVER BASIN (43A)
* *

IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND WITHIN THE SHIELDS RIVER DRAINAGE AREA INCLUDING ALL TRIBUTARIES OF THE SHIELDS RIVER, IN PARK, MEAGHER AND GALLATIN COUNTIES, MONTANA.	**CASE NO. 43A-A** 43A-W-042435-00

CLAIMANT: Julie C. and Joseph D. Harper, Dennis J. and L. Darlene Leahy, Richard D. & Gay W. Juhnke

ON MOTION OF THE WATER COURT

OBJECTOR: Montana Department of Natural Resources and Conservation (Trust Lands Division)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM

Procedural Background

On November 10, 1981, Delbert and Bernice Kunnemann ("Kunnemanns") filed Statement of Claim 43A-W-042435-00 with the Montana Department of Natural Resources and Conservation ("DNRC") for an existing water right to 154 miners inches of water (3.85 cfs) diverted from the Shields River in Section 32 of Township 1 North, Range 10 East, M.P.M., to irrigate 65 acres of land in the N1/2 of Section 16 of Township 1 South, Range 10 East, M.P.M. The Shields River Temporary Preliminary Decree was issued in 1988, decreeing the water right as claimed.

The claim was subsequently called in on motion of the Water Court to review the issues of acres irrigated, place of use and flow rate. On March 19, 1992, the Water Master issued a Report concluding that the historical pre-July 1, 1973 flow rate was 3.85 cfs for use on 35 acres of land in the W1/2 of Section 16, 30 acres of land in the N1/2 of Section 16, and 1.94 acres in the

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SWNESW of Section 4, all in Township 1 South, Range 10 East, Park County.[1] An Order Adopting the Master's Report was filed on April 13, 1992.

On March 13, 1995, the Montana Department of State Lands ("DSL") filed a late objection to "ownership" of the claim, based on the Montana Supreme Court's decision in Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948 (1985). As the objection was filed nearly six years after expiration of the objection period, it was docketed to be heard after issuance of the Basin 43A Preliminary Decree.

In 1989, Dennis J. and L. Darlene Leahy ("Leahys" or "Claimants") acquired the land in the NE1/4 of Section 16. In 1995, they filed an Application to Change Place of Use with the DNRC seeking to remove that portion of the claim previously used on school trust land in the W1/2 of Section 16 and thereby use the entire claim on their private lands. On June 19, 1995, the DSL filed an Objection to the Application. On April 22, 1996, DSL's successor, Forestry and Trust Land Management Division, Department of Natural Resources and Conservation ("TLMD"), moved the Water Court for a judgment declaring the State of Montana to be the owner of that portion of the water right claim used on school trust land.

On August 2, 1996, the Court reopened the claim to resolve the issue of ownership. The claim was consolidated into Case 43A-A and, on May 27 and 28, 1997, came on for hearing before C. Bruce Loble, Chief Water Judge. The Leahys were present and represented by A. Suzanne Nellen, attorney at law. The TLMD was present and represented by Richard Bach, attorney at law. Evidence both documentary and testimonial was adduced, and counsel for the parties submitted proposed findings of fact and conclusions of law. Judicial notice was taken of the contents of the claim file.

Based on the evidence, and upon consideration of the respective arguments of counsel, the Court now makes its own:

FINDINGS OF FACT

1. This claim is based on a portion of a water right decreed to J. B. McNiven ("McNiven") in Henwood v. Hodson, Cause No. 2717, by the Montana Sixth Judicial District Court,

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[1] The Master's Report concluded that Joseph D. and C. Julie Harper, successors in interest to 1.94 acres of Kunnemann land located in the SWNESW of Section 4, T1S, R10E, M.P.M., are entitled to .25 cfs of this claim for that place of use. The Harper portion of this claim is uncontested.

Park County, Montana, in 1911. (Agreed Facts 4, 6)

2. In 1893, Alexander McNiven and John McNiven posted and filed a Notice of Water Right, pursuant to section 1255, 5th Div. Comp. Stat. of 1887, for 600 inches of water diverted from a point on the Shields River "near the north line of Section 4," in Township 1 South, Range 10 East, Park County, for conveyance by "dam, ditch and flume" for beneficial use on the N1/2 of Section 9, Township 1 South, Range 10 East, Park County.

3. In the Henwood decree of 1911, the District Court decreed the water right noted in Finding of Fact 2 to John McNiven as follows:

> [T]he defendant, John McNiven, is the owner of the following lands in Park County, Montana, to wit:
>
> West Half of the South West quarter of Section Four (4), North East quarter of the South West quarter and the South East quarter of the North West quarter of Section Eight (8) and part of the West Half South of the River in Section Nine (9) all in Township One (1) South of Range Ten (10) East.
>
> That the said defendant is the owner of a water right of 450 inches equivalent to a flow of 11 1/4 cubic feet per second of time, appropriated from the waters of Shields River, on the 14th day of August, 1893, which is appurtenant to said land, and that he has a right to divert the same from the said stream at all times when said water is actually needed for irrigating said land, or for other useful and beneficial purposes, provided that said water is not being necessarily used by some other party or parties to this action, whose right to the same is prior to that of the said defendant, as decreed herein.

[emphasis added] ("McNiven decreed water right") (Agreed Facts 3, 5; Joint Exhibit 10, Henwood v. Hodson, Cause No. 2717, issued by Montana Sixth Judicial District Court, Park County, on March 3, 1911; Claim File) The State of Montana was not named as a claimant in the lawsuit.

