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FILED

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Montana Water Court

MONTANA WATER COURT
UPPER MISSOURI DIVISION
BASIN 41M

HAAS RANCH LLC,
Plaintiff,
vs.
HAYNE FAMILY TRUST and
JOHN D. HAYNE
Defendant,
vs.
DUPUYER WATER USERS,
Intervenor.

CASE WC-2009-05
41M 32061-00

Certified From:
Ninth Judicial District Court
Cause No. DV-09-16

HAAS RANCH DECISION

Haas Ranch, LLC (Haas) filed a Complaint against the Hayne Family Trust and John D. Hayne (collectively “Haynes”) in the Montana Ninth Judicial District Court. In that action, Haas sought an order from the District Court prohibiting Haynes from interfering with the cleaning, maintenance and repair of the Singleton, Heighton, and Bailey (“SHB”) Ditch and its headgate by Haas. Further, Haas sought remediation of flooding on its property from the SHB Ditch.

In the District Court Case, John D. Hayne alleged that Haas had no right to repair or maintain the ditch or headgate because the water right conveyed by the SHB Ditch and evidenced by irrigation claim 41M 32061-00 had been abandoned. The Dupuyer Water

Users (DWU) successfully moved to intervene in the District Court Case. They also pleaded that the claim had been abandoned. The DWU and Haynes (Objectors) then moved to certify the issue of abandonment to the Water Court.

The Montana Ninth Judicial District Court, Pondera County, by the Hon. Laurie McKinnon, District Judge, pursuant to § 85-2-406, MCA, entered its Order Certifying Matter to the Montana Water Court. In its Order, the District Court noted the dispute concerns the abandonment of a water right in a basin in which no decree has been issued by the Water Court.

On March 18 and 19, 2010, a hearing was held in Choteau, Montana in the courtroom of the Teton County Courthouse. Attorney Jeanne M. Bender appeared for Haas Ranch, LLC. Attorney Harley R. Harris appeared for the Dupuyer Water Users. John D. Hayne appeared on his own behalf. The Hayne Family Trust did not appear. Witnesses were sworn, testified, and evidence introduced.¹ On the morning of the first day of the hearing, the Court, counsel, and some of the parties performed a site inspection of the headgate, much of the ditch in question, and the place of use.

ISSUES

The primary issue certified to the Water Court was whether the Haas Ranch irrigation claim, diverted through the SHB Ditch, was abandoned. Allegations of abandonment place all elements of a water right claim at issue. Although the contentions, issues of fact and law raised in the Prehearing Order address several issues, this Decision focuses on three issues. (1) Whether Haas has privity of title with the original SHB appropriators and can claim ownership of the SHB Right? (2) Whether Haas has a water

¹ The Water Court recorded all the testimony presented in this hearing on an electronic recording device known as an FTR Reporter. Each day, a new CD was used. Two CDs were used in this proceeding. Reference in this decision to specific testimony will often be identified by the name of the witness if not obvious, followed by a reference to the first or second CD, and then to the electronic place marker identified by the hour, minutes, and, sometimes seconds. The place marker reflects the time of the day when the testimony was recorded. For example, Haas CD 1: 11:51:25 references the testimony of the first witness, Joseph Haas, located on the first CD and beginning at the electronic place marker of 11:51:25, which also indicates that this portion of the testimony of Mr. Haas first began to be recorded at 11:51:25 a.m. on the first day of the hearing.

right to divert from Dupuyer Creek through the SHB Ditch? (3) Whether any Haas claim to a water right diverted from Dupuyer Creek through the SHB Ditch has been abandoned?

JURISDICTION

The Montana Water Court has exclusive jurisdiction to interpret and determine "existing water rights." Section 3-7-501, MCA; *Mildenberger v. Galbraith*, 249 Mont. 161, 166, 815 P.2d 130, 134 (1991); *Baker Ditch Co. v. District Court*, 251 Mont. 251, 255-56, 824 P.2d 260 (1992); and *State ex rel. Jones v. Fourth Judicial District*, 283 Mont. 1, 6, 938 P.2d 1312, 1316 (1997).

"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(12), MCA.

Valid existing water rights maintain their vitality after July 1, 1973 and, although not indefeasible, continue to be defined and protected under the law as it existed prior to July 1, 1973. See generally *McDonald v. State*, 220 Mont. 519, 722 P.2d 598 (1986); and *Adjudication of Water Rights of Yellowstone River*, 253 Mont. 167, 173-74, 832 P.2d 1210 (1992).

