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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MUSSELSHELL RIVER ABOVE ROUNDUP BASIN (40A)
PRELIMINARY DECREE
* *

CLAMAINTS: Erin L. Glennie; Bruce J. Glennie

OBJECTOR: Daniel G. DeBuff

DCERT-0001-WC-2022
40A 184511-00
40A 184518-00

Certified From:
Department of Natural Resources and Conservation
Office of Administrative Hearings

In the Matter of Application for Beneficial Water Use Permit No. 40A 30105384 by Daniel G. DeBuff and Sandra L. DeBuff

ORDER ON MOTION FOR SUMMARY JUDGMENT

BACKGROUND

The Department of Natural Resources and Conservation ("DNRC") Office of Administrative Hearings certified to the Water Court water right claim nos. 40A 184511-00 and 40A 184518-00. The Water Court previously included the two claims in the Preliminary Decree for the Musselshell River, above Roundup Basin (Basin 40A). Daniel G. DeBuff ("DeBuff") objected to both claims during the Basin 40A objection process. Prior to the DNRC certification, the Water Court had not consolidated the claims to address the objections since issuing the preliminary decree.

On May 13, 2022, claimants J. Bruce Glennie and Erin L. Glennie ("Glennie") filed a motion for summary judgment. The motion asks the Court to dismiss DeBuff's objections. DeBuff opposes the motion. The Court heard oral argument on the motion on July 22, 2022 at the Water Court in Bozeman, Montana.

UNDISPUTED FACTS

The following facts are undisputed:

1. The Water Court issued the Preliminary Decree for the Musselshell River, above Roundup Basin (Basin 40A) on June 7, 2017. The Water Court included water right claims 40A 184511-00 and 40A 184518-00 in the preliminary decree.

2. The preliminary decree describes claim 40A 184511-00 as a filed right to use groundwater from a spring that is an unnamed tributary of Cold Spring Creek in Wheatland County for irrigation use. The preliminary decree abstract for the claim describes its various elements, as decreed by the Court. The abstract identifies Glennie as the claim owner. The preliminary decree abstract does not have any issue remarks.

3. The preliminary decree describes claim 40A 184518-00 as a filed right to use groundwater from a spring that is an unnamed tributary of Timber Creek in Wheatland County for irrigation use. The preliminary decree abstract for the claim describes its various elements, as decreed by the Court. The abstract also identifies Glennie as the claim owner. The preliminary decree abstract contains one issue remark:

> THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE SWNESW SEC 3 TWP 9N RGE 17E WHEATLAND COUNTY.

4. On September 11, 2017, DeBuff filed timely objections to both claims. No one else objected to either claim.

5. DeBuff states the basis of his objection to claim 40A 184511-00, as place of use/maximum acres and abandonment/non-perfection. DeBuff included a narrative summary of his objection and included a variety of documents to support the objection.

6. For claim 40A 184518-00, DeBuff states the basis of his objection as flow rate/volume, place of use/maximum acres, point of diversion/means of diversion, and

abandonment/non-perfection. Like claim 40A 184511-00, DeBuff also included a narrative summary of his objection and included a variety of documents to support the objection to claim 40A 184518-00.

7. After the Basin 40A objection and counterobjection periods closed, the Water Court published an objection list. The objection list identifies DeBuff's objections. No one filed notices of intent to appear after the objection list was published.

8. On February 1, 2022, DNRC granted an unopposed motion to certify claims 40A 184511-00 and 40A 184518-00 to the Water Court. The certification order says the certification is "for the adjudication of all factual and legal issues related to the elements of each claim as the same appear in the Basin 40A Preliminary Decree." (Doc. 2.00 at 2).

9. As of the date of DNRC's certification, the issue remark on claim 40A 184518-00 and objections to claims 40A 184511-00 and 40A 184518-00 remain unresolved.

10. The Water Court previously issued a temporary preliminary decree ("TPD") for Basin 40A on May 7, 1985. At that time, Swimming Woman Ranch owned claims 40A 184511-00 and 40A 184518-00.

11. The claims received objections from the Department of Natural Resources and Conservation ("DNRC") following issuance of the TPD. (Doc. 10.00[1], Ex. 3 and Ex. 4).

12. On April 8, 1986, the Water Court called in claims 40A 184511-00, 40A 184518-00, and several other claims owned by Swimming Woman Ranch, on its own motion for the purpose of addressing potential problems with the claimed acres irrigated, volume and flow rate. (Doc. 10.00, Ex. 5).

13. In December 1985, DNRC and Swimming Woman Ranch settled DNRC's objections to all claims, including 40A 184511-00 and 40A 184518-00. The parties filed

[1] Docket no. 10.00 is the Foundational Affidavit of W. John Tietz in Support of Claimants Erin L. Glennie and J. Bruce Glennie's Motion for Partial Summary Judgment. The affidavit includes several documents as exhibits.

settlement stipulations in the Water Court on January 22, 1986. (Doc. 10.00, Ex. 7 and Ex. 8.)

