

Montana Water Court
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FILED

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Montana Water Court

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

CLAIMANTS: 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)

DECISION AND ORDER CLOSING CASE

I. STATEMENT OF THE CASE

This case involves claim 41J 206226-00. Terry Smith, Casey Smith, and Melissa Smith claim this water right for their mining operation on Thomas Creek. The Smith claim was filed by Gene Willison.

The United States of America (Forest Service) (“United States”) and the Montana Department of Fish, Wildlife, and Parks objected to claim 41J 206226-00. The objectors assert the Smiths do not own this right because there is no privity of title between them and Willison, and that regardless, it was abandoned before the Smiths acquired ownership.

Trial occurred on June 7, 2017 at the Montana Water Court. The United States called one witness, who testified about mining claims in the Thomas Creek area. The Montana Department of Fish, Wildlife, and Parks was present at trial, but did not call or examine any witnesses.

II. ISSUES

1. Was there privity of title between Willison and the Smiths?

2. Was claim 41J 206226-00 abandoned?

III. SUMMARY OF DECISION

Privity of Title

There was privity of title between Willison and the Smiths.

Abandonment

The evidence introduced by the United States focused principally on abandonment of unpatented mining claims. The owner of an unpatented mining claim has a right to remove minerals from public land. Mining claims are obtained independently from water rights, and are separate property interests. Ownership of one right does not mean ownership of the other.

Mining claims and water rights are subject to different abandonment standards. A mining claim may be lost simply by missing an annual paperwork deadline, and may be re-established by locating a new claim in the same place.¹ Abandonment of a water right requires nonuse and intent to abandon. While abandonment of a mining claim may suggest the water right used on it was also abandoned, that result is not automatic.

Mining activity and water use along Thomas Creek followed a cyclical pattern. Mining claims were located, abandoned, and then refiled. Water was used on mining claims when they were active, and efforts were made to maintain diversions, pipelines, and other structures needed to use water for mining.

This pattern of usage was inconsistent with abandonment of the Smiths' water right. Accordingly, claim 41J 206226-00 was not abandoned.

IV. FINDINGS OF FACT

These findings are based on a preponderance of the evidence.

Gene Willison filed claim 41J 206226-00 in 1982. The purpose of the claim was to provide water for mining. The claim was for forty miner's inches from Thomas Creek, with a point of diversion in the SESESW of section 35, T11N, R3E.

¹ "Locating" a mining claim is a term of art. The process of location is described later in this order.

Willison's claim is supported by an affidavit signed by Fred Nopper. Mr. Nopper's affidavit describes diversion of water from Thomas Creek in 1934, with a place of use in the S2 of section 35. A map attached to the water right shows a mining claim in this area, and a point of diversion from Thomas Creek. The features shown on the map correspond with those on the claim filed by Willison.

Gene Willison owned and worked mining claims on Thomas Creek. One of those claims was the Big Buck, which was located in 1937. The Big Buck mining claim was in the S2 of section 35. The legal description for the Big Buck mining claim coincides with the place of use identified by Nopper and Willison for water right 41J 206226-00.

The Big Buck claim, like others in the area, was for placer mining. Placer mining requires the use of water.²

According to BLM records, the last owners of the Big Buck claim were Glenn Allman, Robert Hardgrove, and Treva Hardgrove. A 1961 agreement between these parties refers to a six-inch pump. A 1965 agreement references a sluice box. Sluice boxes are used in placer mines to separate gold from materials such as sand and gravel. Sluice boxes require water.

Litigation over the Big Buck and other mining claims arose between Allman and the Hardgroves. Pleadings from that litigation show conveyance of "an interest in said claims" from Glenn Allman to James White and Gene Willison along with rights to conduct mining operations on claims jointly owned by Allman and the Hardgroves. United States Ex. 10.