4. In 1904, John McNiven posted and filed another Notice of Water Right, pursuant to sections 1880 to 1902, Civil Code of 1895, for 100 inches of water diverted from a point on the Shields River "near the north line of Section 4, Township 1 South, Range 10 East, Park County," to be conveyed by "dam, ditch and flume" for beneficial use on the W1/2 of Section 16, Township 1 South, Range 10 East, Park County, this ditch "being an enlargement and continuation of the ditch now owned by the appropriator which is of record in Vol. 1, p. 256, Water Rights,

records of Park County, Montana." The place of use for this filed right was school trust land, which John McNiven began leasing from the State in 1907 or some time thereafter. This filed right was not adjudicated as part of the Shields River Decree in 1911, and no one, including the State of Montana, filed a claim in Montana's statewide general adjudication based on this right until the TLMD filed late Statement of Claim 43A-W-215510-00 with the DNRC in 1996. (Claimants' Exhibits 1, 17)

5. Section 16 is among those sections of public domain reserved in the 1864 Organic Act for "the purpose of being applied to schools," and granted in the 1889 Enabling Act to the State of Montana "for the support of common schools." (Joint Exhibit 3)

6. A field survey of all but the SE corner of Section 16 was completed in 1873, and Plat No. 349, with accompanying notes, was approved by the Office of the U.S. Surveyor General in the same year. Title to Section 16 therefore vested in the State of Montana upon its admission to the Union, even though the patent was not issued to the State until 1943. (Joint Exhibit 3; Judicial Notice of official records on file and of record in the Public Records of the United States Dept. of Interior, BLM, Billings, Montana)

7. On October 29, 1934, the State issued a patent for the NE1/4 of Section 16 to Grace David, who subsequently conveyed the same and the S1/2 of Section 9, "together with ... appurtenances," to Florence and Taylor McNiven. (Joint Exhibit 2) In 1963, Florence McNiven conveyed the NE1/4 of Section 16 (as well as the W1/2 of SW1/4, all of Section 8, and that portion of the N1/2 of Section 9 lying west of the middle of the present channel of Shields River, T1S, R10E, Park County, Montana) to Arnold and Louise Dinsdale, "together with the... tenements, hereditaments and appurtenances," which expressly included "water rights and water ditches, if any, thereto belonging." The Dinsdales also held the lease on school trust land located in the W1/2 of Section 16. (Agreed Fact 8; Joint Exhibits 4, 5, 14 (Letter of Daniel R. Dinsdale, November 18, 1991), and 19; Testimony of Daniel Dinsdale and Delbert Kunnemann)

8. Daniel Dinsdale, their son, stated by letter that prior to July 1, 1973, his father used 154 inches of the water right to irrigate 35 acres of State lease land and 30 acres of private land in the N1/2 of Section 16. He confirmed those statements by testimony and further testified that his father irrigated the leased land above and below Noel Creek out of the McNiven ditch; and his deeded land in Section 16 out of both the McNiven Ditch and the Grannis Ditch. (Agreed Fact 8;

Testimony of Daniel R. Dinsdale; Letter of Daniel R. Dinsdale, November 18, 1991) He testified that when water was short, the water was used on the upper ranch first, and Section 16 was irrigated only if there was enough water left to reach the land.

9. In 1969, the Dinsdales conveyed all their private land to the Kunnemanns, together with all "tenements, hereditaments and appurtenances." Daniel Dinsdale testified that his parents transferred both the private land and the school lease to the Kunnemanns, and that "to his knowledge," all the water rights were intended to transfer with the land. (Agreed Fact 9; Joint Exhibits 6, 20, 21; Testimony of Daniel R. Dinsdale and Delbert Kunnemann; Letter of Daniel R. Dinsdale, November 18, 1991)

10. In 1972, Delbert Kunnemann acquired his own State lease to the land in the W1/2 of Section 16. When water was short, he continued the practice of using the water on the upper ranch first and irrigating Section 16 only when there was enough water to reach the land. Between 1969 and 1988, Kunnemann divided and conveyed tracts of his ranch land and appurtenant water rights to other parties, but retained land in Section 9 and in the NE1/4 of Section 16, together with 154 inches of the water right. Kunnemann continued to use the water right on both his leased and deeded land. Like the Dinsdales, he irrigated the leased land out of the McNiven Ditch both above and below Noel Creek; and his private land adjacent to the leased land out of both the McNiven and Grannis Ditches.

11. On November 10, 1981, Kunnemanns filed a Statement of Claim for 154 inches of the original McNiven decreed water right, with a point of diversion off school trust land and the place of use as the N1/2 of Section 16, Township 1 South, Range 10 East, Park County. Kunnemann testified that his intent with respect to the water right was to "keep the water" for his deeded land, but to "permit" its use on the leased land for as long as he held the lease.

12. When he assigned the school lease to Harry and Alice Williams ("Williams"), Kunnemann did not transfer any portion of the water right to them, but told them they could continue to use his water right on the leased land. When the lease ended, Kunnemann's intent was to continue to use the entire 154 inch water right on his deeded land. In 1991, the Williams attempted to transfer the portion of the water right they used on the school trust land to the DSL. The DSL declined the offer and told the DNRC that the water right belonged to the lessee, because the point of diversion was off the State land. In 1991, the Williams filed an affidavit with the Water Court disclaiming any

ownership interest in the claim. (Agreed Facts 7, 13, 14; Joint Exhibits 12, 21, 25; State's Exhibit 15; Williams letter attached to Affidavit of Harry D. Williams, Sr. and Alice Williams, filed December 10, 1991, Claim and Case Files)

13. In 1989, the Kunnemanns conveyed their land in Section 9 and the NE1/4 of Section 16 to First Security Bank in lieu of foreclosure of a mortgage they had previously granted to the Federal Land Bank. This conveyance was together with "all tenements, hereditaments and appurtenances," and expressly included "all water rights and ditch rights upon or appurtenant to the real property." Kunnemann testified that his intent was to transfer all the water rights with the land. (Joint Exhibits 7, 8, 8b)

14. Shortly thereafter, the bank conveyed the land, "together with all water rights and rights in ditches..." to Rasmussen, who sold the same to the Leahys by contract for deed, dated December 27,1989. Although the escrowed warranty deed is silent as to appurtenances, water rights, and ditch rights, the Agreement to Sell and Purchase promised that "Seller will transfer all water ... rights owned by and pertaining to said property to Buyer," In 1994, First Security Bank filed a transfer certificate to document their transfer of the water right to the Leahys, which was accepted and filed by the DNRC. Although the Leahys had previously filed a Water Right Transfer Certificate with respect to the transfer from Kunnemanns, it was rejected by the DNRC. As the Leahys' certificate was neither prepared nor signed by Kunnemanns, it does not represent their intent with respect to the water right transfer. (Agreed Fact 9; Letter from First Security Bank, Claimant's Exhibit 12; Claimants' Exhibit 28)