The water right at issue in this certification proceeding is asserted to be an existing right in use prior to July 1, 1973. Therefore, it falls within the exclusive jurisdiction of the Water Court.

BURDEN OF PROOF

A claim of an existing right filed in accordance with § 85-2-221, MCA, or an amended claim of existing right, constitutes prima facie proof of its content. Section 85-2-227(1), MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect, including

for claimants objecting to their own claims. Rule 19, W.R.Adj.R. Therefore, the burden of proving the invalidity of the water right identified by statement of claim 41M 32061-00 is on the Dupuyer Water Users and John D. Hayne.

AGREED FACTS

1. In August of 2008, Haas Ranch, LLC (Haas) purchased property (the Property) in Section 10 of Township 28 North, Range 7 West, Pondera County, Montana (the Property). Joseph A. Haas is the principal in Haas Ranches LLC.

2. The Property now owned by Haas includes the following, with exceptions for the Townsite of Dupuyer and a 21.19 acre parcel retained by Donna Matchett:

S1/2SW1/4; W1/2,SE1/4; NW1/4,NE1/4; and the E1/2E1/2 of
Section 10, Township 28 North, Range 7 West, Pondera County,
Montana

3. The Property originally consisted of three separate parcels which were patented to (1) Julian Burd in 1888, (2) George Campbell in 1906, and (3) to the Heirs of Neil McCannell in 1899. The three parcels were consolidated when they came into the ownership of George W. Magee in 1906. Magee lost the Property to foreclosure, and in 1924 it passed to John Matchett who deeded it to his son, Mearlin, in 1944.

4. Until 1984, the Property was owned jointly by Mearlin and Donna Matchett. Mr. Matchett transferred ownership of the Property to his wife in 1984. He passed away later that year.

5. In 1995, Mrs. Matchett sold the Property to Holden Herefords (Holden). Jack Holden is the principal in Holden Herefords, Inc. In that transaction Mrs. Matchett retained a 21.19 acre parcel, which she still resides on.

6. In 2005, Holden Herefords sold the Property on a contract for deed to the Tates, but leased it back from the Tates from 2005 to 2008. In 2008, Tates sold the Property to Haas.

7. Haas Ranch claims certain water rights including one claim based upon one-half of an appropriation of 500 miners inches (6.25 cfs) made by Nelson Singleton,

James Heighton, and L.W. Bailey on June 5, 1890 (SHB Right). This right, as claimed by Mearlin Matchett, is Claim No. 41M 32061, filed in 1981. In Claim No. 41M 32061 Mr. Matchett stated that the water was conveyed to his property by the Singleton, Heighton, Bailey (SHB) Ditch.

8. John D. Hayne resides on property located approximately 1/8 mile west of the Property owned by Haas. The property where he resides is owned by John D. and Leanne M. Hayne. Mr. Hayne is the joint owner with his wife, Leanne, of a single right for watering stock with water from Dupuyer Creek. He makes no claim to own either the SHB Ditch or the SHB Right.

9. The SHB Ditch conveys water from Dupuyer Creek across the Hayne Trust property, across property owned by Ali Newkirk et el. and then across Haas' property.

10. The Dupuyer Water Users is a group of individuals and entities who have water rights claims on Dupuyer Creek and its tributaries. Specifically, they are Arrow S. Inc., Henneman Farms, Inc, Anderson Ranch, (Susan Anderson as Trustee of the Jeanne Anderson & Donald L. Anderson Bypass Trust), Bills Ranch, Inc., and Daryle E. and Pamela R. Swanson. Doug Henneman is the President of Henneman Farms, Thomas Salansky is the President of Arrow S, Inc. and John Shephard is the principal in Bills Ranch Co.

11. This case comes to this Court pursuant to § 85-2-406, MCA, upon certification from the Ninth Judicial District Court, Pondera County, by the Hon. Laurie McKinnon, in Cause No. DV 09-16 (the District Court Case).

DISCUSSION

The water right claim involved in this dispute is located in the Two Medicine River drainage, Water Court Basin 41M. Basin 41M has not yet been the subject of a Water Court decree. Only claim 41M 32061-00 is in dispute in this proceeding. No other statements of claim are at issue or decided in this certified case.

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The SHB Ditch is claimed to divert the SHB Right from Dupuyer Creek at a point basically north of the Mearlin Thomas residence in Dupuyer. The point of diversion is claimed to be in the SE1/4NW1/4SW1/4, Section 10, Township 28 North, Range 7 West. (Ex. 105). The SHB Ditch is north and slightly beyond the fenced school grounds of the Dupuyer School. Approximately 30-45 feet down ditch from the SHB headgate is a smaller ditch sometimes called the "southern lateral," the "southern ditch," or the "feeder ditch." The bottom of this smaller ditch is about 2-4 feet higher in elevation than the bottom of the SHB Ditch. The SHB Ditch and headgate is asserted to have been used to convey Dupuyer Creek water to irrigate the Haas Property.