The conveyance from Allman to White and Willison occurred on May 12, 1980. Sometime thereafter, White and Willison "proceeded to move onto said claims, additional mining machinery and equipment and proceeded to carry on mining operations to recover the gold." *Id.*

Gene Willison also entered an agreement with James White to work the lower 1,100 feet of the Big Buck claim on May 12, 1980. The agreements between Allman,

² As an historical note, the prior appropriation doctrine originated with water rights used for placer mining, and the term "miner's inch" dates to that era.

White, and Willison established a connection between Willison and the Big Buck mining claim. Willison filed water right 41J 206226-00 two years later.

The Big Buck mining claim was abandoned in 1993. Abandonment of the Big Buck claim did not signal the end of mining activity on Thomas Creek, and new mining claims were subsequently filed in the same area. These claims were located by a variety of individuals on lands within or near the place of use for water right 41J 206226-00. Despite changes in the names of mining claims and their owners, mining continued. Water right 41J 206226-00 was used on several of the mining claims that replaced the Big Buck after it was abandoned.

Among the newer mining claims was Teddy Bar 1. Terry White located this claim in the spring of 1994, only one year after the Big Buck claim was abandoned. Terry White sold his interest to Terry Smith, one of the current owners of water right 41J 206226-00. Teddy Bar 1 included lands in the SE and SW of section 35. The lands were similar to the Big Buck and to the place of use for water right 41J 206226-00. Teddy Bar 1 was eventually abandoned in 1997.

Yellow Boy 2 was located near the original Big Buck claim, and on or near the place of use for water right 41J 206226-00. Yellow Boy 2 was located by Terry White in 1994, and again by Terry Smith in 1998.

In 1996, Terry Smith asked Gene Willison for permission to use Willison's water right on Thomas Creek. Terry Smith used this water to work the Yellow Boy mining claim from 1996 until 2004.

An affidavit of Annual Representation of Mining Claim dated 1996 showed that Terry Smith, Terry White, and James White located Teddy Bar 1 and 2, and Yellow Boy 1 and 2, and that they worked these claims from June 1 through October 15 of that year. The operator was Terry Smith.

Also in 1996, Terry Smith sent a letter to the Townsend Ranger District of the United States Forest Service asking to continue placer mining on Yellow Boy 1 and 2, and the Teddy Bar claims. He asked permission to leave the pond and pit open, and the

wash plant and water pump in place if he was not given permission to operate. This infrastructure was used to divert water right 41J 206226-00.

In 2013, Terry Smith located two more mining claims in the same area as the original Big Buck. These new claims were again named Teddy Bar 1 and Teddy Bar 2, and they are still active. The footprint of these claims is similar to the Big Buck claim, which was the original place of use for Willison's water right 41J 206226-00. Terry Smith approached Gene Willison about using his water right for the second time in 2013. Smith's purpose was to use water right 41J 206226-00 to work Teddy Bar 1 and Teddy Bar 2.

Gene Willison's water right 41J 206226-00 was used on the Big Buck claim, and both iterations of Teddy Bar 1. All three mining claims were in the same area, and fell wholly or partially within the place of use for water right 41J 206226-00. Although the underlying mining claims were located and abandoned in a cyclical pattern, mining activity has been occurring since 1937. Water use has followed the pattern of mining activity. When mining resumed, water use also resumed.

The water use undertaken by Willison and the Smiths required labor, materials, and equipment. Willison and the Smiths constructed diversions, ponds, pipelines, and ditches to supply water to their operations. Once built, these structures needed maintenance, which required additional expenditures of labor, material, and equipment.

In December of 2016, Gene Willison transferred ownership of water right 41J 206226-00 to the Smiths. The property description for the transfer referenced Teddy Bar 1 and 2.

There was no evidence of nonuse of water right 41J 206226-00 prior to July 1, 1973. Mining claim records suggest a period of nonuse between 2004 and 2013. Use of water right 41J 206226-00 by the Smiths resumed in 2013.

