

FILED

APR 11 2017

Montana Water Court

MONTANA WATER COURT, UPPER MISSOURI DIVISION
SMITH RIVER - BASIN 41J

CLAIMANTS: ~~Gene L. Willison~~; Casey Smith; Melissa Smith;
Terry Smith

CASE 41J-78
41J 206226-00

OBJECTORS: Montana Department of Fish, Wildlife, and Parks;
United States of America (Forest Service)

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

This case involves claim number 41J 206226-00 filed by Gene Willison for water from Thomas Creek. Willison's claim was for mining. Terry Smith, Casey Smith, and Melissa Smith assert ownership of this claim.

The United States objected to claim 41J 206226-00 and filed a motion for summary judgment asserting that the Smiths do not own claim 41J 206226-00 because it was abandoned and because they lack privity of title with Willison.

For the reasons set forth below, the United States' Summary judgment motion is denied.

II. ISSUES

1. Has the United States satisfied the requirements for summary judgment on the issue of abandonment?

2. Has the United States satisfied the requirements for summary judgment regarding privity of title between Willison and the Smiths?

III. APPLICABLE LAW

Summary judgment is proper when a movant demonstrates that there are no genuine issues of material fact and he is entitled to judgment as a matter of law. Rule 56, M. R. Civ. P.; *Hastie v. Alpine Orthopedics & Sports Med.*, 2015 MT 346, ¶ 15, 382 Mont. 21, 363 P.3d 435. Once the movant demonstrates the lack of genuine issue of material fact, the burden shifts to the non-movant to “prove by more than mere denial and speculation that a genuine issue of material fact does exist.” *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. When evaluating a motion for summary judgment, evidence is viewed in the light most favorable to the non-movant and all reasonable inferences are drawn in favor of the opposing party. *Williams*, ¶ 15.

IV. ANALYSIS

Claim 41J 206226-00 has a point of diversion from Thomas Creek in the SESESW of Section 35, T11N, R3E. The place of use is in the SESW and the SWSE of the same Section. This claim is a use right based on an affidavit filed by Fred Nopper, and its priority date is May 31, 1934. Attached to the water right claim is a map showing Thomas Creek, the point of diversion, and a mining claim in the SESESW and the SWSE of Section 35, T11N, R3E. The name of the mining claim on the map is not identified.

The United States filed a list of mining claims by section number to support its motion for summary judgment. United States of America’s Motion for Summary Judgment and Memorandum in Support (Feb. 28, 2017), Exhibit A, Declaration of Steve Opp, Ex. 1, BLM List of Mining Claims by Section, attachment to Exhibit A. This list shows that Casey Smith, one of the current claimants, is the owner of mining claims called Teddy Bar #1 and Teddy Bar #2. Teddy Bar #1 is in the SW1/4 of Section 35, while Teddy Bar #2 is in the SE1/4. Both Teddy Bar mining claims are near the mining claim identified on the map attached to water right 41J 206226-00.

The United States contends that Willison’s water right was most likely appurtenant to a mining claim known as the Big Buck, which was located in 1937 and closed in 1993. According to United States Exhibit 1 attached to Exhibit A, the Big Buck

was in the SWSE of Section 35. Teddy Bar #1 and Teddy Bar #2 were not located until September 18, 2013. The gap between closing of the Big Buck and location of the Teddy Bar claims was twenty years.

Gene Willison and James L. White entered an agreement in which Willison agreed to assign his right to a “certain Contract for Sale” to James L. White in exchange for the right to work the lower 1,100 feet of the Big Buck claim. United States of America’s Motion for Summary Judgment (Feb. 28, 2017), Ex. B, Agreement between James White and Gene Willison. The agreement referencing the Contract for Sale was notarized on August 7, 1982. The Smiths contend that Terry Smith later purchased mining claims from Jim White in 1994. If true, this assertion indicates the possibility of a connection between Willison and White and between White and the Smiths.

Abandonment

The United States asserts that water right claim 41J 206226-00 was appurtenant to the Big Buck mining claim. The United States contends that the Smiths have not shown privity of title between themselves and the owners of the Big Buck, which was closed before the Smiths located their claims for Teddy Bar #1 and Teddy Bar #2 in 2013. In effect the United States is arguing that water right claim 41J 206226-00 ceased to exist in 1993 at the latest, when Big Buck was closed. The United States asserts that no conveyance of water right 41J 206226-00 could have occurred after that time because it had been abandoned.