The SHB Ditch travels for approximately the first one hundred yards down ditch from the SHB headgate through a very thick brushy area of trees, willows, and vegetation. (Ex. 101) The brush was so thick that walking the bed of the SHB Ditch in this area, at the time of the site inspection, would have been very difficult. John Hayne testified that the area was devastated by a flood in 1964 and cleaned out with a Cat during that summer. He said the ditch was dug through a swampy area, that springs seep into the ditch, and that water in the ditch does not freeze in the winter until the ditch crosses into the Haas Property. (Hayne CD1: 12:28 to 12:34)

The Haas Property is bounded on the south by the Conrad-Dupuyer road which runs east and west along its southern boundary. (Ex. 101) The road is at a higher elevation than the Haas Property and the gradient of the Haas Property falls generally southwest to northeast, meaning that water will generally flow from the southwest towards the northeast. (Hayne CD1: 12:51) The so-called Burd Ditch runs east along the Conrad-Dupuyer road and enters the Haas Property near its southwest corner. (Ex. 103 and Ex. 105 pg. DWU-18) The "Gillette (Wall) (Matchet)" Ditch is south of the Conrad-Dupuyer road and the Haas Property. (Ex. 103) The Matchett property extended south of the Conrad-Dupuyer road into Section 15. (Ex. 209) The historical irrigation of the property south of the road or Burd Ditch irrigation were not issues in this proceeding.

FIRST ISSUE - PRIVITY OF TITLE

Haas asserts partial ownership of the SHB Right. Historically in water right litigation, any party asserting a right had the burden of proving each of the material allegations of a cause of action by satisfactory evidence. *Tucker v. Missoula Light & Ry. Co.*, 77 Mont. 91, 100, 250 P. 11, 15 (1926); *Woodward v. Perkins*, 116 Mont. 46, 51, 147 P.2d 1016, 1018 (1944); *Eliason and Indreland v. Evans*, 178 Mont. 212, 219, 583 P.2d 398,402 (1978); and § 93-1501-1, RCM (1947).

This historical burden included a requirement that the claimant prove a contractual relationship or privity of title with the original appropriator. *Kenck v. Deegan*, 45 Mont. 245, 248-49, 122 P. 746, 747-48 (1912). Without privity of title, the earliest priority that could be awarded is the date the claimant came into possession of the right. *Kenck*, 45 Mont. at 248-49, 122 P. at 747-48. Since a timely filed statement of claim is prima facie proof of its content, the burden of proving a lack of privity was on DWU and Mr. Hayne.

That burden was met. The record demonstrates Haas does not have any written privity of title or contractual relationship with the original appropriators - Nelson Singleton, James Heighton, and L.W. Bailey - except possibly for 7/8 of an acre. (Compare paragraph 1 in Ex. 204 with Agreed Finding of Fact 2. See also discussion on privity of title between counsel and the Court at the conclusion of the hearing - CD 2: 10:35 to 10:38.) Therefore, Haas has no claim to the SHB Right.

In view of the lack of privity, Haas asserts ownership of an unknown portion of the SHB Right based on an unwritten agreement between Julian Burd (a Haas predecessor), and Singleton, Heighton, and Bailey. Haas argues the agreement was created around 1890 when the construction of the SHB Ditch intersected the Burd Ditch and cut off Julian Burd's ability to irrigate the northern section of his irrigated field ("north hay field") using a portion of a water right appropriated by his brother Samuel Burd on May 15, 1883 and subsequently transferred to Julian. (CD 1: 2:45 to 2:46) Haas argues that Julian Burd would not have allowed the irrigation of his north hay field with the 1883 water right to be interrupted without assurance that he could use some portion of the SHB Right on his north hay field. (Haas CD 2: 2:39 to 2:50; Attorney Bender CD 2: 10:35 to 10:38)

Although Mr. Haas presented a Power Point presentation illustrating the Matchett Ranch History to support his theories and testified to assumptions and suppositions which he drew from his research, he presented no evidence to support his important conclusions. For example, he testified that Samuel Burd and Julian Burd were brothers, that Samuel agreed to transfer a portion of his 1883 appropriation to Julian, and that water claim 162030 and Exhibit 204 supported those conclusions. (CD 1: 2:45 to 2:46) Claim 162030 was not placed into evidence and Exhibit 204 contains no reference to a Burd sibling relationship or to an agreement transferring an appropriation from Samuel to Julian.