15. The State of Montana did not file an independent claim in Montana's statewide general adjudication effort for any water right used on the W1/2 of Section 16 until 1996, when it filed Statement of Claim 43A-W-215510-00 for 100 miners inches, with a priority date of 1904. During the temporary preliminary decree objection period for Basin 43A, and at the time of the 1992 Master's Report amending the decree, the policy of the DSL was to assert State interest only in water rights that were diverted on and used on State land and not to claim ownership of a water right with a point of diversion off school trust land. According to the TLMD and Tom Hughes, Water Rights Specialist for the TLMD, the TLMD did not amend its policy or begin claiming water rights put to beneficial use on State land regardless of point of diversion until after 1991. (Agreed Facts 1, 2, 10, 11, 12; Joint Exhibit 16; Claimants' Exhibit 1; *see also* Joint Exhibit 17; DNRC records and Case

File)

From the above Findings, the Court now makes the following:

CONCLUSIONS OF LAW

I

The Montana Water Court has exclusive jurisdiction to interpret and determine "existing water rights." §§ 3-7-224 and 3-7-501, MCA; State ex rel. Jones v. Fourth Judicial District, 283 Mont. 1, 6, 938 P.2d 1312 (1997); Baker Ditch Co. v. District Court, 251 Mont. 251, 255, 256, 824 P.2d 260 (1992); and Mildenberger v. Galbraith, 249 Mont. 161, 166, 815 P.2d 130 (1991).

II

Existing water rights were recognized and confirmed in the 1972 Constitution of the State of Montana at Article IX, Section 3. "'Existing right' or 'existing water right' means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." Section 85-2-102(8), MCA. *See generally* In Matter of Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 173, 174, 832 P.2d 1210 (1992); McDonald v. State, 220 Mont. 519, 525, 722 P.2d 598 (1986). The same constitutional guarantee prevents the State from affecting rights vested at the time the [1972] Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, Sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Pettibone, 216 Mont. at 702; *See also* Yellowstone River, *supra.*

III

A claim of an existing water right filed in accordance with 85-2-221, MCA, constitutes *prima facie* proof of its content. § 85-2-227, MCA. The elements of a *prima facie* statement of claim may be overcome by a preponderance of the evidence contradicting and overcoming the claim. When that is accomplished, the burden of proving the claim shifts back to the claimant. *See* analysis of this issue in Memorandum Opinion of the Montana Water Court, Case No. 40G-2, March 11, 1997, which analysis the Court incorporates herein by reference. Therefore, when Kunnemanns filed their Statement of Claim in accordance with § 85-2-227, MCA, and asserted an ownership interest in the original McNiven decreed water right, their claim became *prima facie* proof of its contents, and the burden of contradicting and overcoming the contents of that claim lay

in the State of Montana. Section 85-2-227, MCA.

IV

The State's premise that "because this involves school trust land, the holding in Department of State Lands v. Pettibone ... is applicable," is incorrect. The holding in Pettibone applies only to water rights diverted or developed on and appurtenant to school trust land. Pettibone, 216 Mont. at 376. Therefore, the State may not presume that Kunnemann was acting on behalf of the State of Montana when he used part of his water right to irrigate school trust land, or that the water right necessarily became appurtenant to the school trust land and owned by the State of Montana. Pettibone, 216 Mont. at 372-373; Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 83, 290 P. 255 (1930). The water right used in this claim was diverted and developed off school trust land and was used on private land. Accordingly, the rules with respect to the ownership of appropriations made on and for the public domain or private land are more applicable to this case.

V

When J.B. McNiven, the Claimants' predecessor in interest, diverted water in 1893 from the Shields River on non-school trust land and conveyed it by "dam, ditch, and flume" to irrigate his private land in Sections 4, 8, and 9, Township 1 South, Range 10 East, Park County, Montana, he acquired a positive, certain, and vested property right, which was subsequently decreed in his name and appurtenant to his private land. Pettibone, 216 Mont. at 375. *See also* Yellowstone River, *supra*. Neither he, nor his successors in interest, may be divested of that property right except through the exercise of Constitutionally provided powers such as eminent domain, Mont. Const. Art. II, Sec. 17, or the general police power, and without affording due process of law, Mont. Const. Art. I, sec. 17. Pettibone, 216 Mont. at 375.

VI

When the owners of this vested water right changed its place of beneficial use from time to time to other private land they owned, *e.g.* 30 acres in the NE1/4 of Section 16, the water right also became appurtenant to the new place of use, because there was no evidence of any intent to the contrary, and no other water users alleged or proved any injury as a result of these changes. §89-803, RCM (1947); Maclay v. Missoula Irrigation District, 90 Mont. 344, 353, 3 P.2d 286 (1931).

VII

When the owners of this vested water right temporarily changed its place of use from time to time to school trust land they leased in the W1/2 of Section 16, the water right was used in gross. No part of the water right permanently attached as an appurtenance to the school trust land owned by the State of Montana. There was no privity of title between the owners of the water right (McNiven and successors) and the owner of the school trust land (State). Any use of the water right on school trust land leased by the owners of the water right was intended to be temporary and with the owners' permission only. Title to the water right was intended to remain with the lessees and appurtenant to the private land on which it was beneficially used. *See e.g.* Maclay, 90 Mont. at 353-354; Yellowstone Valley, 88 Mont. at 82; St. Onge v. Blakeley, 76 Mont. 1, 18-19, 245 P. 532 (1926); and Smith v. Denniff, 24 Mont. 20, 27-28, 60 P. 398 (1900).

VIII

As there was no severance or reservation of the water right in the chain of title conveying the 30 acres in the NE1/4 of Section 16 by mesne conveyance to the Leahys, or other evidence of intent to sever the water right from the land, all but the Harpers' portion of the right ultimately transferred to the Leahys by deed as an appurtenance to the land. §85-2-403(1), MCA; Yellowstone Valley, 88 Mont. at 84.

IX

There was no intentional or voluntary waiver of known rights by the Leahys or their predecessors at either the time of the original temporary preliminary decree or subsequent amendment by the Water Court, and therefore, the Court denies the State's claim of waiver. Estate of Pelzman, 261 Mont. 461, 863 P.2d 1019 (1993). As the State failed to establish all the elements of judicial estoppel with respect to the Leahys' asserted positions in this case, the Court also denies the State's claim of judicial estoppel. Caekaert v. State Fund, 268 Mont. 105, 885 P.2d 495 (1994); Fiedler v. Fiedler, 266 Mont. 133, 879 P.2d 675 (1994).