V. PRINCIPLES OF LAW

A showing of abandonment requires "a concurrence of act and intent--the relinquishment of possession and the intent not to resume it for a beneficial use.... Neither an intention to abandon nor nonuser [sic] is sufficient; the union of both is

indispensable to constitute abandonment.” *Thomas v. Ball*, 66 Mont. 161, 167; 213 P. 597, 599 (1923) (citations omitted). “[I]ntent to abandon ‘need not be proved directly, but may be inferred from all the circumstances of the case.’” *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813 (quoting *Denver by Bd of Water Comm’rs v. Snake River Water Dist.*, 788 P.2d 772, 776 (Colo. 1990)).

Intent to abandon may be established by showing a prolonged period of nonuse. Once nonuse has been established, a rebuttable presumption of abandonment arises, and the burden of proof shifts to the claimant to show lack of intent to abandon. *Heavirland*, 2013 MT 313, 372 Mont. 300, 311 P.3d 813.

The length of time needed to establish a presumption of abandonment varies. Nine years of non-use is “certainly very potent evidence, if it stood alone, of an intention to abandon.” *Smith v. Hope Mining Co.*, 18 Mont. 432, 438, 45 P. 632, 634 (1896). Twenty-three years of nonuse raised a presumption of abandonment in *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). In *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 56, 375 Mont. 327, 328 P.3d 644, a period of nonuse ranging from 18 to 29 years was sufficient. In *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983), a 40-year period raised a presumption of abandonment, and in *Holmstrom Land Co. v. Meagher County Newlan Creek Water District*, 185 Mont. 409, 424, 605 P.2d 1060, 1069 (1979) it was 75 years.

“To successfully rebut a presumption of abandonment, a claimant must produce ‘[s]pecific evidence explaining or excusing the long period of non-use of the particular water rights on the specific property....’” *Heavirland*, 2013 MT 313, ¶ 32, 372 Mont. 300, 311 P.3d 813 (quoting *In re Musselshell River Drainage Area*, 255 Mont. 43, 51, 840 P.2d 577, 582 (1992)).

VI. ANALYSIS

1. Was there privity of title between Willison and the Smiths?

The objectors contend there was no privity of title between Willison and the Smiths.

The objectors assert that Willison's water right was appurtenant to the Big Buck claim, which was abandoned. Because the Big Buck claim was abandoned, the objectors contend Willison's water right could not later have been conveyed to the Smiths or their predecessors. The objectors assert that abandonment of the Big Buck occurred before Jim White located other mining claims in the area. Although White conveyed mining claims to the Smiths, the objectors assert he did not convey them an interest in the Big Buck.

The objectors also assert the Smiths did not acquire title to any other mining claim that matched the place of use for Willison's water right 41J 206226-00. The objectors argue that abandonment of a mining claim creates a gap in the chain of title for the land on which the water right is used, thereby preventing the conveyance of any appurtenant water right. Montana case law does not support this argument.

The owner of a water right does not need to own the land on which it is used. *Thomas*, 66 Mont. at 166, 213 P. at 599. The status of title to the underlying land does not always determine title to the water right used upon it. "The legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right..." *Hays v. Buzard*, 31 Mont. 74, 81, 77 P. 423, 425 (1904) (quoting *Smith v. Denniff*, 24 Mont. 20, 29, 60 P. 398, 401 (1900)).

This rule makes sense. If ownership of land and water are separate, and the landowner sells or leases the land, the water right owner is not deprived of title. *St. Onge v. Blakely*, 76 Mont. 1, 18, 245 P. 532, 537 (1926). Water rights may also be conveyed separately from the land on which they are used. *Yellowstone Valley Co. v. Associated Mortgage Investors*, 88 Mont. 73, 84, 290 P. 255, 258-259 (1930).

Applying these principles, it is apparent that ownership of the Willison water right did not depend on an unbroken chain of title to the mining claim on which it was first used. The United States suggested the water right described by Nopper was used on the Big Buck mining claim. This belief is reasonable given the similarity between the place of use for the water right and the legal description of the Big Buck claim.

The record establishes a connection between Willison and the Big Buck in several ways. Glenn Allman conveyed an interest in the Big Buck to James White and Willison. Willison also had a separate agreement with White to work the lower 1,100 feet of the claim. The place of use claimed by Willison for water right 41J 206226-00 was nearly the same as the footprint of the Big Buck.