Without evidence of these important facts, the Haas theory collapses. To adopt the Haas theory, the Court would have to assume several facts which are not in evidence, i.e. that: (1) there was an agreement between Samuel and Julian, (2) Julian was irrigating his northern hay field when the SHB Ditch was constructed, (3) Julian's northern field irrigation was disrupted in 1890 by Singleton, Heighton, and Bailey, (4) Julian and Singleton, Heighton, and Bailey entered into an agreement, and (5) the terms of the agreement provided a transfer of a portion of the SHB Right and a portion of the SHB Ditch to Julian Burd.

The lack of evidence in the record to support the Haas theory precludes the Court from adopting the Haas contentions. Moreover, the existence of one deed in the record casts even more doubt on the theory. In 1891, around the time frame Julian Burd was supposedly making an agreement with the SHB Ditch owners, Samuel C. Burd conveyed an "undivided one-half interest" of the Samuel C. Burd May 15, 1883 appropriation to Eugene E. Leech and included an "interest in ditch and right away." (Ex. 204, unnumbered pg. 4 at 4). Leech is a predecessor of Lucian H. Bailey and Nelson J. Singleton, the S and the B of the SHB Right.

Several land and water right transfers were occurring in this general area between 1891 and 1893, sometimes within a few days of each other. (Ex. 204) It appears that a small core of the early water users and landowners in this area were making agreements about land and water rights transfers and they were filing documents in the public record. If Samuel Burd and other property owners recognized the benefit of recording a water and

ditch transfer in 1891, it seems likely there would be similar documents filed to memorialize the two agreements which Mr. Haas theorizes took place. None are in evidence.

Although the possibility of the Haas conjectures are plausible, they are no more plausible than other potential alternative conjectures. For example, assuming *arguendo* that Julian Burd entered into any agreement with Singleton, Heighton, and Bailey, the agreement could have provided for any of the following alternatives: (1) a permissive or (2) contractual right to use some portion of the SHB Right; or (3) a permissive or (4) contractual right to convey any Burd water right (diverted through the Burd headgate and Ditch) into the SHB Ditch (after the two ditches intersected down ditch from the SHB headgate) and then to Burd's northern hay field.

Any (1) permissive use of the SHB Right by Burd could not ripen into actual ownership of the right. *See generally Smith v. Krutar*, 153 Mont. 325, 457 P.2d 459 (1969). As noted earlier, there is no evidence of a (2) contractual transfer of the SHB Right to Burd. Therefore, assuming *arguendo* that the Haas theory has any merit, it most likely would have involved a (3) permissive or (4) contractual right to use some portion of the SHB Ditch, not the SHB Right, to convey some or all of Julian Burd's own water right to Burd's northern field. Although not an issue in these proceedings, based on counsel's discussion in the last few minutes of the hearing, it appears likely that the existence of the Burd water right and/or alternatives (3) and (4) may be in dispute. (CD 2: 10:35 to 10:38)

Without evidence that the Haas predecessors, including Julian Burd, came into possession of some portion of the SHB Right, the Court cannot recognize any Haas ownership of the claimed SHB Right. *Kenck*, 45 Mont. at 248-49, 122 P. at 747-48. There is no privity of title between the original appropriators of the SHB Right and Haas. Accordingly, the Haas claim to the SHB Right represented in claim 41M 32061-00 is **DENIED**.

SECOND ISSUE - HAAS WATER RIGHT CLAIM

Once it became clear that Haas had no privity of title with and no claim to the SHB Right, Haas could no longer rely on the elements contained in the SHB prima facie statement of claim. Haas had the burden to prove that Dupuyer Creek water was diverted through the SHB Ditch and beneficially used on the Matchett/Haas Property prior to July 1, 1973 and to establish all the elements of an existing water right. Those elements are set forth in § 85-2-234(6), MCA.

Some evidence was presented that Mearlin Matchett did operate the SHB headgate, did divert water through the SHB Ditch, and did irrigate out of the SHB Ditch prior to July 1, 1973. The evidence, however, was insufficient to establish a flow rate, number of acres irrigated, and a defined place of use.

