

Montana Water Court
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FILED

MAR 13 2018

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
RED ROCK RIVER BASIN (41A)

CLAIMANTS: Carrie A. Peters; Roger D. Peters;
Helen Wellborn; William R. Wellborn

OBJECTOR: Hildreth Livestock Co.

NOTICE OF INTENT TO APPEAR: Denhan Ranches, Inc.

CASE 41A-183
41A 95026-00
41A 117659-00

ORDER ADOPTING MASTER'S REPORT

Procedural History

This case addresses two irrigation claims from Medicine Lodge Creek. Claim 41A 95026-00, is owned by Roger and Carrie Peters (Peters). Claim 41A 117659-00 is owned by William and Helen Wellborn (Wellborn).¹ Both claims are based on an August 1, 1886 right for 120.00 miner's inches (3.00 cfs) decreed to James Nesbitt by the Beaverhead County District (Nesbitt right). Peters and Wellborn both claim all 120.00 miner's inches of the Nesbitt right. Since the combined flow rates exceeded the decreed flow rate, both claims appeared in the Preliminary Decree with "decree exceeded" issue remarks.

¹ William Wellborn is deceased. Nonetheless, William and Helen are both record owners in the State's water right database. This decision refers to "Wellborn", meaning Helen, as the current owner of the claim.

Hildreth Livestock Co. (Hildreth) filed objections to both claims. On May 5, 2016, Hildreth filed a motion for partial summary judgment addressing these objections. The Master granted the motion and incorporated that decision into the Master's Report.

Denhan Ranches Inc. (Denhan) filed a Notice of Intent to Appear for claim 41A 95026-00. On April 18, 2016, Denhan and Peters filed a stipulation. The stipulation did not require any changes to claim 41A 95026-00.

Peters and Wellborn could not resolve the decree exceeded issue. The Master held a hearing on this issue on November 28, 2016. Both parties offered several exhibits into evidence consisting mainly of chain of title documents. Wellborn called three witnesses. Peters called no witnesses. Peters were represented by counsel at hearing, but appeared pro se in their objection to the Master's Report.

The Master issued his report on February 17, 2017. The Master found Wellborn claim 41A 117659-00 was the successor to the Nesbitt decreed right and was entitled to the entire 120.00 miner's inch flow rate. The Master recommended terminating Peters claim 41A 95026-00.

Peters objected to the Master's Report. That objection restates Peters' argument that the only issue before the Court is the flow rate that should be awarded to the two claims. However, the objection goes on to raise new issues regarding Wellborn's historical use and the number of acres Wellborn irrigates with the Nesbitt Right. As part of these new arguments, Peters filed a Request for Judicial Notice. As a preliminary matter, the Court will address this filing.

Peters' Request for Judicial Notice

As part of their objection to the Master's Report, Peters filed a Request for Judicial Notice of Claim 41A 118190-00 under Rule 201, M.R. Evid. This claim, for an unnamed tributary of Medicine Lodge Creek, is owned by Joseph and David Wellborn. Peters argues the claim relates to claim 41A 117659-00 because the source of the claim is a swamp on Helen Wellborn's property that actually irrigates a substantial portion of the place of use claimed by 41A 117659-00. Peters assert both they and Wellborn are successors to the Nesbitt right. They argue the 120.00 miner's inch flow rate should be

apportioned between the two parties based on acres irrigated. Peters claim a 711.00 acre place of use while Wellborn claims an 80.00 acre place of use. In the Request for Judicial Notice, Peters contend Wellborn irrigates about 24.00 acres with the Nesbitt right. The remaining 56.00 acres are irrigated by the swamp water developed by Joseph and David Wellborn. They seek judicial notice of claim 41A 118190-00 as evidence of their contentions.

Wellborn objects to the request for judicial notice arguing claim 41A 118190-00 is not relevant to the issues raised on the two claims in this case. The Court agrees. Peters' request seeks to use this claim as evidence supporting arguments they first raised in their objection to the Master's Report. Those arguments are not timely. In addition, Peter's new arguments are not relevant to the decree exceeded issue. The current record provides sufficient evidence to decide that issue.

Granting the request for judicial notice would open the door to further evidentiary proceedings. Peters cannot make the kind of factual allegations they assert through this request without giving Wellborn the opportunity to present her own evidence. The decree exceeded issue before the Court does not warrant reopening the record. Peters' request is not within what is contemplated by Rule 201, M.R. Evid. and is DENIED.

Standard of Review

The Water Court reviews the Water Master's findings of fact for clear error. *Heavirland v. State*, 2013 MT 313, ¶14, 372 Mont. 300, 311 P.3d 813; Rule 23, W.R.Adj.R. Clear error can be found by one of three ways. A factual finding may be clearly erroneous if it is not supported by substantial evidence. Even if supported by substantial evidence, the finding may be clearly erroneous if the trier of fact misapprehended the effect of the evidence. Even if supported by substantial evidence and the effect of the evidence is not misapprehended, a finding may be clearly erroneous if, in light of the evidence as a whole, the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 17, 383 Mont. 205, 369 P.3d 1034.

Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting. This standard is deferential, and not synonymous with the clear error standard. A reviewing court may still find a factual finding is clearly erroneous even though there is evidence to support it. *Eldorado*, ¶ 18.

The Water Court reviews a Master's conclusions of law to determine if they are correct as a matter of law. *Skelton Ranch v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 26, 375 Mont. 327, 328 P.3d 644.

Issue Presented

Which water right claim in this case is the successor to the Nesbitt decreed right?

Analysis

1. Origin of the Nesbitt Right

The 120.00 miner's inch Nesbitt right was originally decreed in *Graeter et al. v. Rife et al.*, Case No. 129, 5th Judicial District, Beaverhead County (1895) (1895 Decree); (Wellborn-11). The District Court awarded a total of 270.00 miner's inches, with an August 1, 1886 priority date through the Nesbitt Ranch Ditch. The three original appropriators were Wilson Wadams, James Nesbitt, and Frank Andrews. The appropriation was split between these three appropriators as follows:

| | |
|--|-----------------------|
| Wilson Wadams | 30.00 miner's inches |
| James Nesbitt (James Selway successor) | 120.00 miner's inches |
| Frank Andrews (T.B. Craver successor) | 120.00 miner's inches |

The district court found all three owners were tenants in common of the Nesbitt Ranch Ditch (Wellborn-11 at Conclusion 9). Both Peters and Wellborn claim the Nesbitt right.

The original Nesbitt property, consisting of nearly 160 acres, is located in the SESW of Section 7 and the E2NW and Lot 2 (i.e. SWNW) of Section 18.² James Nesbitt acquired the patent to the property in 1888 (Wellborn-3 and 12). Nesbitt sold to James Selway in 1892, with all "water rights and water privileges" (Peters-2b). James Selway's

² All legal land descriptions are in T10S, R11W, Beaverhead County. For brevity, the township, range, and county are not included in legal land descriptions.

successors, Hawley and Lovilla Selway, sold to C.L. Livestock Company in 1920, “with all water rights decreed for said lands to Hawley J. Selway in the Horse Prairie water suit” (Peters-2e).³

2. 1925 District Court Decree

In 1925, the district court issued a second decree for Medicine Lodge Creek, *C.L. Livestock Company et al. v. Hildreth Livestock Company et al.*, Case No. 3405, 5th Judicial District, Beaverhead County (1925) (1925 Decree). While both parties made extensive references to this decree, neither party included it as an exhibit at hearing. Since the Water Court keeps copies of most district court decrees, including this decree, the Court takes judicial notice of the 1925 Decree.

Like the 1895 Decree, the 1925 Decree listed the ownership, flow rate, priority date, and ditch used by each water right. In addition, the 1925 Decree provided the legal description for the land owned by each party. The 1925 Decree listed C.L. Livestock Company as the owner of the Nesbitt property in Sections 7 and 18 and a larger parcel of land in Sections 4, 5, 9, and 10. C.L. Livestock Company received three water rights in this decree:

1. 105.00 miner’s inches, September 15, 1887, through its Ditch #1.
2. 250.00 miner’s inches, October 15, 1883, through its Ditch #2.
3. 120.00 miner’s inches, August 1, 1886, through the Nesbit[t] Ranch Ditch (Finding 5A).

By including the ditches, it is apparent the district court found each water right was limited to use on land serviced by that ditch. While there is some question regarding the original location of the Nesbitt Ranch Ditch, the 1925 Decree is clear, the Nesbitt right was conveyed through the Nesbitt Ranch Ditch and used on the Nesbitt property in Sections 7 and 18. Based on the 1925 Decree, it is clear the Nesbitt right was appurtenant to the Nesbitt property at that time.

3. Land Transactions 1925-1993

³ While the deed misstates the source name and misidentifies the decree, the Nesbitt right is the only water right decreed for this property by the district court.

C.L. Livestock Company owned the Nesbitt property in Sections 7 and 18 for several years. In 1950 C.L. Livestock Company sold the Nesbitt property to Dale Metlin “with all water and water rights, ditches and ditch rights.” Metlin was the president of C.L. Livestock Company at the time (Peters-2f). In 1973, Metlin sold the Nesbitt property to Duke Davis with all appurtenances, but no mention of water rights (Peters-2g). In the same year, Davis sold the property to Wellborn with all appurtenances (Peters-2h). Wellborn is the current owner of the Nesbitt property.