Despite a period of shared history, the Big Buck mining claim and water right 41J 206226-00 were separate property interests. Although it appears Willison used water right 41J 206226-00 on the Big Buck, that does not mean title to the water right followed title to the mining claim, or that the fate of these two property interests was the same.

Willison's water right was used on other claims after the Big Buck was abandoned, and Willison conveyed water right 41J 206226-00 to the Smiths in 2016. There is no evidence he conveyed that water right to anyone else. The possibility of such a conveyance is unlikely because Smith asked Willison for permission to use Willison's water right twice; once in 1996 and again in 2013. Willison's transfer of his water right to the Smiths in 2016 established privity of title between him and the Smiths independent of any mining claim.

The chain of title for the Big Buck mining claim does not determine ownership of the Willison water right. There is no evidence Willison ever owned a one hundred percent interest in the Big Buck claim. At the time he filed water right 41J 206226-00, ownership of the Big Buck was divided among several parties, including Willison. Fractured ownership of the mining claim did not prevent Willison from owning the entirety of the water right used upon it.

Willison was free to convey his water right separately from the Big Buck, or any other mining claim. Accordingly, the Smiths did not need to show privity of title between themselves and a specific mining claim to successfully assert ownership of Willison's water right.

The Smiths did not have the burden of proof. That burden fell on the objectors who challenged Smiths' ownership. The objectors did not present any evidence that someone else owned the Willison right. Instead, the objectors argue that the Willison

water right was appurtenant to mining claims that were abandoned, thereby causing a break in the chain of title to the land on which the water was used. The objectors also assert that abandonment of mining claims caused abandonment of Willison's water right, thereby leaving him with nothing to convey to the Smiths. That assertion is addressed below.

Because mining claims and water rights are separate property interests that may be conveyed separately, privity of title to the Big Buck mining claim was not a prerequisite to ownership of water right 41J 206226-00. Absent a showing of abandonment of his water right claim, Willison's conveyance of water right 41J 206226-00 to the Smiths was legitimate.

The objectors also argued in post-trial proposed findings of fact and conclusions of law that there was no evidence that Willison ever acquired a pre-1973 water right. This lack of evidence, they contend, is sufficient to overcome the prima facie status of claim 41J 206226-00. In effect, the objectors argue that because the Smiths have not offered evidence to show conveyance of a pre-1973 water right to Willison, Willison's claim to such a right was invalid.

This argument misplaces the burden of proof in water rights cases. The Legislature made a policy choice to bestow prima facie status on water rights under Section 85-2-227(1), MCA. As a result, objectors have the burden of proving a water right is invalid. Claimants do not have an obligation to support their water rights with additional evidence until the objector's burden has been met or other evidence shows that the water right is unsound. In the absence of such proof, a claimant may, under the prima facie statute, rest on his or her claim.

Applying this statute, Willison did not need to show privity of title with the appropriator of the Nopper right as a condition precedent to claiming that right. The burden to show that Willison was not the owner fell on the objectors, who did not show Willison was an illegitimate claimant.

Willison claimed a water right for use on a mining claim in the S2 of section 35. Willison's claim for water was based on a water right for mining purposes described by

Nopper in the S2 of section 35. The Big Buck mining claim, which Willison worked, was also in the S2 of section 35. Both the Big Buck mining claim and the water right described in Nopper's affidavit originated in the 1930s.

Glenn Allman, an owner of the Big Buck, conveyed a partnership interest in the Big Buck to James L. White and Gene Willison. United States Ex. 10. White and Willison are predecessors of the Smiths, who are the current claimants of the water right described by Nopper for use on the S2 of section 35.

Neither objector showed that a third party had superior title to the Nopper water right, or that it was abandoned before Willison claimed it. The objectors cannot discharge their burden of proof simply by criticizing Gene Willison for failing to supply a perfect chain of title between himself and the Nopper water right. Establishing that Willison did not own the Nopper right was the objectors' burden. That burden was not met.

