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Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty., 321 P.3d 38 (Mont. 2014)

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Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty., 321 P.3d 38
(Mont. 2014)

claimants have the burden to prove the requested amendments by a preponderance of the evidence. Accordingly, the Court rejected Nelson's argument and held that the Brooks' motion to amend did not serve as a repudiation of the original claim.

The Court then addressed whether the water court erred by relying on the Brooks' Statement of Claim as prima facie evidence of the water right. The Court noted that a claim of an existing right "constitutes prima facie proof of its contents until the issuance of a final decree, and that an objector has the burden to prove by a preponderance of the evidence that the elements of the original claim do not reflect the actual beneficial use of the water, as it existed prior to July 1, 1973." Nelson's argument relied on the inference that since the mine was in operation until 1976, Minerals Engineering was likely using the Disputed Well until that time. The Court dismissed this argument and held that the water court correctly concluded that such inferences are not sufficient to overcome the prima facie proof of a filed Statement of Claim.

The Court next addressed whether the water court erred by concluding that it did not need to consider whether the Brooks' claimed right was a "use" right or a "filed" right. A "use right" is a right that puts water to a beneficial use without written notice, filing, or decree, whereas a "filed right" is a right filed and recorded prior to July 1, 1973. The Court then upheld the water court's determination that it need not consider what type of right was in question because, in this case, the type of right was immaterial because both types require proof of beneficial use, and because the amount of use, priority date, and purpose of use are not related to the type of right.

Finally, the Court addressed whether the water court erred by concluding that ownership of the land containing the point of diversion for the claim was not dispositive of the ownership of the water right. Nelson claimed that the water court incorrectly disregarded evidence as to Apex's ownership of the mining claim where the Disputed Well was located. The Court held that a water right is a "usufructuary" right, rather than a physical ownership right, and therefore, "ownership of land where water has its source does not necessarily give exclusive right to such waters so as to prevent others from acquiring rights therein." Therefore, Nelson's claim of ownership of the mining claim where the Disputed Well was located was not dispositive of the issue of ownership of the Disputed Well's water.

Accordingly, the Court affirmed the water court's determination that the claim belonged to the Brooks, and that Nelson failed to prove by a preponderance of the evidence that the Brooks' use of the Disputed Well did not accurately reflect the use as it existed prior to 1973.

Devon Bell

***Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty.*, 321 P.3d 38 (Mont. 2014)** (holding that (i) a public road right-of-way includes the land reasonably necessary for maintenance, repair, and enjoyment; (ii) remand was necessary to determine the width of the public right-of-way established by prescriptive use; (iii) public use of the road right-of-way to access the Ruby River for recreational purposes was permissible; and (iv) access to the river through the public road right-of-way did not constitute an unconstitutional taking of the

landowner's property).

In Madison County, Montana ("County"), Seyler Lane, Lewis Lane, and the Duncan District Road cross the Ruby River by way of bridges. The County built and maintains the three bridges, and all three roads are public. The public acquired use of Lewis Lane and the Duncan District Road through deed and statutory petition, respectively. The public acquired a right-of-way to Seyler Lane and Seyler Bridge through prescriptive use. Defendant James C. Kennedy ("Kennedy") owns land that abuts Seyler Lane and Seyler Bridge. In 2004, with the County's permission, Kennedy built a private fence along the public right-of-way.

In 2004 the Public Lands Access Association, Inc. ("PLAA") sued the County, asserting that the fence intruded on the public's right-of-way and prevented the public from accessing the river. The trial court determined that the Seyler Lane public right-of-way, acquired by prescriptive use, included only the paved and traveled portion of the road and did not include the land beyond Kennedy's fences. The trial court granted the County a separate secondary prescriptive right for any use reasonable and necessary for maintenance and repair. PLAA appealed the decision.

On appeal, the Montana Supreme Court ("Court") determined that all four issues PLAA raised boiled down to one question: whether the public had a right to use the Seyler Lane right-of-way to access the Ruby River. To answer this inquiry, the Court had to determine (i) the ultimate width of the Seyler Lane right-of-way established by prescriptive use and (ii) the purpose for which the right-of-way may be used.

In deciding to grant the County a secondary easement, the trial court relied on Montana case law stating that secondary easement rights may be granted to owners of canal or ditch easements for the purpose of reasonable maintenance. However, the Court noted that what was at issue in this case, as compared to a private easement, was a county road right-of-way established by prescriptive use, and that when a county road is established the public acquires the right-of-way "and the incidents necessary to enjoying and maintaining it." Montana case law further prescribes that when a public road, as opposed to a private easement, is established by prescriptive use, the public right-of-way includes areas necessary to maintain it and allow for safe and convenient use. Accordingly, since land for maintenance and repair was already included in the public right-of-way, the Court held that the trial court erred by granting the County a secondary easement for that specific purpose. The Court reasoned that by doing so the trial court essentially split and narrowed the public right-of-way, which already existed beyond the portion of the road actually traveled.

After holding that the public could use the Seyler Lane right-of-way beyond the traveled path, the Court remanded the issue back to the lower court to determine the exact width of the public's easement. However, the Court first had to determine whether the trial court could consider evidence of past recreational use of the Ruby River when making that determination. PLAA argued that in the original proceeding the trial court erred by excluding evidence of historical recreational use. The Court held that while recreational use alone is not sufficient to establish prescriptive use, it may be considered as part of "the nature of the enjoyment by which the public road right-of-way was acquired and, thus, may be considered in determining the width of the public road right-of-

way.” However, the Court stated that recreational uses that extended beyond the width necessary for maintenance and repair would have to be established by clear and convincing evidence through the statutory period. The Court also noted that a party seeking to admit evidence of recreational use could only rely on use that pre-dated Montana’s 1985 statute, which prohibits establishment of a prescriptive easement if acquired by entering private property to reach surface waters.