14. On April 4, 1988, Harold DeBuff acquired Swimming Woman Ranch's interest in certain property, including claims 40A 184511-00 and 40A 184518-00. (Doc. 13.00 at 8). Harold DeBuff was Daniel DeBuff's brother. (Doc. 10.00, Ex. 14 at 10 (answer to Interrogatory no. 16)).

15. On June 21, 1990, the Water Court issued a master's report recommending adoption of the 1996 stipulations. The Master's Report recommended certain modifications to the number of acres irrigated and removal of a quantified volume from the claims. The Master's Report also identifies Harold K. and Laurie M. DeBuff as claimants along with Swimming Woman Ranch. (Doc. 10.00, Ex. 6).

16. The Water Court adopted the Master's Report, with certain minor modifications, in an order entered on August 1, 1990. (Doc. 10.00, Ex. 9).

ISSUE

Should DeBuff's objections be dismissed under various claim and issue preclusion doctrines and statutory provisions cited by Glennie?

DISCUSSION

A. Summary Judgment Standard.

Summary judgment is an extreme remedy that is only proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3); *Missoula Elec. Coop. v. Jon Cruson, Inc.*, 2016 MT 267, ¶ 15, 385 Mont. 200, 204, 383 P.3d 210, 213. A material fact is one that involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co*., 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court must view the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co*., 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. "All

reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment." *Id.*

Where the moving party is able to demonstrate there is no genuine issue as to any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co*., 2001 MT 59, ¶ 26, 304 Mont. 356, 362, 22 P.3d 631, 636. Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 14, 353 Mont. 252, 255, 220 P.3d 395, 399.

B. Application.

Glennie raises two sets of arguments as to why the Water Court should dismiss DeBuff's objections. First, Glennie argues § 85-2-233(1)(c), MCA and § 85-2-233(1)(d), MCA bar the objections. Second, Glennie argues the objections are barred by the doctrines of res judicata or collateral estoppel. The Court addresses the arguments in reverse order.

1. Do res judicata or collateral estoppel bar DeBuff's objections?

Glennie argues DeBuff's objections are barred by the doctrines of either res judicata (claim preclusion) or collateral estoppel (issue preclusion) because the objections DeBuff raises were addressed during the TPD proceedings. " Res judicata applies if five elements have been satisfied: (1) the parties or their privies are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them; and (5) a final judgment has been entered on the merits in the first action." *Adams v. Two Rivers Apartments*, LLLP, 2019 MT 157, ¶ 8, 396 Mont. 315, 319-20, 444 P.3d 415, 419. "Collateral estoppel has four elements: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; (3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is now asserted was afforded a full and fair opportunity to litigate the issue." *Adams*, ¶ 9.

Both res judicata and collateral estoppel require the issuance of a "final judgment" on the merits. The threshold question raised by Glennie's motion is whether the Water Court's issuance of an order adopting a master's report during the TPD proceedings qualifies as a final judgment on the merits. If the TPD proceedings are not a final judgment on the merits, both res judicata and collateral estoppel fail because all elements must be present under each theory.

The proceedings Glennie relies on for its common law claim and issue preclusions arguments involved resolution of issues at the TPD stage of the adjudication. The Water Court has not issued a final decree for Basin 40A, and no one appealed the issues decided in the TPD proceedings for these claims. Until the Water Court issues a final decree, all Water Court orders for claims in the basin are interlocutory. *In re Adjudication of Sage Creek Drainage Area*, 234 Mont. 243, 763 P.2d 644 (1988); *In re Horvath*, Case 76G-548 (Master's Report, May 22, 2006); 2006 Mont. Water LEXIS 4, *8. An interlocutory order is not a final order, so neither collateral estoppel nor res judicata apply.

2. Does § 85-2-233(1), MCA bar the objections?

Glennie argues DeBuff's objections to the claims are barred under § 85-2-233(1)(c) and (d), MCA. These two subsections state:

> (c) 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. However, a person may not raise an objection to a matter in a preliminary decree if that person was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of the following reasons ***.
>
> (d) After March 28, 1997, a person may not raise an objection or counterobjection to a matter contained in a subsequent decree issued under this part if the matter was contained in a prior decree issued under this part for which there was an objection and counterobjection period ***.

These two statutes incorporate aspects claim preclusion and issue preclusion and apply them to Water Court proceedings that occur prior to issuance of a final decree. While the subsections are similar, they contain important distinctions that recognize

differences in how the Water Court has issued decrees in various basins in light of legislative changes to the adjudication provisions of the Water Use Act.