2. Was claim 41J 206226-00 abandoned?

The objectors assert that claim 41J 206226-00 was abandoned. They contend this right was tied to the mining claim on which it was used, and that abandonment of the mining claim resulted in abandonment of the water right. They assert the water right was abandoned when Gene Willison quit working the Big Buck, or when the Big Buck itself was abandoned.

The objectors assert that nonuse of Willison's water right began either in 1983 when Willison quit working the Big Buck, or in 1993 when the Big Buck was abandoned. Under either scenario, the objectors assert there has been a long period of nonuse which establishes a rebuttable presumption of abandonment.

The law applicable to creation and abandonment of unpatented mining claims and water rights is not the same. The first step toward establishing an unpatented mining claim is called location. Location of a mining claim consists of staking the corners of the claim and posting notice at the site. 43 C.F.R. § 3831.1. The next step depends on where the claim is located, but usually involves recording a certificate of location in the county clerk and recorder's office and the local BLM office within a specified time. *Id.*

Once an unpatented mining claim has been located, the claimant must meet several annual requirements or lose the claim. Owners of unpatented claims are required to perform “not less than one hundred dollars’ worth of labor...or improvements made during each year.” 30 U.S.C. § 28. In addition, the claimant must annually file a notice of intention to hold the claim, an affidavit of assessment work performed, or an application for deferment of assessment work. 43 U.S.C.S. § 1744(a)(1). Failure to comply with these annual requirements “shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner... .” 43 U.S.C.S. § 1744(c). Missing a deadline can result in abandonment of a mining claim irrespective of the owner’s intent.

Water rights are created differently than mining claims. The simplest historical method of perfecting a water right was to divert water and apply it to beneficial use. No posting of notice or filing of documents was needed. This method was used to create the water right claimed by Willison.

Abandonment of mining claims and water rights is also different. Unlike abandonment of a mining claim, loss of a water right requires evaluation of the owner’s intent. Abandonment of a water right “is a voluntary act involving a concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use. Neither alone is sufficient to bring about the abandonment of the right.” *Osnes Livestock Co. v. Warren*, 103 Mont. 284, 294, 62 P.2d 206, 211 (1936).

A change in the status of land on which water is used does not automatically affect a water right. As an illustration, cancellation of a Desert Land Entry does not result in abandonment of the water right used upon it. Otherwise, “by using a water right upon leased lands the owner would incur the risk of losing it.” *Hays*, 31 Mont. at 82, 77 P. at 425. Similarly, abandonment of a ditch right does not mean the water right carried in that ditch was abandoned. *Kleinschmidt v. Greiser*, 14 Mont. 484, 495, 37 P. 5, 6 (1894). “[A]bandonment of a water right is a question distinct from abandonment of a right created in a different manner.” *In re Musselshell River*, 255 Mont. at 47, 840 P.2d at 579.

In this case, abandonment of mining claims does not automatically result in abandonment of the water right used on those claims. The question separate from the fate of mining claims along Thomas Creek is whether Willison's water right was abandoned. The answer depends on whether there was a presumption of abandonment established by a prolonged period of nonuse, and if so, whether the Smiths rebutted that presumption by showing lack of intent to abandon.

The evidence shows a pattern of ongoing mining activity on Thomas Creek that spans decades and continues today. That pattern included a cycle of location and abandonment of multiple mining claims on or near the area where Willison's water right was used. The cycle of location and abandonment included the Big Buck, two versions each of Teddy Bar 1 and Teddy Bar 2, and the Yellow Boy claims. Each time a mining claim was abandoned, another claim was located in the same area under a different name, and sometimes by a different owner. Although there were periods when mining did not occur and water was not used, those periods always ended with a resumption of both activities.