The Supreme Court has repeatedly held: "The quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use . . . the principal of beneficial use [being of] paramount importance." *Allen v. Petrick, et al.*, 69 Mont. 373, 376-77, 222 P. 451, 452 (1924) as cited in *McDonald v. State*, 220 Mont. 519, 536, 722 P.2d 598, 608 (1986). The same quantity of water will irrigate more land in one location than it would if applied in another location, the differences due to such variables as the quality of the soil, the length of the ditches, and the probable loss in seepage and evaporation therefrom. *Petrick*, 69 Mont. at 376-80 and 384, 222 P. at 452-55.

The record contains no evidence of the amount of water required by the land and crops and no evidence of the quantity of water historically diverted and applied to the Haas Property land and crops. Without such evidence, the Water Court cannot decree a flow rate and a place of use and cannot recognize a Haas "use" water right being diverted through the SHB Ditch and headgate.

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Evidence identifying the historical place of use is also in short supply. During its examination of the Matchett/Haas claim, the DNRC concluded that 74 acres were irrigated on the Matchett Property. This conclusion was drawn from an interpretation of two data sources, one being a 1964 aerial photo and the other being a 1979 aerial photo. (Ex. 105, DWU 000006 and DWU 000007)

Aerial photos are a “snapshot in time” and their interpretation requires a comparison of “tonal changes” or “tonal variations” between bordering fields. (David Donohue CD 1: 4:01 to 4:03, 4:08 to 4:09, 4:18) Darker areas in black and white photos indicate areas that have “higher moisture content and, you know, a way to interpret it - is that it is irrigated.” (Donohue CD 1: 4:03) Sometimes the tonal changes are very subtle. (Donohue CD 1: 5:38 to 5:39) In some instances, the Court believes the subtlety led to erroneous interpretation efforts. For example, areas were identified as having “higher moisture content” on aerial photos flown in 1984, 1990, and 1995 even though the landowner or a lessee testified that irrigation had not taken place on the Property during those years.

Furthermore, based on the site inspection and the testimony of some of the witnesses, some portion of the 74 acres identified by the DNRC, notably the acres in the northeast (appearing to include some of the Donna Matchett homesite and the surrounding area) and some in the southeast of Section 10, cannot be irrigated from the SHB Ditch. Without knowing the precise identity of those acres, the Court cannot specify a place of use for the remaining acres.

Considering the apparent difficulty in interpreting tonal variations on the aerial photos depicting the Property and the fact that some unknown portion of the 74 acres is not capable of being irrigated from the SHB Ditch, the number of acres identified by the DNRC as being irrigated appears to have been an inaccurate interpretation and cannot be used to identify a place of use.

....

Haas has failed to provide the Court with all the necessary evidence to establish the existence of an “existing water right” based upon the pre-July 1973 diversion of water from Dupuyer Creek through the SHB Ditch and headgate for beneficial irrigation use on the Haas Property. Based on the record, the Court cannot recognize any existing water right claims for a Haas “use” right.

THIRD ISSUE - ABANDONMENT

Even if there were sufficient evidence to establish a Haas water right in use before July 1973, the preponderance of the evidence established that Dupuyer Creek water has not been diverted through the SHB headgate, down the SHB Ditch, and beneficially used on the Matchett/Haas Property for a period of 19 to 24 years. This long period of nonuse shifted the burden to Haas to introduce evidence which might excuse or explain the long period of nonuse.

Law of Abandonment

The controlling and fundamental principle upon which water rights are perfected and continue to possess legal validity is that of beneficial use: water rights cease when the water is no longer applied to a beneficial use. *79 Ranch Inc. v. Pitsch*, 204 Mont. 426, 432, 666 P.2d 215, 218 (1983); *In re Adjudication of Water Rights of the Clark Fork River*, 254 Mont. 11, 15, 833 P.2d 1120, 1123 (1992); and *Matter of Adjudication of Musselshell River Above Roundup*, 255 Mont. 43, 47, 840 P.2d 577 (1992).

In *79 Ranch* and subsequent cases, the Montana Supreme Court summarized the two-step process for determining the abandonment of a water right as follows:

The objectors have the initial burden of proving that a water right has not been used for a sufficiently long period of time to raise a rebuttable presumption of an intent to abandon that right. *79 Ranch*, 666 P.2d at 218. Once a period of nonuse sufficient to raise the presumption of an intent to abandon has been established, the burden shifts to the claimant of the water right to explain the reasons for nonuse. *79 Ranch*, 666 P.2d at 218. To rebut the presumption of abandonment, the claimant must establish “some fact or condition excusing the long period of nonuse, not mere expressions

of hope or desire reflecting a 'gleam-in-the-eye philosophy' regarding future use of the water." *In re Clark Fork River*, 833 P.2d at 1123 (quoting *79 Ranch*, 666 P.2d at 219).

