

Montana Water Court
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FILED

AUG 11 2015

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MADISON RIVER BASIN (41F)

CLAIMANT: James M. Guyette

CASE 41F-A11

OBJECTORS: Beaver Dam Ranch LLC, Porter Bennett
and Carolyn Quan, Wyatt Gibbs, Cline J. Oliver

41F 7392-00	41F 7396-00
41F 7393-00	41F 7397-00
41F 7394-00	41F 7398-00
41F 7395-00	41F 7399-00

ORDER GRANTING SUMMARY JUDGMENT

PROCEDURAL HISTORY

On December 30, 2013 claimant James M. Guyette (Guyette) filed a Verified Motion to Amend eight water right claims on South Meadow Creek. Guyette seeks to add information remarks addressing conveyance loss. The motion is based on the decree in *Morrison v. Higbee*, Cause 1183, Madison County, (1912) (South Meadow Creek Decree) and succeeding Water Court and District Court cases.

Guyette published notice of his motion to amend and served individual notice on all South Meadow Creek water right claim owners. Objections to the motion were filed by Beaver Dam Ranch LLC, Porter Bennett and Carolyn Quan, Janet M. Endecott, Lawrence Gibbs, Wyatt Gibbs, Claudette Hughes (Seven Bar Ranch LLC), Cline J. Oliver, and Greg Doud (Ramshorn Ranch LLC).

At a July 1, 2014 telephone conference, most of these objectors acknowledged Guyette's assertions regarding the language in the South Meadow Creek Decree and

succeeding Water Court and District Court cases were correct. In fact, several objectors indicated they would file a similar motion to amend if the Guyette motion was successful. Other objectors expressed the opinion that adding conveyance loss to the flow rates for senior water right claims will serve to eliminate most of the water available to their junior water rights. These objectors also raised issues concerning accurate water measurement and poor ditch maintenance.

The Court issued a Scheduling Order on September 19, 2014. With the consent of the parties, that Order was vacated on January 23, 2015 and a Settlement Master was appointed. On March 31, 2015, the Settlement Master filed a report indicating the parties were unable to reach an agreement.

Janet M. Endecott withdrew her objection to Guyette's Motion on March 3, 2015. Ramshorn Ranch LLC and 7L Bar Ranch withdrew their objections on April 14, 2015. On April 23, 2015, the Court dismissed the objection of Lawrence Gibbs and set the case back on a hearing track. Guyette moved for a Judgment or Order on the Pleadings on May 6, 2015 which objectors Beaver Dam Ranch, LLC, and Porter Bennet and Carolyn Quan answered. The Court denied the motion on May 29, 2015. Claimant Guyette and objectors Beaver Dam Ranch, and Wyatt Gibbs/Cline J. Oliver each submitted a proposed pretrial order on May 20, 2015. Bennett and Quan concurred with the Beaver Dam Ranch's proposed pretrial order.

The prehearing Conference was held on May 28, 2015. Objectors Wyatt Gibbs and Cline Oliver failed to appear. Guyette moved for their default and the Court set a June 10, 2015, Show Cause Hearing by telephone conference call. Objectors Gibbs and Oliver appeared at the hearing and were able to show cause. The Court set aside the defaults. The parties then discussed the status of the case. Guyette indicated he intended to file a motion for summary judgement. On June 11, 2015, the Court issued an Order setting a briefing schedule for the contemplated motion. On June 24, 2015, Guyette filed a Motion for Summary Judgment. None of the objectors filed a response.

BACKGROUND

The South Meadow Creek Decree includes language indicating all flow rates are to be measured at the property line rather than the creek. (South Meadow Creek Decree at Finding 34, Conclusion 25, and Order, Paragraph 4). The actual enforcement of this language from the time of the decree until the 1970s is not clear. Subsequent proceedings in the District Court and Water Court served to confirm the language in the South Meadow Creek Decree.

A June 18, 1986 Master's Report ordered all water users on South Meadow Creek to measure and file with the Clerk of District Court, their estimated conveyance losses at the beginning of the irrigation season. The water commissioner was instructed to deliver the decreed flow rate plus estimated conveyance water. The report contemplated this requirement for a period of two years to presumably gain some idea of the actual amount of conveyance loss that would be required for each water right claim. (Master's Report for Cause No. 1183 June 18, 1986 at Conclusion of Law 10).