Determining which of the subsections applies turns on whether the Water Court has issued a TPD, and whether proceedings for any prior decree included both an objection period and a counterobjection period. The Water Court issued the Basin 40A TPD in May, 1985, well before the March 28, 1997 date referenced in both subparts to the statute. The legislature did not add the opportunity to file counterobjections until 1997. Ch. 174, § 4, L. 1997. Because the Water Court issued the Basin 40A TPD in 1985, the TPD had no counterobjection period. That means subpart (d) does not apply and all that remains of Glennie's motion is whether subpart (c) bars DeBuff's objections.

Unlike subpart (d), Glennie's statutory argument as to subpart (c) is not date-constrained because the Basin 40A TPD was issued before March 28, 1997. That means the objection bar in subpart (c) applies if Glennie proves DeBuff was a "party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree" unless the objection is allowed for one of the enumerated reasons. Section 85-2-233(1)(c), MCA.

The TPD proceedings commenced when Swimming Woman Ranch owned the two claims. The parties submitted a settlement stipulation to the Court for approval in early 1987. Daniel DeBuff's brother Harold DeBuff acquired Swimming Woman Ranch's interest in the claims in 1988. Because the Court did not approve the stipulation until 1990, Harold DeBuff was a party to the case during a portion of the time it was litigated and also when it was resolved.

The parties dispute whether Daniel DeBuff and Harold DeBuff are the same "person" for purposes of applying the preclusion provisions of § 85-2-233(1)(c). If they are, then Daniel DeBuff may not object to any "matter" previously litigated unless an exception applies. If they are not, then Daniel DeBuff may pursue the full scope of his objections.

Glennie cites several Montana cases as authority for the position that Daniel DeBuff should be considered in privity, and therefore the same person, for purposes of

applying the preclusion test. In *Denturist Ass'n of Mont. v. State*, 2016 MT 119, ¶ 14, 383 Mont. 391, 395, 372 P.3d 466, 470, the Montana Supreme Court held that an association's lawsuit on behalf of an individual denturist was barred because a previous lawsuit had been filed on behalf of every denturist in Montana. In *Adams v. Two Rivers Apartments*, the Court found privity when "the interests of the entities in the litigation are 'closely aligned.'" 2019 MT 157, ¶ 13. Applied to this case, Glennie argues Daniel DeBuff was in privity with Harold DeBuff through an apparent combination of familial relationship and knowledge of the property.

Although the facts are undisputed that Daniel DeBuff was Harold DeBuff's brother and Daniel knew a lot about Harold's operations on the property, these facts alone do not meet the privity standard so as to treat them as the same person. The cases cited by Glennie suggest the focus instead should be on whether Daniel and Harold shared the same interests in the prior litigation, not whether they were related or shared common knowledge about the operations. In the prior case, Harold DeBuff became a claimant after the case had settled, although the settlement had not yet been approved. In this case Daniel DeBuff is an objector. Except in situations where a party objects to their own water rights, which is not present here, the interests of a claimant and an objector are not the same. Under the standard for summary judgment, Glennie has not provided sufficient facts for the Court to find sufficient privity to meet the statutory "person" standard.

Even if the privity question was close, Glennie also must demonstrate the TPD proceeding and this case involve the same "matter." DeBuff argues Glennie's claims are fully or partially abandoned. Abandonment was not a matter litigated in the TPD proceeding. Moreover, abandonment is an issue that may evolve over time because it depends on questions of fact, "dependent upon the evidence of the conduct, acts, and intent of the parties claiming the usufruct of the water." *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 309, 311 P.3d 813, 819 (citation omitted). In other words, facts about abandonment may be different now than they were in 1987.

Glennie seems to argue that because the prior proceedings involved a determination of acreage, and acreage adjustments may be the result of an abandonment proceeding, the matters are the same. That is not correct. The prior settlement involved technical issues of the amount of land historically irrigated and adjustments to acreage based upon aerial photograph interpretations conducted by DNRC. (Doc. 10.00, Ex. 3 and Ex. 4). An abandonment proceeding may also involve downward adjustments to acreage, but for entirely different reasons. *See, e.g.*, *Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.*, 2022 MT 19, 407 Mont. 278, 502 P.3d 1080. Issues of abandonment and maximum acreage are not the same "matter." That means under § 85-2-233(1)(c), MCA, even if Daniel DeBuff and Harold DeBuff were persons in privity, the matters addressed in the TPD proceeding do not preclude Daniel DeBuff from objecting to the Glennie claims in the preliminary decree.

ORDER

For the foregoing reasons, Glennie's motion for summary judgment is DENIED. By separate order, the Court will set a conference to discuss the schedule for further proceedings.

Digitally signed by Stephen Brown
Date: 2022.09.20 06:37:43 -06'00'

Stephen Brown
Associate Water Judge

Service via Electronic Mail

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