Adjudication of Clark Fork, 274 Mont. 340, 344, 908 P.2d 1353, 1355 (1995).

Long Period of Nonuse

At the risk of setting forth too brief a summary, the salient information presented by the witnesses regarding nonuse of irrigation water on the Matchett/Haas Property is summarized as follows.

John D. Hayne testified he moved to Dupuyer in 1953, attended the Dupuyer School from 1954 to 1963, and that his father owned part of the land on which the SHB Ditch is located. John Hayne was very familiar with the ditch in question. As a youngster, he referred to the ditch as Bruner's Ditch. Later in his life, he called it the Hutterite Ditch. He said the ditch was used to irrigate the property east of the Haas Property which was once owned by Bud Deardorf and Duane Bruner and later sold to a Hutterite Colony. He testified that the current SHB headgate was installed in 1964 and the sale to the Colony took place in 1969. (CD 1: 12:26 to 12:54)

Mearlin Thomas, the nephew of Mearlin Matchett, worked on the Matchett Property from about 1954 to 1964. He said the only name he ever heard applied to the SHB Ditch was simply "the ditch." He said his uncle irrigated out of the ditch when he worked on the Property. Beginning in 1978 or so, Mr. Thomas began living in a mobile home which overlooked the SHB Ditch and headgate. From 1978 to around 1986 (when he changed the directional orientation of his residence), he could see the headgate out his west picture window. His Uncle Mearlin Matchett was the only person he ever saw open the SHB headgate and his uncle stopped doing that when his health began to deteriorate around 1980, 81, or 82. (CD 2: 9:35 to 9:44)

Donna Matchett married Mearlin Matchett and moved onto the Matchett place in 1959. Mr. Matchett regularly irrigated from the SHB Ditch until about 1982. He died in December 1984. Mrs. Matchett did not irrigate from or maintain the SHB headgate or Ditch after Mr. Matchett's death. Around 1986 -1987 or so, she attended nursing school in Havre. She leased her property to Ron Jones and later to a Mr. Nowlin. She sold her place on June 13, 1995 to Holden Herefords, reserving a 21 acre homesite. (Donna Matchett CD2: 9:03 to 9:33 and Ex. 209)

Ron Jones testified he leased the Matchett place from 1988 to 1991. The SHB headgate would not open and he could not irrigate out of the SHB Ditch. He advised Mrs. Matchett of the problem and she told him that she did not want to invest any money in the ditch for improvements. (Jones CD 1: 2:03 to 2:07)

John G. Shepard testified that he was born in Dupuyer, attended the Dupuyer School from 1967 to 1976, and played in the SHB Ditch area as a youngster. His family place has water rights conveyed through the Gillette Ditch which is located across the Conrad-Dupuyer road from the Matchett Property and about three quarters of a mile south. When Mr. Nowlin leased the Property from Mrs. Matchett in the early 90s, a "water fight" began on the Gillette Ditch. Mr. Nowlin could not get the SHB headgate to open and tried to divert water through the Gillette Ditch to irrigate the Matchett Property. Mr. Shepard testified that "we had to stop him." (Shepard CD 1: 2:08 to 2:13)

Douglas Henneman testified that he has water rights at the bottom end of Dupuyer Creek and has lived on his place since 1987. During drought years, he receives enough water to irrigate 50% of the years and during regular years about 70% of the years. Mr. Henneman testified that since 1987 he drives the Conrad-Dupuyer road about 40 to 50 times a year. He is familiar with the Matchett Property and the first time he saw evidence of irrigation on the Property north of the road was in 2009. He said he has been particularly attentive to the SHB Ditch

since 1998 because that is about when the Hutterite Colony, which borders the Property on the east, obtained a change to its water right from the DNRC and did so without Mr. Henneman being notified. He said he has been looking not just for water use activities, but also for equipment use, such as a tractor operating a ditcher to clean out laterals for irrigation purposes. The year 2009 was the first time he saw evidence of irrigation on the Property located on the north side of the road. He has seen irrigation on the south side of the road. (CD 1: 2:14 to 2:36)

