IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 18-0684

DAVID M. HOON, TERI L. HOON,

Plaintiffs, Appellants and Cross-Appellees,

v.

BETTY MURPHY, as Trustee for the In I Am We Trust, and BEAR MOUNTAIN LLC,

Defendants, Appellees, and Cross-Appellants,

PETER A. BURGGRAFF, JUDY BURGGRAFF

Objectors

OBJECTIONS AND ANSWER TO PETITION FOR REHEARING

On Appeal from the Montana Water Court Case No WC-2017-02
Honorable Douglas Ritter, Associate Water Judge

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ARGUMENT

David and Terri Hoon ("Hoons") argue that this Court overlooked facts material to its decision. According to the Hoons, the Water Court determined that the May 28, 1891 Notice of Appropriation by Thomas Gibson was used "on his desert land entry." At p. 3. Apparently, the Hoons suggest that the Water Court acknowledged that this claim had been perfected. This argument mischaracterizes the Water Court's findings, and does not show that this Court overlooked any fact of relevance to its decision. Those findings and this Court's decision correctly determined that Hoons and the Murphys shared water under a joint appropriation as of June 1, 1891.

The Water Court's Finding of Fact No. 6 includes a statement that "Gibson used the May 28, 1891 right as part of his desert land entry in 1893." This is not a finding that Gibson irrigated the lands patented under the entry with this May 28th, 1891 claim. It merely notes that the claim was identified in his application for patent. This Court likewise noted the Gibson identified the May 28th, 1891 NOA in his application for a desert land entry. Opinion, at ¶ 6.

It is not possible to know now why Thomas Gibson included this reference in his patent application. However, Hoons' witness John Westenburg noted that entries under the desert land laws required one to identify a specific water right for the irrigation of the lands described in the entry. Tr. 187. A "use right" under Montana law will not do, because it is not reflected by any document, although there is no requirement for any particular priority date. Id., Tr. 191. Moreover, the form used for application for patent required one to identify any other person or entity that owns any interest in the water right. Hoon Exhibit 5, Question 16. Because the Gibson-Pritchard NOA of June 1, 1891 obviously identifies another person or entity with an interest in that water right, a designation of another NOA obviates the need to explain to the federal government why a joint appropriation does not forfeit one's right to make a desert land entry. In any event, the evidence purporting to support this desert land entry claimed that between 350 and 450 inches of water were used by Gibson, and these amounts are more in keeping with the appropriative limits under the Gibson-Pritchard NOA, as they substantially exceed the 300 inches claimed under the May 28, 1891 NOA. *See* Hoon Exhibit 5, 202-208.

This isolated reference does not change the Water Court's determination that any right senior to the Gibson-Pritchard NOA is simply not supported by any evidence of historic use, and of course it is that historic use that must inform any

perfection of the May 28th, 1891 claim. Opinion, at ¶ 30. Central to the Hoons' position in this proceeding is their insistence that the reference in the statement of claim submitted by Don and Sara Hilger to a May 28th, 1891 right shows a senior entitlement. Opinion, at ¶ 44. The Water Court rejected any such priority because it was inconsistent with "the wealth of evidence supporting actual historic use." FOF 31, Opinion at ¶ 17. Accordingly, the Hoons are simply mistaken that the Water Court did not determine that the May 28th, 1891 claim had not been perfected. It had not been perfected because the "wealth of evidence" demonstrated that it had never been used.