X

Dennis J. and L. Darlene Leahy, and Julie C. and Joseph D. Harper, are the current owners of Claim No. 43A-W-042435-00.

XI

Having decreed ownership of this claim in the Leahys and Harpers, the Court declines

to address the Leahys' alternative claims of Waiver and Estoppel.

MEMORANDUM

The Legal Issue

The State of Montana filed this action to obtain a declaratory judgment adjudicating the State of Montana to be the owner of that part of Claim No. 43A-W-042435-00 historically used on school trust land in the W1/2 of Section 16. The TLMD asserts three theories in support of its motion. The first theory is based on the holding and rationale of the Montana Supreme Court in Department of State Lands v. Pettibone. The second and third theories are based on waiver and judicial estoppel. The Leahys (successors to the Kunnemanns) contest the State's motion and theories by distinguishing the Pettibone decision and basing their ownership on the doctrine of appurtenancy as interpreted and applied by the Montana Supreme Court in those cases involving water rights diverted and used on the public domain.[2] In addition, the Leahys contend that by failing to timely file a claim to the water, or even timely filing an objection to the claim, the State of Montana has now waived its right to do so.

The legal issue before the Court, therefore, is as follows:

> Who is the owner of a water right diverted on the public domain or private land and decreed by a district court to be appurtenant to private land, when part of that water right is subsequently used for beneficial purposes on State school trust land?

Discussion

Department of State Lands v. Pettibone

The TLMD argues that when Kunnemanns used a portion of the 1893 McNiven decreed water right to irrigate the school trust land they were leasing from the State of Montana, they were acting on behalf of the State, and, upon its beneficial use thereon, that portion of the water right attached and became appurtenant to the Montana school trust land and owned by the State of Montana. The TLMD supports its argument by citing the holding of the Department of State Lands v. Pettibone.

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[2] *See e.g.* Castillo v. Kunnemann, 197 Mont. 190, 642 P.2d 1019 (1982); Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 P. 2d 286 (1931); Yellowstone Valley Co. v. Assoc. Mort. Investors, 88 Mont. 73, 290 P. 255 (1930); St. Onge v. Blakeley, 76 Mont. 1, 245 P. 532 (1926); Lensing v. Day & Hansen Security Co., 67 Mont. 382, 215 P. 999 (1923); Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334 (1905); Hays v. Buzard, 31 Mont. 74, 77 P. 423 (1904); Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Woolman v. Garringer, 1 Mont. 535 (1872); and Donnell v. Humphries, 1 Mont. 518 (1872).

Twenty-three water rights were involved in the Department of State Lands v. Pettibone appeal. 216 Mont. at 365. Four rights were for groundwater wells developed and used wholly on school trust land. One right was for a groundwater well which straddled the border between trust land and private land and was used on both. Three rights were in developed springs located and used on trust land. Thirteen of the rights were for diversions from streams on trust land for use on trust land. One water right was in a reservoir on trust land for stockwater use on both trust land and private land. One right was for a diversion on trust land for irrigation on both trust land and private land. All of the water rights were diverted, developed, and perfected on school trust land as "use rights" after the original appropriators acquired their leases from the State of Montana.

The Montana Supreme Court focused its analysis and decision on the special character of the land as "school trust land" and the role of the State of Montana as "trustee" of those lands. *See generally*, Pettibone, 216 Mont. at 365-366, 368-371, 375. The Court found that "the State holds these lands subject to the school trust. The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property does so 'subject to the trust.'" Ibid. at 375. The Court distinguished school trust land from the public domain, private land, and other public land in general, and applied three important principles previously articulated by the United States Supreme Court in school trust land cases: (1) trusts created by the enabling acts are similar to private charitable trusts; (2) the enabling acts creating school trusts must be strictly construed according to fiduciary principles; and (3) enabling acts, in general, preempt State law and constitutions. Ibid. at 369, *citing* Trustees of Vincennes University v. State of Indiana (1852), 55 U.S. 268; Springfield Township v. Quick (1859), 63 U.S. 56; and Andrus v. Utah (1980), 446 U.S. 500.

The Pettibone Court noted the tradition of both the United States Supreme Court and the Montana Supreme Court of acknowledging and protecting the essential trust nature of school land and the necessity to preserve the value of the trust corpus for its intended beneficiaries. The Court's analysis focused particularly on the school trust principles applied in Lassen v. Arizona, 385 U.S. 458 (1967) and Jerke v. State Dept. of Lands, 182 Mont. 294, 597 P.2d 49 (1979), from which it drew and applied the following two rules:

> "First, an interest in school land cannot be alienated unless the school trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must

receive compensation.

Second, any law or policy that infringes on the state's managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land."

Ibid. at 371.

Based on these special school trust land rules, the Pettibone Court distinguished school trust land cases from public domain, public trust, and federal reserved water right cases. The Court found that a special relationship exists between the lessees of school trust lands in Montana and the State of Montana as trustee of those lands. Ibid. at 368. It is a relationship in which:

> The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State....The lessee, under the terms of the lease, is simply entitled to the use of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefore.

Ibid. (emphasis added) *See also* 375-376.

As the lessee of school trust land is acting on behalf of the State when making appropriations on and for school trust sections, title to the water right vests in the State, not the lessee. Ibid. at 368, 375-376. Under Montana law, where the owner of a water right also owns the land on which the water is put to beneficial use, the water right is usually deemed to be incidental or appurtenant to the land, and remains appurtenant thereto until severed from the land by the owner of the water right. Section 70-15-105, MCA. *See discussion, infra,* at pp. 16-18. Therefore, the Pettibone Court deemed the 23 water rights at issue to be appurtenant to the school trust land. Ibid. at 368. As an interest in the land (trust), they could not be surrendered by the State without receiving fair market value for the rights. Ibid. at 371, 373. As none of the lessees in Pettibone alleged payment of consideration to the State apart from the lease payments, the Court concluded that all 23 water rights were owned by the State of Montana:

> We hold that the lessee, under the terms of the school lease, is entitled to the use of water appurtenant to the leased land. The State is the beneficial user thereof, and its duty as trustee of the school lands prohibits it from alienating this interest in the land absent full compensation therefor. Absent such compensation, the title to the water rights in this case vest in the State.

Ibid. at 376.