A month later, Judge W.W. Lessley, issued an Order in Cause No. 1183 which confirmed the practice of estimating conveyance loss and adding that amount to decreed flow rates. (Order for Cause No. 1183 July 30, 1986). The Master's Report and Order were issued in Cause No. 1183 with a Fifth Judicial District caption. However, Water Master O'Brien signed her report as a Water Master for the Montana Water Court. Judge Lessley signed his Order as the Chief Water Judge. Given the nature of the Report and Order, it appears the Master and Judge were acting in a dual capacity for both Courts.

In Water Court case 41F-59, James Robertson attempted to amend his claim to increase his flow rates to account for the conveyance loss. The Water Master declined to permanently increase the flow rates. Rather, the Master's Report recommended adding the following information remark:

DELIVERY OF THE ABOVE DECREED FLOW RATE TO THE PLACE OF USE OF THIS CLAIM REQUIRES AN ADDITIONAL FLOW RATE FOR REASONABLE CONVEYANCE LOSS. BY ORDERS OF JUDGE W.W. LESSLEY IN CAUSE NUMBER 1183, FIFTH JUDICIAL DISTRICT, STATE OF MONTANA, DATED JUNE 25, 1986 AND JULY 30, 1986, THE OWNER OF THIS RIGHT IS DIRECTED TO FILE AN ESTIMATED CONVEYANCE LOSS EACH YEAR WITH THE MADISON COUNTY CLERK OF COURT. THE WATER COMMISSIONER SHALL ADMEASURE AT THE HEADGATE ON SOUTH MEADOW

CREEK, THE DECREED FLOW RATE PLUS THE ESTIMATED FLOW RATE OF REASONABLE CONVEYANCE LOSS.

The remark served to confirm Robertson's right to the additional conveyance loss but continued the requirement to file an estimated conveyance loss each year with the Clerk of Court. (Master's Report, issued September 21, 1987, Order Adopting issued May 20, 1991).

Guyette's Motion seeks to add this remark or a similar remark to his South Meadow Creek water right claims.

ISSUES PRESENTED

1. *Is summary judgment appropriate in this case?*
2. *If summary judgment is appropriate, is Guyette entitled to conveyance loss for his water rights?*
3. *If Guyette is entitled to conveyance loss, how should the Water Court address conveyance loss?*

STANDARD OF REVIEW

Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620 (citing M.R.Civ.P. 56(c)). To determine the existence or nonexistence of a genuine issue of material fact, the Court will look to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 4, 304 Mont. 356, 22 P.3d 631. All reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 17. The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Lee*, ¶ 25. Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the party opposing summary judgment must present material and substantial evidence rather than merely conclusory or

speculative statements. *Lee*, ¶ 26. Proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel. *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997).

ANALYSIS

1. *Is summary judgment appropriate in this case?*

Guyette carried the initial burden to show there are no genuine issues of material fact. *Lee*, ¶ 25. He provided evidence showing the history of District Court and Water Court decisions holding that South Meadow Creek water right claims were historically entitled to conveyance loss and water measurement at their property line. Guyette has met this initial burden.

The burden then shifted to the objectors to show evidence of issues of material fact. *Lee*, ¶ 26. Because the objectors failed to respond to the claimant's Motion for Summary Judgment, they did not meet their burden. The Court finds there are no genuine issues of material fact.

Flow rates decreed by district courts are typically measured at the point of diversion or as close to the point of diversion as possible. However, district courts had the discretion to depart from this standard when circumstances required that departure. In the South Meadow Creek Decree, the District Court decreed specific flow rates for each water right and determined that those flow rates should be measured at the claimant's property line rather than the point of diversion.

The Water Court acknowledged this historical practice and determined the District Court's measurement policy should be reflected in an information remark. However, the Water Court placed the burden on each claimant to petition this Court and seek to add the remark to their South Meadow Creek decreed rights. Guyette's Motion to Amend complies with previous Water Court rulings.

Guyette's motion for summary judgment is deemed well taken. Based on the absence of genuine issues of material fact and controlling law, summary judgment is appropriate.