There were periods when ownership of the Willison water right and the mining claims on which it was used were different. Abandonment of a mining claim by one person does not show intent to abandon a water right owned by someone else. As an example, Glenn Allman gave up an interest in the Big Buck mining claim when Gene Willison owned water right 41J 206226-00. Whatever Allman's intent regarding the Big Buck claim, it did not signal intent by Willison to abandon his water right. Allman's actions did not determine the fate of a water right he did not own.

In some cases, the operators of abandoned mining claims returned and located new claims in the same area using Willison's water right to work those claims. The Smiths followed this pattern. They worked and then abandoned Teddy Bar 1, and then returned and refiled it again. They used Willison's water right on both occasions.

These actions show that intent was not the same regarding abandonment of specific mining claims, mining in general, and water rights. Mining claims came and went, but mining activity continued. The history of this area shows a general lack of

intent to abandon both mining and water use along Thomas Creek. Although a water right cannot be resurrected once abandoned, the ongoing cycle of use and nonuse in this case does not equal abandonment because there was no union of nonuse and intent.

Thomas, 66 Mont. 161, 213 P. 597.

That does not mean abandonment of mining activity and abandonment of a water right cannot occur together. A claimant in the Clark Fork basin owned a patented mining claim and an appurtenant water right. The water right was not used for fifty years and the ditch once used to convey it was not in working condition. The owner of the mining claim had not done any mining, but explained that his water right was not abandoned because he “was awaiting a turn of events in the mining industry to realize the value of both his water right and the underlying mineral interest.” *In re Adjudication of the Existing Rights to the Use of all the Water, Both Surface & Underground Within the Clark Fork River Drainage Area*, 274 Mont. 340, 908 P.2d 1353, 1356 (1995). The Montana Supreme Court rejected this argument.

There are differences between this and the *Clark Fork* case. In the *Clark Fork* case, the mining claim was patented and both the mining claim and water right were owned by the same person for decades. That owner made no effort to mine or use water, and did not develop either property interest.

The story is different here. Mining in the Big Buck area has been ongoing for decades and continues today. Water has been used in conjunction with mining activity irrespective of ownership differences between mining claims and the Willison water right. The miners on Thomas Creek invested significant amounts of labor, time, and equipment in development of their mining operations and in the use of water needed to support those operations. That investment occurred over many years.

Abandonment is a question of fact, and determining whether a water right has been abandoned requires weighing the entire history of the case. *Heavirland*, 2013 MT 313, ¶ 32, 372 Mont. 300, 311 P.3d 813. The periods of nonuse associated with water right 41J 206226-00 were part of a cycle, and were reasonably explained by the Smiths. Periods of dormancy were followed by resumption of use and by expenditures of

additional effort and resources. The history of mining and water use on Thomas Creek does not show that water right 41J 206226-00 was abandoned.

In documents submitted after trial, the objectors asserted Willison showed intent to abandon by failing to attend proceedings scheduled by the Water Court. The Water Court eventually sanctioned Willison for non-attendance by terminating his right. His right was only resurrected after new owners appeared and made a commitment to address the validity of Willison's right on the merits.

Though it is not defensible conduct, failure to attend court proceedings is common among self-represented litigants. The reasons for this behavior range from fear, to lack of understanding of the process, to willful refusal to participate. Where litigants show good faith, the Court generally responds with patience.

The evidence at trial showed that Gene Willison is over ninety years old and has issues with balance that impact his mobility. Under these circumstances, Mr. Willison is entitled to some leeway. His failure to attend prior court proceedings is not evidence of intent to abandon.

VII. CONCLUSIONS OF LAW

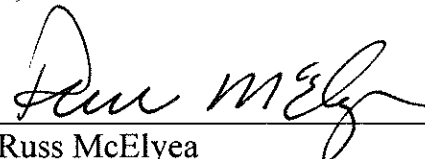
1. There was privity of title between Gene Willison and the Smiths.
2. Water right 41J 206226-00 was not abandoned.

VIII. ORDER

Water right 41J 206226-00 shall appear in the final decree for the Smith River basin in accordance with the attached abstract.

Case 41J-78 is CLOSED.

DATED this 25 day of July, 2017.


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Chief Water Judge

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