Pettibone is Distinguishable

Title to the school trust land involved in this case vested in the State of Montana upon its admission to the Union, even though the patent was not issued to the State until 1943.[3] However, as shown by the findings, this claim is based on a water right diverted in 1893 from a point on the Shields River off school trust land for use on land owned by the appropriator. It was subsequently decreed in 1911 to be owned by the appropriator and appurtenant to his private land. Therefore, it was already a positive, certain and vested property right before it was ever used on school trust land. For such a water right, a different set of rules applies. As the Pettibone Court, itself, emphasized:

> Respondents cite several cases that appear to articulate a contrary rule. The first, *Smith v. Denniff*... is distinguishable in the fact that it concerned water appropriations made ... on federal lands who diverted water for use on the public domain....As discussed above, school trusts lands are subject to a different set of rules than other public lands."
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> * * *
>
> Secondly they cite Hayes v. Buzzard [sic]... for the rule that the question of whether water is appurtenant to the underlying land turns upon the intention of the appropriator. Again, Hays arose on public domain land, not school trust land. This Court recognized that distinction....

Pettibone, 216 Mont. at 372-373, 702 P.2d 948. (emphasis added)

Prior Appropriation on the Public Domain

Water law in the State of Montana was born in the rough and primitive gold fields of California, where an enforceable water right was acquired simply by taking the waters of the public domain and putting them to beneficial use, with first in time being first in right.[4] Those

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[3] In United States v. Wyoming, the United States Supreme Court held that: "The interest of the State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government." 331 U.S. 440, 443-444, 91 L. Ed. 1590, 1593 (1946). *See also* Clemmons v. Gillette, 33 Mont. 321, 326, 83 P. 879 (1905).

[4] *See generally* Matter of Dearborn Drainage Area, 234 Mont. 331, 340, 766 P.2d 228 (1988); Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921); Maynard v. Watkins, 55 Mont. 54, 173 P. 551 (1918); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); Smith v. Duff, 39 Mont. 382, 389, 102 P. 984 (1909); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); Murray v. Tingley, 20 Mont. 260, 50 P. 723 (1897); Kleinschmitt v. Greiser,

customs ripened into well recognized rules that were subsequently adopted and given the force of law by Montana's territorial and State legislatures and courts.[5] From an early date, the United States Supreme Court acknowledged that Montana's water law was fixed and regulated by these local customs, rules and court decisions,[6] and in 1866, they received the formal confirmation of Congress.[7] Broder v. Natoma Water and Mining Co., 101 U.S. 274 (1879); Atchison v. Peterson, 87 U.S. 507, 512-513 (Mont. Terr. 1874).

As the territory became increasingly settled, the great value and complexity of water use became more apparent, Miles v. Butte Electric Co., 32 Mont. 56, 67, 79 P. 549 (1905), and the spare descriptions and applications of the early doctrine were augmented by interstitial rulings and dicta of the Montana Supreme Court.[8] By 1900, the Montana Supreme Court described the appropriation doctrine in Montana in more complete terms as follows:

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14 Mont. 484, 37 P. 5 (1894); Sweetland v. Olsen, 11 Mont. 27, 27 P. 339 (1891); Woolman v. Garringer, 1 Mont. 535 (1972); King v. Edwards, 1 Mont. 235, 239 (1870). *See also* Atchison v. Peterson: By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the US, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property, 87 U.S. 507, 510 (Mont. Terr. 1874); Basey v. Gallagher: The views [in Atchison v. Peterson] expressed and the rulings made are equally applicable to the use of *water* on the public lands for purposes of irrigation. No distinction is made in those States and territories by the custom of miners or settlers or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial use, 87 U.S. 670, 682 (Mont. Terr. 1874); and Broder v. Water Company, 101 U.S. 274 (Cal. 1879).

[5] *See e.g.* King v. Edwards, 1 Mont. 235, 239 (1870) ("The mining customs of any particular mining district [in Montana] have the force and effect of laws, or, in other words, are laws.") *See also* Bailey v. Tintinger, 45 Mont. 154, 166, 122 P. 575 (1912)("These customs formed a part of our unwritten law, or, as it might more aptly be termed, the common law of this country as distinguished from the common law of England.")

[6] Basey v. Gallagher, 87 U.S. 670 (Mont. Ter. 1874); Atchison v. Peterson, 87 U.S. 507 (Mont. Ter. 1874).

[7] Section 9 of the Act of 1866 provided that: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same...."

[8] As Justice Holloway pointed out in Mettler v. Ames: "It may be conceded that in each instance the observations were not necessary to the decision rendered, but they do, respectively, represent the views of the distinguished jurists who in the early days were largely instrumental in formulating the public policy of Montana respecting this subject." 61 Mont. 152, 169, 201 P. 702 (1921). Thus, although not necessarily of precedential value, it is certainly instructive and persuasive.

> We recognize the doctrine that right to the use of water may be owned without regard to the title to lands upon which the water is to be used; that is, that a right to the use of water is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another. But, as every appropriation must be made for a beneficial or useful purpose (section 1881, Civil Code), it becomes the duty of the courts to try the question of the claimant's intent by his acts and the circumstances surrounding his possession of the water, its actual or contemplated use and the purposes thereof....

Toohey v. Campbell, 24 Mont. 13, 17-18 (1900). (emphasis added)

When appropriated on the public domain in compliance with law, legal title to the water right vested in the appropriator. It was "a positive, certain, and vested property right," of which the appropriator could be divested only through the exercise of Constitutionally provided powers, such as eminent domain or the general police power, with due process of law. Smith v. Denniff, 24 Mont. 20, 27, 60 P. 398 (1900). *See also* In Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 173-174, 832 P.2d 1210 (1992);[9] Pettibone, 216 Mont. at 375; Osnes Livestock Co. v. Warren, 103 Mont. 284, 294, 62 P.2d 206 (1936); and St. Onge v. Blakely, 76 Mont. 1, 18, 245 P. 532 (1926). Legal title to the land upon which such a water right was used or intended to be used did not affect the appropriator's title to the water right. Smith, 24 Mont. at 29. The above principles were summarized by the Montana Supreme Court in St. Onge v. Blakely as follows:

> The right to use water ... is a possessory right which may be acquired by appropriation and diversion for a beneficial use; such a right can be acquired by a squatter on public lands, or one holding lands under contract for its purchase (citations omitted) and, once the right is acquired, its owner cannot be deprived thereof by a conveyance of the land by the land owner. (citations omitted).