2. *If summary judgment is appropriate, is Guyette entitled to conveyance loss for his water rights?*

The eight Guyette claims in this case are based on rights decreed by the District Court in the South Meadow Creek Decree. The Decree includes language indicating all flow rates are to be measured at the property line rather than the creek. (South Meadow Creek Decree at Finding 34, Conclusion 25, and Order, Paragraph 4). This means the point where water is measured can be a significant distance from the creek. As a result, extra water must be diverted from the creek to account for conveyance loss. This District Court practice was confirmed by the June 18, 1986 Master's Report, Judge Lessley's July 30, 1986 Order, and proceedings in Water Court case 41F-59. (Master's Report for Cause No. 1183 June 18, 1986 at Conclusion of Law 10; Order for Cause No. 1183 July 30, 1986; Master's Report, issued September 21, 1987, Order Adopting issued May 20, 1991).

Guyette is entitled to conveyance loss for his South Meadow Creek decreed water right claims.

3. *If Guyette is entitled to conveyance loss, how should the Water Court address conveyance loss?*

This case provides an interesting example of the "jurisdictional seam" between Water Court jurisdiction to determine the historical use of all existing water right claims and District Court jurisdiction over water distribution. In previous decisions, Judge Lessley, was apparently acting as both Chief Water Judge and the District Court Judge. As a result, it appears the Water Court was directing the parties to file annual conveyance loss estimates with the District Court. These requirements are reflected in the information remark placed on claims in case 41F-59. Those requirements come under the authority of the District Court, not the Water Court. § 85-2-406, MCA; § 85-5-101, MCA; *see also Eldorado Canal Co. v. Lower Teton Joint Objectors*, 2014 MT 272, ¶ 32, 376 Mont. 420, 337 P.3d 74.

The remark used in case 41F-59 is problematic. It places conditions on the water rights at issue that are within the jurisdiction of the District Court. The conditions are

based on Judge Lessley's orders when he was acting as a District Court Judge. However, these Orders are subject to review by the District Court as part of the ongoing administration of South Meadow Creek. The District Court may determine that Judge Lessley's Orders no longer serve to address the conveyance loss issue and may determine that a different approach is appropriate. As a result, a Water Court information remark should identify the historical and continuing right to flow rate measurement at the property line and leave administration of the rights to the District Court.

Guyette's Summary Judgment Motion suggested that the Water Court should limit its involvement to placing a more general information remark on his claims. Guyette asserts that the remark used in Water Court case 41F-59 is not appropriate. He argues an appropriate remark should simply reference his right to conveyance loss and state the claim is entitled to its decreed flow rate measured at the claim owner's property line. In negotiations with objectors Beaver Dam Ranch and Bennett/Quam, Guyette developed proposed remark language that also provided a legal description for the property line location.

The Court agrees with this approach and will place a more general remark on Guyette's claims that note his entitlement and identify the location for measuring water.

CONCLUSION

1. Summary judgment is appropriate in this case.
2. Guyette is entitled to his decreed flow rates measured at his property line. This includes sufficient conveyance water to deliver the decreed flow rates to his property line when his rights are in priority.
3. Guyette's entitlement to conveyance loss shall be noted on his water right decree abstracts through the following information remark:

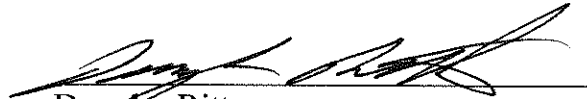
THE FLOW RATE FOR THIS CLAIM SHALL BE MEASURED AT OR ABOUT THE POINT WHERE THE CONVEYANCE DITCH CROSSES THE CLAIMANT'S PROPERTY LINE IN THE SWSWNE, §35, T4S, R2W, MADISON COUNTY. SEE THE CLAIM FILE OR WATER COURT CASE 41F-A11 FOR MORE INFORMATION.

ORDER

The Guyette Motion for Summary Judgment is GRANTED. The issue remark noted in Conclusion 3 shall be added to each of the eight Guyette claims in this case.

A Post Decree Abstract of Water Right Claim, for each claim is served with this Order to confirm the remark has been added to the claims in the state's centralized water right record system.

DATED this 11 day of August, 2015.


Douglas Ritter
Associate Water Judge

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