John B. Holden, manager and president of Holden Herefords Corporation, testified that Holden Herefords owned the Property from 1995 to 2005 when it was sold to James and Rebecca Tate and their son's corporation. After the sale, Holden Herefords leased the Property from 2005 to 2008. Mr. Holden testified that over the 13 years he was associated with the Property he had never personally irrigated it, had never been to the SHB headgate, and never followed the Ditch to the headgate. He testified that the SHB Ditch ran water year round and would "sub" out, that his cattle used the Ditch for stockwater, and that occasionally the Ditch was blocked off to back water up to spread out on some unspecified acreage. He did not know when the Property was irrigated under his ownership, but testified the first time it occurred was when he told his employee, J.D. Evans, to "go try and spread some water around." (CD2: 10:11 to 10:12) He speculated that those instructions were issued in the "early 2000s," possibly "2000 or 2001," but he was "not sure." (*Id.*) (Mr. Evans did not confirm the date in his later testimony.) Mr. Holden said the southern lateral off the SHB Ditch was not used except when water from the Gillette Ditch crossed the Conrad-Dupuyer road from the property he owned to the south and collected in the southern lateral. The northeast of the Property, next to the Hutterite Colony property line, was never irrigated. (CD 2: 10:05 to 10:21)

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J. D. Evans testified he began to work for Holden Herefords in 1996 and that in 14 years he irrigated some unspecified acreage on the Property about 5-6 times. He did so by blocking the culvert under the road leading to Mrs. Matchett's home and the blocked water would back up and spread out. He had never been to the SHB headgate or followed the Ditch to the headgate. He did not specify when he first blocked off the culvert. The last time he irrigated was approximately 2006. Whether the 5-6 times he testified to irrigating was limited to one year or more than one year is unknown. (CD 2: 10:23 to 10:31)

David Donohue, a hydrogeologist, was asked for his opinion as to "whether the land in the NWSE, NESE, and SENE of Section 10 [basically the Haas Property] was irrigated with water from the SHB Ditch during the period of time from the 1940s forward?" He first replied that he saw "no indication that it wasn't irrigated." (CD 2: 3:47 to 3:48)

Throughout most of his testimony, Mr. Donohue was careful in his choice of words. When asked if a certain aerial photo showed irrigation, he would often respond that the tonal variations on the photo suggested higher or lower soil moisture levels or that vegetation appeared alive. Only during the last few minutes of his testimony did he testify, in a general sense, that he saw evidence of irrigation, and that it was his opinion that from the 1940s onward the SHB Ditch was used to irrigate the Haas Property. (CD 2: 5:43, 5:56, and 6:02)

At no point, however, did Mr. Donohue describe field locations with the degree of specificity which the Court needs to identify the historical irrigated place of use and the legal description of the irrigated land to which the water right was appurtenant. The Court needs this information to comply with § 85-2-234(6)(e), MCA. Mr. Donohue expressed no opinion as to where water came from in the south ditch and he "did not evaluate historical use of water on that property." (CD 1: 5:28 and 5:50 to 5:51) He had no opinion as to whether the area around Mrs. Matchett's house was irrigated. (CD 1: 5:41)

With respect to the crucial time frame from 1982 forward, the time period of nonuse, Mr. Donohue's testimony and aerial photos were not useful. Regarding the August 1984 aerial photo (Ex. 114), Mr. Donohue stated that there was "more potential for moisture in the soils" in the dark areas on the aerial photo of the Matchett Property. (CD 1: 4:15) He expressed no opinion that the darker areas were irrigated. In fact, Mrs. Matchett testified that her husband last irrigated the Property in 1982, that he died in December 1984, and that the only irrigation she attempted in 1984 was south of the Conrad-Dupuyer road. (CD 1: 9:18 to 9:19; 9:11 to 9:12) Therefore, notwithstanding the appearance of darker areas on the 1984 aerial photo, the Court concludes no irrigation took place out of the SHB Ditch in 1984 on the Property.

Referencing the July 1990 aerial photo (Ex. 116), Mr. Donohue stated what he found to be important were the "tonal changes suggesting that there's more soil moisture - or vegetation is alive." (CD 1: 4:18) On cross examination, Mr. Donohue was questioned about the "darker" areas being irrigated land and his response was "it appears to be irrigated at the tonal change." (CD 1: 5:35 to 5:36) When asked to explain other darker areas on the photo, Mr. Donohue responded that the photo was "again, a snapshot in time - July 9, 1990 - I'm not sure what the precipitation was like up in here." (CD 1: 5:36) Mr. Donohue agreed the tonal variations were "pretty subtle" on this photo. (CD 1: 5:38) Of significance to the Court is that this 1990 aerial photo was flown during the Ron Jones lease period and Mr. Jones testified the SHB headgate was inoperable and he could not irrigate north of the Conrad-Dupuyer road. (CD 1: 2:03 to 2:06) Therefore, notwithstanding the appearance of the subtle darker areas on the 1990 aerial photo, the Court concludes no irrigation took place out of the SHB Ditch in 1990 on the Property.