This Court's analysis confirmed that there is a "wealth of evidence," indeed "overwhelming evidence," Opinion at ¶¶ 38, 39, that the May 28th, 1891 claim was never perfected. "Despite Hoon's assertions to the contrary, the premise of the Water Court's finding regarding the non-perfection of the May 28, 1891 NOA was grounded in an abundance of evidence presented by both Hoon and Murphy." Opinion at ¶ 32. Like the Water Court, this Court noted the deposition testimony of Thomas Gibson confirming that he got one-half of the waters diverted into the Gibson-Reinig Ditch under the June 1, 1891 Gibson-Pritchard NOA. His pleadings in prior proceedings to determine water rights out of the South Fork of the Dearborn identified only this June 1, 1891 water right, and those same pleadings requested that the court require all parties to set forth all their claims to

any water from the South Fork of the Dearborn. Opinion, at ¶ 38. This evidence was completely consistent with the pleadings and deposition testimony of W.W. Reinig, the Murphys' predecessor. Finally, this Court noted that it is inherently implausible that Hoons owned 7.50 cfs under a May 28th, 1891 claim, and another 6.25 cfs reflecting a 50% undivided interest in the June 1, 1891 Gibson-Pritchard NOA. The sum is 13.75 cfs from a Ditch whose capacity is 15.48 cfs, leaving bare Hoons' admission that the Murphys' shared the water in the Gibson-Pritchard Ditch, and the cost of maintenance on that Ditch. Opinion, at ¶ 39.

As this Court noted, the validity and extent of an appropriation is principally governed by the intent of the appropriator. Opinion, at ¶ 48. Accordingly, this Court did not overlook material facts by determining the scope and extent of Hoons' water rights by statements of the original appropriator Thomas Gibson, or by the acts of Thomas Gibson in sharing the waters of the Gibson-Reinig Ditch equally.

Sloan v. Byers, 37 Mont. 503, 97 P. 855 (1908), and *Bennett v. Quinlan*, 47 Mont. 247, 131 P. 1067 (1913), do not support the Hoons' position that their predecessor was not required to plead all his water rights in the former proceeding, notwithstanding his prayer for relief that sought just that result for all parties. In *Bennett*, the Court determined that a prior decree did not under res judicata principles preclude cotenants adjudicated a right in the former action from

contesting their entitlements inter sese. The Court concluded that the former judgment did not adjudicate such matters. Likewise, in *Sloan,* the Court determined that a decree confirming water rights in a ditch did not adjudicate the individual rights of users under that ditch, and that they were free to litigate these entitlements.

Both the *Bennett* and *Sloane* courts looked to what was actually determined in the former action. The Water Court examined the uses under the Gibson-Reinig Ditch in the same way. It carefully reviewed the statements of the those who irrigated out of the Ditch, and determined that there was no priority to the flows diverted into the Ditch.

Contrary to Hoons' claims, this result does not fail to accord a properly filed statement of claim as prima facie proof of the claim's content. Opinion, at ¶44. Instead, the evidence itself demonstrated that the May 28, 1891 claim was never put to use, and as a result, any such prima facie status was rebutted. Opinion, at ¶ 45.

Hoons' arguments that the record fails to show nonuse of their May 28, 1891 for purposes of abandonment simply ignores the "overwhelming evidence," Opinion at ¶39, that there was no use of water under any such priority. While the nonperfection of a right makes it impossible to abandon the non-existing appropriation, and while this Court did not reach the abandonment issue for

precisely this reason, it is nonetheless clear that the asserted May 28th, 1891 has never been used for precisely the reasons this Court and the Water Court relied upon to establish that the right had not been perfected.

The nonuse of any such senior claim comes into the sharpest focus when it is evaluated in the context of water availability from the South Fork of the Dearborn. Gary Murphy testified that he could have used the entire 15.48 cfs diverted into the Ditch for the irrigation of his 427 acre place if use. Tr. 319;1-10; FOF 45. In some years, he was unable to irrigate all his acreage even a single time. The flows in the South Fork simply atrophied too quickly. Tr. 321; 1-9. To cover all his acreage even with a single irrigation, he needed good rainfall, and a heavy snowpack that prompted runoff to at least the middle of July. Tr. 300; 2-7.

After spring runoff is over in the first part of July, the available flows in the South Fork drop precipitously within approximately a week's time to 6-8 cfs. Tr. 308; 15-22. This amount still must answer to ditch loss from the point of diversion to the splitter box, and then it is split between the Murphys and the Hoons. Tr. 309; 3-7. Flows available for diversion into the Ditch continue to erode across the remainder of the irrigation season, albeit in a more linear fashion. Mr. Murphy noted that by the end of September in the year prior to trial, he could get only 3 cfs into the Ditch. Tr. 309; 1-2.