C.L. Livestock Company continued to own property in Sections 4, 5, 9, and 10 until it sold this land to Peters in 1993 (Peters-1a-j). However, the Company did not acquire all of the 711.00 acre place of use for claim 41A 95026-00 until 1966 (Peters-1c, d, e, f, and g). The parcels acquired in 1966, after C.L. Livestock sold the Nesbitt property in 1950, constitute 451.00 acres of the 711.00 acre place of use.

4. Master’s Report and Objections

The Master found the Nesbitt right was historically conveyed through the Nesbitt Ranch Ditch and remained appurtenant to the Nesbitt property in Sections 7 and 18 through several conveyances. He found there was no credible evidence indicating the right was severed from the Nesbitt property or historically used on the Peters property in Sections 4, 5, 6, and 9. The Master found the right was conveyed to Wellborn when she acquired the Nesbitt property. Regarding Peters claim that the right had been moved to their property pursuant to Section 89-803 RCM (1942, repealed 1973), the Master found this assertion was speculative and not supported by evidence.

Peters assert C.L. Livestock Company marshalled its water rights. Peters contends, the Nesbitt right became appurtenant to not only the 80.00 acres Wellborn irrigates on the Nesbitt property, but also to the 711.00 acres Peters acquired from C.L. Livestock Company. At hearing, Peters argued the only issue before the Master was the flow rate for each claim. They asserted their claim was prima facie proof of its content and therefore, they had no obligation to support their priority date or place of use. In their post-hearing filing Peters argued the decreed flow rate should be split between the

parties based on acres irrigated with 108.00 miner's inches going to Peters and 12.00 miner's inches going to Wellborn.

Peters' objection to the Master's Report reiterates their claim is prima facie proof of its content and therefore presumed to be historically accurate. In other words, they had no obligation to prove historical use. However, Peters now asserts Wellborn had the obligation to prove historical use and failed to do so. Peters argues Wellborn failed to prove she historically used all 120.00 miner's inches for irrigation.

Peters did not object to Wellborn's claim. They did not question Wellborn's historical use at hearing. Their arguments regarding Wellborn's current use are not timely or relevant to the decree exceeded issue. Peters and their predecessor had no interest in the Nesbitt right after 1950. Any alleged nonuse by Wellborn does not serve to validate Peters' claim to a portion of the Nesbitt right.

Conclusion

While both statements of claim are prima facie proof of their content, that presumption of correctness can be overcome by other evidence, Section 85-2-227(1), MCA; *Burkhartsmeier et al. v. Burkartsmeier et al.*, Case 40G-2, (MT Water Court Memorandum Opinion and Order Adopting Master's Report Mar. 11, 1997). In this case, both claims are based on the same historically decreed water right. The filings are adverse to each other. Both claims cannot be correct as filed. A decree exceeded issue brings the validity of both claims into question and may touch on a number of claim elements, not just flow rate. By its nature, a decree exceeded issue serves to overcome the prima facie presumption of correctness for both statement of claim filings. While either party can choose to stand by their statement of claim as filed, they do so at their peril. The basis of the claims has been called into question. The prima facie presumption of correctness has been overcome. In this circumstance, each claimant must accept the burden of persuasion to support the historical accuracy of the water right they are claiming, Section 26-1-402, MCA.

The significant evidence on the decree exceeded issue is the chain of title. C.L. Livestock Company is the common predecessor to both Peters and Wellborn. The

company acquired the Nesbitt property and appurtenant water right in 1920. C.L. Livestock Company sold the Nesbitt property to Dale Metlin in 1950 with "all water and water rights, ditches and ditch rights" (Peters-2f). The 1925 district court decree clearly states the 120.00 miner's inch Nesbitt right is appurtenant to the Nesbitt property. There is no credible evidence showing a portion of the Nesbitt right was severed from the Nesbitt property prior to the 1950 conveyance. Even if C.L. Livestock Company did use a portion of this right on other property, it is apparent it sold the entire right to Metlin in 1950.


Based on the district court decree and the plain language in the deeds, C.L. Livestock Company conveyed all 120.00 miner's inches of the Nesbitt water right to Metlin as part of the 1950 transaction. After this transaction, C.L. Livestock Company and its successors had no interest in the Nesbitt right. As the successor to Metlin, Wellborn acquired the entire Nesbitt right when she purchased the property in 1973. Wellborn claim 41A 117659-00 is the successor to the Nesbitt right. Since the claimed basis for Peters claim 41A 95026-00 is invalid, the claim should be dismissed.

Order

The Master's recommendations are supported by substantial evidence. The Master did not misapprehend the effect of the evidence. A review of all of the evidence does not indicate the Master made a mistake. The Master's conclusions of law are correct. It is therefore,

ORDERED that pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court **ADOPTS** the Master's Report and its Recommendations, and **APPROVES** the changes to the centralized computer record system that are reflected on each abstract served with the report.

DATED this *13* day of *March*, 2018.



Douglas Ritter
Associate Water Judge

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