Referencing the August 1995 aerial photo (Ex. 115), Mr. Donohue was specifically asked about the Matchett Property: "Does that indicate that there was

irrigation taking place or, at least, those fields were watered in 1995?” In response, Mr. Donohue stated: “So again, you’ve got, you know, a little darker tones in through here. This area, you know, was cut.” (CD 1: 4:23) Again, no opinion was expressed as to irrigation. Most of his testimony regarding the 1995 photo was about crops being cut. This was the first year of Holden Herefords ownership of the Property (Ex. 209) and Mr. Holden testified that he did not irrigate the Property in 1995. (CD 2: 10:05 and 10:12) So, again, notwithstanding the appearance of the “little darker tones” on the 1995 aerial photo, the Court concludes no irrigation took place out of the SHB Ditch in 1995 on the Property.

Referencing the September 2002 aerial photo (Ex. 125), Mr. Donohue was requested to explain “what he saw in 2002.” He said “this one isn’t as clear as the other ones” and “the area of interest that we are looking at - north of the Singleton, Heighton, Bailey Ditch - a darker tone.” (CD 1: 4:25) Again, no opinion was expressed as to irrigation north of the SHB Ditch. Given the fact that the 2002 aerial photo was not “as clear as the other ones” and that three of the other photos exhibited darker tones on the Property even though convincing testimony was presented that no irrigation occurred during three of the years represented by the other photos, the Court is not persuaded that the darker tone indicates irrigation out of the SHB Ditch took place in 2002 on the Property.

There is no evidence in the record that the SHB headgate was ever opened after 1982 through the date of the hearing in 2010. After 1982, there is no credible evidence of irrigation out of the SHB Ditch until Mr. Evans blocked off a culvert to “spread some water around.” Mr. Holden speculated that this event may have occurred in the early 2000s, possibly 2000 or 2001, but he was not sure. Mr. Evans was similarly vague and only mentioned the last time he irrigated, which he thought was probably “about 4 years ago”(CD 2: 10:25), which would place the date in 2006. Therefore, the evidence establishes a period of nonuse from 1982 to 2001 or from 1982 to 2006, a period of 19 to 24 years.

The evidence of first irrigation use by Holden Herefords on the Property was too vague and uncertain to fix a specific date. In accordance with the rule set forth in *Vidal v. Kensler*, 100 Mont. 592, 598, 51 P.2d 235, 238 (1935), the Court concludes 2006 to be the first year the Property was irrigated by Holden Herefords.

Whether the actual nonuse was 19 or 24 years, either period was a sufficiently long continuous period of nonuse to raise a rebuttable presumption of an intent to abandon any water right which may, at one time, have been diverted through the SHB Ditch to irrigate some portion of the Property. The burden then shifted to Haas, as the claimant, to explain the reasons for nonuse and to establish “some fact or condition excusing the long period of nonuse.” *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218.

The nonuse between 1982 until 1986 was explained by the deteriorating health and death of Mr. Matchett. After that, there was no explanation for the nonuse other than the SHB headgate was inoperable, which the Court concludes is not a sufficient reason to justify such a long period of non-irrigation. Since Haas failed to explain the reasons for nonuse, any Matchett/Haas water right diverted through the SHB Ditch and headgate has been abandoned.

Once a right is abandoned, it is lost, and any reassertion of such a right merely amounts to an effort to create a new appropriation. *O’Shea v. Doty*, 68 Mont. 316, 321, 218 P. 658, 659 (1923). After July 1, 1973, a person may not appropriate water except by complying with the Water Use Act. Section 85-2-301(1), MCA.

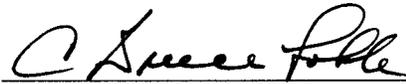
There is no evidence, Holden Herefords, the Tates, or Haas appropriated a water right after 1995 (the year Holden Herefords acquired the Property) by complying with the Water Use Act. Whether the 5-6 times Mr. Evans blocked the culvert near Mrs. Matchett’s house took place after 2000, 2001, or in 2006, the effort was too late to resurrect or create a new water right.

CONCLUSION

There is no privity of title between the original appropriators of the SHB Right and Haas. The Haas claim to the SHB Right represented in claim 41M 32061-00 is **DENIED**.

Haas has no claim for a Dupuyer Creek “existing water right” diverted through the SHB Ditch and headgate for use on the Haas Property. If Haas ever had such an existing water right, it has been **ABANDONED**.

Dated this **29** day of November 2010.



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