After runoff is over, even with his sprinklers, he is unable to operate both pivots after around July 15th in a typical year. Tr. 325; 19-21. Thereafter, he managed the available supply as best he could to maximize hay production. At some point in a typical irrigation season, the available water will be insufficient to run either sprinkler, and at such times, Gary filled a pond on his property with the residual flows, and ran a single sprinkler off the accumulated water until the supply was exhausted, and then started refilling the pond to start the process anew. Tr. 326;7-16.

Don Hilger irrigated at least 421 acres. FOF 44. Gary accepts that in the event he was not using water, Don could have used all of the 15.5 cfs diverted down the Ditch at runoff. Tr. 322;15-19. Indeed, Mr. Westenberg, the Hoon's expert, noted that the entire 12.5 cfs under the June 1891 filing is well within the Water Court's and the DNRC's standards for irrigation efficiency on 421 acres, and Hoons necessarily insist that that they reasonably require the sum of 6.25 cfs (one-half of the Gibson-Pritchard NOA) and 7.50 cfs (the May 28th, 1891 claim), or 13.75 cfs, to irrigate their lands. Tr. 177; 13-20

Given this context, a 7.50 cfs senior right under the May 28th, 1891 priority would have meant that the Murphys would have no water supply after spring snowmelt runoff, and only 4 cfs, during runoff, before ditch loss to their ranch. Four cfs is one-half of the residual capacity of the Ditch after 7.50 is subtracted

from the total capacity of 15.48 cfs. The fact that this never happened is by itself potent proof that the senior right has not been used. Indeed, it underscores the Water Court's determination that in the event that water was ever used under the senior claim, it has now been abandoned by well over a century of nonuse. *See* FOF 32. Contrary to Hoons' arguments, such a long period of nonuse results in a presumption of an intent to abandon the right, and requires Hoons to demonstrate an adequate explanation for such nonuse. *79 Ranch v. Pitsch*, 204 Mont. 426, 666 P.2d 215 (1983). There is no explanation at all for such a steady abdication of diversions under the asserted senior right.

CONCLUSION

This Court did not overlook facts material to the decision. It exhaustively analyzed all of the questions presented by Hoons, and this Court's judgment fully answers to a controlling precedent. The Petition for Rehearing should be dismissed.

Respectfully submitted this 6th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Matthew W. Williams hereby certify that I have served true and accurate copies of the foregoing Objections and Answer Brief to Petition for Rehearing to the following on 4/06/2020:

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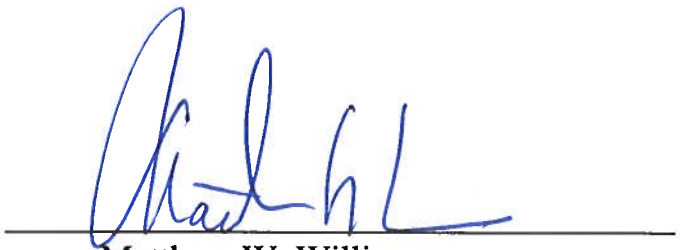

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CERTIFICATE OF COMPLIANCE

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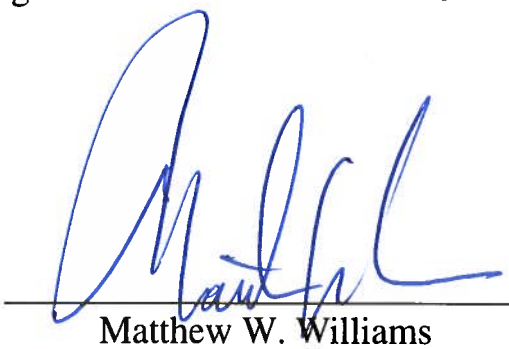

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