The success of the United States’ argument depends on two assumptions. The first is that water right 41J 206226-00 was appurtenant to the Big Buck mining claim when it was closed in 1993. There is evidence to support this assumption, as both the water right and the mining claim are in the same part of section 35.

The second assumption is that whoever owned 41J 206226-00 intended to abandon their water right when the Big Buck mining claim was closed. This assumption is not supported by evidence and amounts to conjecture by the United States. While closing of a mining claim may lead to abandonment of an appurtenant water right, that conclusion is not automatic.

Whether a water right has been abandoned is an issue of fact. The United States has not supplied evidence showing prolonged nonuse of water right 41J 206226-00. Other than speculation, the United States has supplied no conclusive evidence showing what happened with water right 41J 206226-00 after 1993. Elimination of genuine issues of material fact is necessary for the United States to prevail with an abandonment argument at the summary judgment stage of this proceeding. The fate of water right 41J 206226-00 after 1993 is unclear, and summary judgment on the issue of abandonment is inappropriate.

Privity of Title

The United States asserts that “the Smiths are not the legal successors in interest to any property interest held by the owners of the Big Buck unpatented mining claim.” United States of America’s Motion for Summary Judgment at 10 (Feb. 28, 2017). The United States contends that the Smiths could not have obtained an interest in the Big Buck claim after it was closed in 1993, and that privity of title between the Smiths and the prior owner of water right 41J 206226-00 cannot be established.

This argument again depends on an assumption that water right 41J 206226-00 died when the Big Buck mining claim was closed. While that assumption may or may not be proven at trial, it has not been established for the purposes of summary judgment.

In the alternative, the United States asserts that summary judgment is appropriate because there is no deed conveying water right 41J 206226-00 to the Smiths. Deeds containing express transfers of a water right are not the only method of conveying a water right. Many water rights are transferred by implication, a point established by the United States in its reply brief. United States of America’s Reply Brief in Support of Motion for Summary Judgment at 2 (March 30, 2017) (citing *Smith v. Denniff*, 24 Mont. 20, 60 P. 398 (1900)).

At this stage of the proceeding, it is unclear exactly what relationships existed between the Smiths and prior owners of claim 41J 206226-00. The United States acknowledged this uncertainty with the following statement: “The documents before the Court show that the mining claim to which a water right *might* attach, and through which

it *might* be transferred as an appurtenance, has been abandoned.” United States of America’s Reply Brief at 2 (March 30, 2017) (emphasis added).

This statement recognizes an open question about whether claim 41J 206226-00 attached to a mining claim, and if so, which one. This question is critical, because the question of appurtenance, and the transfers of mining claims to which the right may have been appurtenant, may determine its ownership and subsequent fate. The lack of a deed conveying claim 41J 206226-00 to the Smiths raises questions about privity, but it does not rule out a genuine issue of material fact on that issue.

At trial, the Smiths’ claim of ownership for claim 41J 206226-00 will depend on whether privity of title exists between them and prior owners of that right. The Court expresses no opinion on the outcome of that issue by ruling against the United States on summary judgment.

V. CONCLUSION

The United States has not satisfied the requirements for summary judgment on the issue of abandonment.

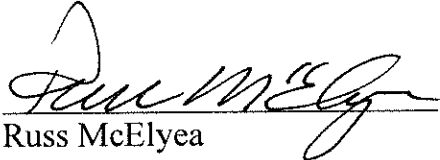
The United States has not satisfied the requirements for summary judgment regarding privity of title between Willison and the Smiths.

VI. ORDER

The United States’ motion for summary judgment is DENIED.

The remainder of the hearing track dates set in the Court’s January 10, 2017 First Amended Scheduling Order remain active. The First Amended Scheduling Order stated the trial would occur on June 7, 2017 at 10:00 AM, but did not specify a trial location. The trial will be held at the **Montana Water Court, 1123 Research Drive, Bozeman, Montana.**

DATED this 11 day of *April*, 2017.


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Last Order (Former Owner):

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Mail Returned as Undeliverable 6/24/2016

Note: Caption and Service List Updated 4/7/2017