The Court then turned to the issue of scope and held that public use of the Seyler Lane right-of-way may include purposes outside those established during the adverse period. The trial court had determined that the public could not travel from the road to the water because the areas were designated only for maintenance and repairs by the County, and, in the alternative, the PLAA had failed to submit evidence of recreational use occurring during the *original* prescriptive period. Having already determined that the public’s right-of-way included those areas needed for maintenance and repair, the Court held that the use of a public road right-of-way established by prescriptive use was not limited to “the adverse usage through which the road was acquired.” The Court held that, as compared to private prescriptive use, the scope of a public road right-of-way is broader and is not limited to the adverse uses by which the public acquired it. It also includes uses that are reasonably incident to the historical uses, and uses that are reasonably foreseeable. In other words, PLAA was not required to show particular recreational use of the right-of-way in order for the public to use it for that purpose now; it needed only to show that recreational use was incidental or reasonably foreseeable. The Court concluded that use of the Seyler Lane right-of-way to access the Ruby River was a “reasonably foreseeable use of a public road right-of-way that crosses a river.”

Finally, the Court addressed Kennedy’s cross-appeal of the trial court’s finding that the public could use the Lewis Lane and Lewis Bridge right-of-way, acquired through an express grant contained in the original deed, to access the Ruby River. The public acquired use of the Lewis Lane roadway and bridge after the County purchased the right-of-way from Kennedy’s predecessor-in-interest in 1910. Although the 1910 deed contained a grant of the right-of-way, Kennedy argued that the trial court erred in allowing the public to use the sixty-foot wide right-of-way to access the river for two reasons: (i) his predecessor never intended the right-of-way to be used for recreational purposes, such as fishing and wading; and (ii) granting public access to the Ruby River amounted to an unconstitutional taking of property because Kennedy owned the riverbed beneath the right-of-way.

The Court rejected Kennedy’s first argument because the Lewis Lane deed expressly granted a public easement without limitation as to its uses. Without clear intent otherwise, the court presumes that a dedicator intended the public to use the right-of-way “in such a way that is most convenient and comfortable for usage known at the time of dedication and to those justified by lapse of time and change of conditions.” Accordingly, the Court held that public access to the river was a convenient and comfortable public use justified by the lapse in time and change in the public’s use over that time.

The Court also rejected Kennedy’s second argument. Kennedy claimed that, as the owner of the riverbed underlying a non-navigable stream, he had the right to exclude the public from accessing that section of the river. The Court,

however, noted that it “is settled law in Montana” that the owner of a riverbed does not have the right to exclude the public from utilizing the riverbed of non-navigable waters and banks up to the high water mark. Therefore, the Court held that since Kennedy never had the right to control access to the water he had “no compensable interest” in the property he claims was taken.

Accordingly, the Court affirmed the trial court’s finding that allowing public access to the Ruby River did not constitute an unconstitutional taking. The Court, however, reversed the trial court on all other issues and remanded the case to the trial court to determine the definite singular width of the Seyler Lane public right-of-way.

Kobi Webb

Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co., 328 P.3d 644 (Mont. 2014) (holding that the water court (i) properly admitted historical documents prepared in anticipation of litigation, pursuant to the ancient documents exception to the hearsay rule; (ii) correctly rejected the Water Master’s findings as to the capacity of a flume on the Thomas ditch and did not improperly substitute its own view of the evidence; (iii) correctly determined that the claimants’ predecessors abandoned or never perfected portions of the claimants’ water rights; and (iv) correctly concluded that the claimants did not acquire any water rights by adverse possession).

Claimants Gregory Duncan, Sherri Donovan, Terry Dougherty (collectively “Duncan”) and Skelton Angus Ranch, Inc. (“Skelton”) filed statements of claim for existing water rights based on notices of appropriation (“NOAs”) filed between 1895 and 1913. These claims shared a single point of diversion from the South Fork of Dupuyer Creek in the Two Medicine River Basin, from which the water flowed through the Thomas ditch and into both Duncan and Skelton’s land. Pondera County Canal and Reservoir Company (“Pondera”) filed a notice of intent to appear in the adjudication of Skelton and Duncan’s claims; Pondera also diverted water from the South Fork of Dupuyer Creek through the Thomas ditch. Following a hearing, the Water Master (“Master”) quantified and assigned priority dates to the claimed water rights. The Montana Water Court (“water court”) amended and then adopted the Master’s Report (“Report”) as amended. Duncan and Skelton then appealed the decision of the water court to the Supreme Court of Montana (“Court”).

The Court considered four issues on appeal. First, the Court addressed whether the water court properly admitted documents that Pondera produced in the early 1900s documenting the water rights in the area. Pondera originally prepared these documents in order to determine the viability of obtaining land under the federal Carey Land Act. Duncan and Skelton argued that the documents were self-serving hearsay evidence prepared in anticipation of litigation and that Pondera had a motive for misrepresentation when the documents were created. The Court held that the statements were properly admitted under the ancient documents exception to the hearsay rule. The Court defined an ancient document as “a document in existence for twenty years or more, the authenticity of which is established.” In this case, Duncan and Skelton conceded that the documents were in existence for over twenty years and were authentic. Addi-