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Skelton Ranch, Inc. v. Pondera Cnty. Canal & Reservoir Co., 328 P.3d 644 (Mont. 2014)

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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 Canal & Reservoir Co., 328 P.3d 644 (Mont. 2014) (holding that the water court (i) properly admitted historical documents prepared in anticipation of litigation, pursuant to the ancient documents exception to the hearsay rule; (ii) correctly rejected the Water Master’s findings as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-

tionally, the Court noted that the Master found that the documents had “sufficient circumstantial indicia and trustworthiness for admission,” and that both the Master and the water court acknowledged the scarcity of purely objective data concerning the water rights at issue.

Second, the Court addressed whether the water court correctly rejected the Master’s findings regarding certain variables used to determine the historical capacity of the Thomas ditch flume (“flume”). The flume was originally built in 1912 after the Thomas ditch washed out in 1908. In 1931 the flume was rebuilt to a size significantly larger than the 1912 flume. In his Report, the Master concluded that certain water rights were limited to the capacity of the 1912 flume, and the construction of the 1931 flume resulted in the creation of new “implied” water rights to be distributed among the parties.

The Master then performed independent calculations to determine the flow rates for both the 1912 flume and the 1931 flume. The flow rates that resulted from these calculations were much higher than the estimated flow rates submitted by the parties’ expert witnesses. The water court rejected the Master’s findings concerning the capacity of the 1912 flume because the Master used the slope measurement from the 1912 flume but based the overall dimensions on a 1920 flume structure. The water court also rejected the Master’s findings concerning the capacity of the 1931 flume, holding that the Master committed clear error by relying on Manning’s formula, which depends heavily on slope, when the factual record contained no slope measurement for the 1931 flume.

The water court relied on testimony from the parties’ experts when calculating the 1912 flume’s capacity. The testimony of the parties’ experts revealed that the maximum capacity of the 1912 flume was likely 4.6 cubic feet per second (cfs). The water court then determined that because the flume did not carry its maximum capacity at all times, the right should be limited to 4.5 cfs. The water court avoided using Manning’s formula when calculating the capacity of the 1931 flume, instead relying on the expert witnesses’ calculations for an inlet-controlled structure and concluding that the flume’s capacity was twenty cfs. The Court held that the water court correctly determined that the Master committed clear error when calculating the flume’s capacities. The Court also held that the water court did not substitute its own view of the evidence for the Master’s because the evidence did not support the Master’s findings.

Third, the Court addressed whether the water court correctly determined that portions of Duncan and Skelton’s water rights had been abandoned or never perfected. Duncan and Skelton claimed additional water rights under 1895, 1902, and 1913 NOAs. The Master determined that Duncan and Skelton’s predecessors abandoned these additional water rights because of the flume’s limited capacity. The water court held that Duncan and Skelton never had rights to the 1895 claim and adopted the Master’s finding that the Duncan and Skelton’s predecessors had abandoned the 1902 and 1913 water rights. Duncan and Skelton argued that their predecessors perfected the 1895 right in the original ditch that washed out and that their predecessors lacked the requisite intent to abandon the other rights.

Addressing the 1895 NOA, the Court concluded that the water court correctly held that neither Duncan nor Skelton had perfected the 1895 NOA. The Court noted that Skelton owned none of the lands mentioned in the 1895

NOA, and that the lands that Duncan owned that were subject to the 1895 NOA reflected a chain of title that did not reference the 1895 NOA. Accordingly, both Duncan and Skelton lacked the requisite contractual relationship with the original appropriator.

The Court then addressed the 1902 and 1913 NOAs and held that the water court was correct in finding that Duncan and Skelton abandoned any water they claimed to have used that exceeded the flume's capacity. The Court reasoned that the flume's capacity limited the amount of water available for beneficial use for eighteen to twenty-nine years, a period of time sufficient to raise a presumption of abandonment. Duncan and Skelton argued that their predecessors' continuous struggle to repair and expand the original flume demonstrated an intention to maintain the rights. The Court found this unpersuasive, holding that those efforts merely signaled an intention to continue to use the amount of water carried by the original 1912 flume. Accordingly, the Court held that the Master and water court did not err in finding the claimed water in excess of the flume's capacity abandoned.

Finally, the Court addressed whether the water court correctly adopted the Master's conclusion that neither Duncan nor Skelton acquired any water rights by adverse possession. Duncan and Skelton argued that if they did lose their interest in the 1895 appropriation, they or their predecessors reacquired ownership of that right through adverse possession. The Court stated that in order for Duncan or Skelton to prove adverse use, they had to provide evidence that they or their predecessors used the water "at a time when the owner of the right to use the water had need of it, used it in such a substantial manner as to notify the owner that it was being deprived of water to which it was entitled; and that during all of that period, the owner could have maintained an action against him for so using the water."

The Master determined that Skelton was not entitled to any portion of the 1895 appropriation based on adverse possession because Duncan's predecessors, as upstream users, used all of the water right carried in the 1912 flume before Skelton could attempt to use it. The Master then determined that Duncan did not provide sufficient evidence to support an adverse possession of either the 1895 or 1902 appropriations. The Court therefore agreed with the Master's determination that neither Duncan nor Skelton were entitled to claim any water from the 1895 appropriation based on adverse possession.

Accordingly, the Court affirmed the water court's opinion on all four issues raised by the claimants.

Brock Miller

NEBRASKA

Joe McClaren Ranch, L.L.C. v. Neb. Pub. Power Dist. (*In re 2007 Admin. of Waters of the Niobrara River*), 851 N.W.2d 640 (Neb. 2014) (holding that: (i) the legislative history of the statutes governing the Nebraska Department of Natural Resources' water right cancellation procedures was not relevant to the issues of common law abandonment or statutory forfeiture, but its improper admission was harmless; (ii) NPPD's failure to call for administration of the Niobrara River prior to 2007 was not evidence of an intent to abandon its water