76 Mont. at 18. (emphasis added)

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[9] The Court takes judicial notice that the Montana Supreme Court has found that: "While these [water] rights are protected against unreasonable state action....they have not been granted indefeasible status." In Matter of Adjudication of Existing Rights in Mussellshell River Drainage Area, 255 Mont. 43, 48, 840 P.2d 577 (1992), *citing* to In Matter of Adjudication of Yellowstone River Water Rights, 253 Mont. 167, 173-174, 832 P.2d 1210 (1992).

Attachment of Water Rights to Land

Mere possession of a water right originated by another does not establish ownership of the water right. St. Onge, 76 Mont. at 19; Kenck v. Deegan, 45 Mont. 245, 249, 122 P. 746 (1912). Privity of title must exist between the claimant and the original appropriator of the water right. Ibid. at 19. *See also* Head v. Hale, 38 Mont. 302, 308, 100 P. 222 (1909), and Hays v. Buzard, 31 Mont. 74, 82, 77 P. 423 (1904). Privity of title may be established by (1) an express conveyance of the water right, Castillo v. Kunnemann, 197 Mont. 190, 197-198, 642 P.2d 1019 (1982); (2) a contractual relationship with the original appropriator, together with immediate possession of the land and water, St. Onge, 76 Mont. at 12-14; or (3) an express conveyance of land to which the water right is appurtenant. Spaeth v. Emmett, 142 Mont. 231, 237, 383 P.2d 812 (1963); Hays, 31 Mont. at 82; and Smith, 24 Mont. at 28.

It is well settled that a water right may pass as an appurtenance to land in Montana. 1 Wiel, Water Rights in the Western States §550 (1911). *See also* 1 Hutchins, Water Rights Laws in the Nineteen Western States 469 (1971) . "[W]hether a water right passes as an appurtenance involves two questions: (a) Whether the water right is an appurtenance, and (b) whether, being such, it was intended to pass. Both of these are questions of fact in each case." Ibid. (emphasis added) *See e.g.* Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 83, 290 P. 255 (1930); Lensing v. Day & Hansen Security Co., 67 Mont. 382, 384, 215 P. 999 (1923); Custer Consolidated Mines Co. v. City of Helena, 52 Mont. 35, 43, 156 P. 1090 (1916); Bullerdick v. Hermsmeyer, 32 Mont. 541, 550, 81 P. 334 (1905); Donnell v. Humphries, 1 Mont. 518, 524-525 (1872).

Montana statute has long provided that "[a] thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit...." Section 70-15-105, MCA, preceded by § 67-211, RCM 1947. Thus, the Montana Supreme Court has directed that "[w]hen a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto and, as such, passes with the conveyance of the land, unless expressly reserved from the grant." Yellowstone, 88 Mont. at 84. *See also* Castillo, 197 Mont. 196; Adams v. Chilcott, 182 Mont. 511, 518, 597 P.2d 1140 (1979); Schwend v. Jones, 163 Mont. 41, 515 P.2d 89 (1973); Lensing, 67 Mont. at 384; and Sweetland v. Olsen, 11 Mont. 27, 29, 27 P. 339 (1891).

These directives, however, do not propound an inflexible rule, for the Court has also found that "the fact that [a water right] has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance." Hays, 31 Mont. at 82. *See also* Hutchins, *supra*, at 471. As the appropriator and his successor are entitled to change the place of use and to sever and reserve or convey the water right apart from the land on which it is used, a legally acquired water right is akin to an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain lands as an appurtenance thereto. Maclay, 90 Mont. at 353. Therefore, whether a water right attaches as an appurtenance to land in Montana is a question of fact, and the burden of proof is on the party asserting ownership by appurtenancy. Yellowstone Valley, 88 Mont. at 82; Custer Consolidated Mines, 52 Mont. at 43; Donnell, 1 Mont. at 524-525.

Given its similarity to an easement in gross, unity of title between the owner of a water right and owner of the land is required before the Montana Supreme Court will *deem* a water right appurtenant to land pursuant to the statute. Smith, 20 Mont. at 27-28. Where there is no such unity of title, a water right is not deemed appurtenant to land until either the owner of the water right obtains title to the land or conveys the water right to the owner of the land, or the facts and circumstances of the case indicate *intent* on the part of the water right owner to make the water appurtenant to the land. Smith, 20 Mont. at 28.[10] The Smith Court applied this principle in a landlord-tenant situation as follows:

> Section 1078 [now 70-15-105, MCA] may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as

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[10] In the case of a water right appropriated by a squatter in possession of land taken in good faith upon the public domain, the water right could become appurtenant to land before legal title (patent) was acquired, if the facts and circumstances established that the claimant had appropriated and used the water for the benefit of the land, and that he intended the water right to become appurtenant to the land. *See e.g* Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940)(overruled on other grounds by Grimesly v. Spencer, 206 Mont. 184, 198, 670 P.2d 85 (1983)); Geary v. Harper, 92 Mont. 242, 248, 12 P.2d 276 (1932); St. Onge 76 Mont. at 14; Wood v. Lowney, 20 Mont. 273, 277, 50 P. 794 (1897); and McDonald v. Lannen, 19 Mont. 78, 85-86, 47 P. 648 (1897).

For further applications demonstrating the flexibility of the rule and focus on the intent of the grantor, *see* Maclay, 90 Mont. at 353-354; Yellowstone Valley, 88 Mont. at 82; St. Onge, 76 Mont. at 18-19; Warren v. Senecal, 71 Mont. 210, 219, 228 P. 71 (1924); Lensing, 67 Mont. at 384; Sayre v. Johnson, 33 Mont. 15, 20, 81 P. 389 (1905); Bullerdick, 32 Mont. at 553-554; Hays, 31 Mont. at 82-83; Toohey v. Campbell, 24 Mont. at 17-18; and Donnell, 1 Mont. at 531-532.

> intended, become inseparably attached as an appurtenance, and the appropriator thereby lose his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of Section 1882 [change in place of use] of the Civil Code.

Smith, 24 Mont. at 30. The Smith Court therefore concluded that:

> The common-law rule that an easement acquired by a tenant as an appurtenant to the land inures to the benefit of the landlord upon the expiry of the tenancy (citations omitted) is, for the reasons we have stated, inapplicable to cases arising under the statutes in respect of prior appropriation of water rights.... Ibid.

Transfer of Appurtenant Water Rights

Whether a water right appurtenant to particular land passes with a conveyance of the land is also a question of fact. Yellowstone Valley, 88 Mont. at 84. Montana statute provides that "[t]he transfer of a thing transfers also all its incidents unless expressly excepted." § 70-1-520, MCA. Accordingly, the Montana Supreme Court has held that:

> [T]he governing rule is that everything essential to the beneficial use and enjoyment of the property conveyed is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

Yellowstone Valley, 88 Mont. at 84.

The right of a claimant to title to a water right based on appurtenance, therefore, typically depends on the interpretation of deeds furnishing the chain of title. Hays, 31 Mont. at 82.[11] "In a conveyance of a water right or any other property, it is the intent of the parties, so far as the same has been lawfully expressed, which must control the courts in the construction of the instrument by which the property is conveyed." Lensing, 67 Mont. at 382-383. *See also* Yellowstone

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[11] In the case of a water right appropriated by a squatter in possession of land taken in good faith upon the public domain, the Court has held that "no deed was necessary, for one who has settled upon and is in possession of public lands of the United States may convey his right in the same, together with a water right appurtenant thereto, orally and for or without consideration, to one who takes possession thereof." St. Onge, 76 Mont. at 14. *See also* Cook v. Hudson, 110 Mont. 263, 278, 103 P.2d 137 (1940)(overruled on other grounds by Grimesly v. Spencer, 206 Mont. 184, 198, 670 P.2d 85 (1983)); Geary v. Harper, 92 Mont. at 248; Wood v. Lowney, 20 Mont. at 277; and McDonald v. Lannen, 19 Mont. at 85-86.

Valley 88 Mont. at 84.[12] When the deed does not specify the particular appurtenant right intended to be conveyed, extrinsic evidence must be used to establish it. Bullerdick, 32 Mont. at 550; Hays, 31 Mont. at 82; and Donnell v. Humphreys, 1 Mont. at 526. The question becomes: "What rights ... does the [claimant] appear to have acquired in the water under that deed, in light of the facts as they then existed, and the behavior of the parties with reference to it?" Hays, 31 Mont. at 82.

Water Right Claim No. 43A-W-042435-00

The 450 miner's inches of water on which this claim is based was diverted by Alexander and John McNiven from the Shields River at a point over two miles off school trust land for the irrigation of private land pursuant to the Laws of 1887. It was subsequently adjudicated in the 1911 Shields River Decree as owned by J.B. McNiven and appurtenant to McNiven's private land. Having been appropriated and perfected in compliance with Montana law, it became a vested property right, and neither McNiven, nor his successors in interest, could be divested of it for public use except through constitutional means.

The Dinsdales (Kunnemanns' immediate predecessors) acquired the McNiven land, which now included the NE1/4 of Section 16, by mesne conveyance in 1963. As there was no evidence of intent to sever or reserve the water right in the conveyances, the appurtenant water right transferred to the Dinsdales with conveyance of the land. The Dinsdales also leased school trust land in the W1/2 of Section 16, and they used 154 inches of the decreed water right to irrigate both 30 acres of their private land in the NE1/4 and 35 acres of the school trust land, moving the water between the two tracts as needed and as conditions permitted.

As the Dinsdales owned both the water right and the private land in the NE1/4 of Section 16, and there was no evidence of a contrary intent, that portion of the water right used to irrigate the 30 acres became appurtenant to it. Although the water right was used from time to time on school trust land, no part of the water right became appurtenant to that school trust land, because there was no unity or privity of title to the land and water between the Dinsdales and the State of Montana, and no evidence of intent to make the water right appurtenant to the school trust land. Even though the Dinsdales were lessees of the school trust land, they were not acting on behalf of

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[12] For rules of construction, *see generally*: Van Hook v. Jennings, 56 St. Rep. 767, 768, 295 Mont. 409, 412-413, 983 P.2d 995 (1999); Morningstar Enterprises, Inc. v. Grover, 247 Mont. 105, 111, 805 P.2d 553 (1991); and Musselshell Farming & Livestock Co. v. Cooley, 86 Mont. 276, 283 P. 213 (1929).

the State when they succeeded to ownership of the water right, or when they used it to irrigate the school trust land. Their intent was merely to temporarily change the place of use of their private, vested water right. When the Dinsdales conveyed the land in the NE1/4 of Section 16 to the Kunnemanns without a reservation or exception of the water right, their intent was to transfer the water right with the land as an appurtenance to it. The Kunnemanns also succeeded to the Dinsdales' lease of the school trust land and continued the practice of using the water to irrigate both the 30 acres of private land in the NE1/4 and the 35 acres of school trust land. Like their predecessors, even though the Kunnemanns were lessees of the State and temporarily used the water from time to time on school trust land, they intended to keep their vested right attached as an appurtenance to their private land, including the 30 acres in the NE1/4 of Section 16. When the Kunnemanns transferred their land to the bank in lieu of foreclosure, they intended the 154 inch water right to transfer with the land. When the Leahys subsequently acquired the land by mesne conveyance without a severance or reservation of the water right, they acquired all but the Harpers' portion of the 154 inch water right appurtenant to it.

Waiver and Judicial Estoppel

As an alternative theory, the State of Montana argues that the Leahys waived their right to object to the State's claim of ownership of a portion of Claim 43A-W-042435-00 by failing to raise or object to the issues of (1) total irrigated acreage on State land, (2) the effect of the 1904 right, and (3) the validity of Kunnemanns' filing on the State land at the time of the temporary preliminary decree and subsequent Master's Report amending the decree. The State also appears to argue that the doctrine of judicial estoppel prevents the Leahys from now asserting ownership of the that part of the water right claimed and decreed for use on school trust land, after they acquiesced to the Findings of Fact set forth in the Master's Report, filed March 19, 1992. An Order Adopting the Master's Report was filed on April 13, 1992, which amended the Temporary Preliminary Decree for the Shields River Basin (43A).

Waiver is an equitable doctrine, applicable only where there is intentional or voluntary relinquishment of a known right, claim or privilege. Estate of Pelzman, 261 Mont. 461, 465, 863 P.2d 1019 (1993). The Leahys did not waive their right to object to DSL's interest in this claim for three reasons.

First, Leahys or their predecessors were not statutorily required to file objections to

any water right claim contained in the Shields River Temporary Preliminary Decree when the decree was issued in 1988, because a subsequent preliminary decree eventually will be issued. A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree issued before March 28, 1997. Section 85-2-233(1)(c), MCA.

Second, the Leahys or their predecessors could not have waived their right to object to DSL's interest in this claim, because both Leahys and the DSL were unaware of DSL's interest in this claim until long after the 1989 deadline to file objections to claims in the Shields River Temporary Preliminary Decree expired. Even though the Supreme Court issued its Pettibone decision in 1985, the DSL affirmatively declined to accept a portion of the water right claim when it was offered in 1990 to DSL by the Williams, State lessees. The DSL, now TLMD, readily admits in its proposed finding of fact 28 that it was "apparently confused" as "to whether it had a right to claim a portion of this water right, since it was diverted off of state land" and that it was only "sometime after 1991 that the state began asserting an interest in all water rights perfected on state lands regardless of place of diversion." (Trust Lands' Brief and Amended Proposed Findings, Conclusions and Order, page 9. See also proposed finding 11 at page 5.) If the DSL was so "confused" over its ownership interest in this claim that it actually declined to accept the 1990 offer from Williams, then Leahys or their predecessors certainly cannot be said to have knowingly waived any right to object to DSL's ownership interest in this claim in 1989.

Third, the statement of claim is *prima facie* proof of its content. Section 85-2-227(1), MCA. The claim does not identify the State as the owner. Therefore, the burden to contest ownership was on the State and not on the Leahys or their predecessors. See Conclusion of Law III.

Consequently, without an obligation to object or notice of the State's claim of ownership, the Leahys or their predecessors cannot have intentionally or voluntarily waived their right to object to the State's ownership interest in this claim.

The TLMD argument on the doctrine of judicial estoppel is also not applicable. The doctrine estops litigants from asserting inconsistent or contradictory positions in separate litigation. Caekaert v. State Fund, 268 Mont. 105, 115, 885 P.2d 495 (1996). The doctrine only applies to those statements that have misled the adverse party and if accepted would injuriously affect the adverse party. Fieldler v. Fieldler, 266 Mont. 133, 139-140, 879 P.2d 675 (1994). "Stated simply, it is a rule which 'estops a party to play fast-and-lose with the courts' (citation omitted)." Fieldler,

266 Mont. at 140.

The TLMD argues that when the Leahys offered evidence in 1992 to the Water Master by affidavit and attached Daniel Dinsdale's 1991 letter showing the historical irrigable acreage under the water right on both their deeded land and the State school trust land, they acquiesced in the extent of irrigable acreage under the water right appurtenant to the State land as well as their own land and are estopped from asserting an inconsistent position now. (Trust Lands' Brief and Amended Proposed Findings, Conclusions and Order at page 13). The TLMD presented no evidence that it was mislead by Leahys' prior positions.

The Leahys' 1992 effort does not contradict their current court filings. In their 1992 affidavit, the Leahys claimed to be the owners of Water Right 43A-W-042435-00 with a flow rate of 3.85 [cfs], which they purported was used on 30 acres of deeded land in the N1/2 of Section 16. To this affidavit was attached a letter from Daniel Dinsdale that his father had "154 inches of water, rate of flow was 3.85," [cfs] to irrigate 30 acres of deeded land in the N1/2 of Section 16 and 35 acres of leased land in the W1/2 of Section 16; and that all of his father's water rights were intended to transfer with the land. In 1991, Harry and Alice Williams filed their affidavit, by which they purported to be the owners of that portion of the water right used on school trust lands. In 1992, the Water Master relied on these affidavits and found that this 3.85 cfs claim was beneficially used, prior to July 1, 1973, on the 65 acres described in the Dinsdale letter. The State's claim of ownership was not an issue.

In the proceedings subsequent to 1992, the Leahys have not proposed a different historical place of use. Leahys merely petitioned the DNRC for authorization to remove a portion of their claimed water right historically used on school trust lands and to transfer the beneficial use of that water to their private land. As a result, they have been required to participate in this proceeding to defend their ownership of a portion of the claim. Their current position is not inconsistent with their previous position and did not mislead the TLMD. Whatever confusion and inconsistency that has arisen regarding ownership of this water right claim mostly results from TLMD's change in policy after 1991, the resulting presentation of a complex legal issue, a water right transfer process that could only raise a legal issue and not solve it, and a cumbersome procedure to bring the issue to the Water Court for resolution.

Conclusion

The State of Montana has failed to meet its burden of contradicting and overcoming the Leahys' claim of ownership. As this water right was diverted, developed and perfected on private land, and decreed to be privately owned and appurtenant to private land before it was used on school trust land, the holding in Department of State Lands v. Pettibone does not apply.

The facts and circumstances here show that the water was intended to be and was appurtenant to private land, including 30 acres in the NE1/4 of Section 16. Temporary use of the water on school trust land did not make the water appurtenant to the school trust land, because there was no unity or privity of title between the successive owners of the water right and the owner of the school trust land, no intent to make the water appurtenant to the school trust land, and no conveyance of the water right to the State in writing. When the Leahys became successors to the private land without a severance or reservation of the water right, they acquired the 154 inch water right appurtenant to the land, less only that portion previously conveyed to the Harpers.

Just as it would make no sense to allow each succeeding tenant to appropriate and "walk off" with one water right after another diverted and developed on and for, and appurtenant to, school trust land, it would make no sense to allow the State to "take" one vested right after another from unsuspecting lessees who merely intend to apply their vested water rights for temporary use on school trust land. While school trust land may temporarily benefit from a lessee's private water right, TLMD is not entitled therefore to convert that fortuitous effect into a permanent asset of the trust estate. While the State's fiduciary role as charitable trustee clearly prohibits it from surrendering interests of the trust estate without receiving full market value, a private existing water right such as this right was never an "interest" of the trust estate to begin with and should not be considered part of its value.

The TLMD's motion for declaratory relief determining the State of Montana to be the owner of that portion of Claim 43A-W-042435-00 used on school trust land in Section 16, Township 1 South, Range 10 East, M.P.M., is **DENIED.**

DATED this 29 day of June, 2000.

C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

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

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DATED this 29 day of June, 2000.

Lori M. Burnham Beck
Clerk of Court