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Axtell v. M.S. Consulting, 955 P.2d 1362 (Mont. 1998)

MONTANA

Axtell v. M.S. Consulting, 955 P.2d 1362 (Mont. 1998) (holding that genuine issues of material fact exist regarding abandonment of specific water rights and that summary judgment was improper).

M.S. Consulting owned a 110 acre parcel of land in Madison County, Montana. The Axtells owned a two acre parcel within the larger parcel. Eclipse Creek ran through both parcels. Several springs were located on the large parcel, but outside the perimeter of the small parcel. Over the years the Axtells and their predecessors in interest used one of the springs for their domestic water needs. M.S. Consulting attempted to prevent the Axtells from using this spring.

The Axtells filed a complaint and obtained a temporary injunction enjoining M.S. Consulting from interfering with the spring water supply. The Axtells then moved for summary judgment in the district court. The court found no disputed issues of material fact and granted summary judgment in favor of the Axtells.

The district court found that Ms. Florence Baker, the previous owner of the entire parcel, had obtained water from the spring for use on what is now the small parcel. The court also found that when Ms. Baker divided the land she conveyed the large parcel away and reserved the small parcel. In so doing she necessarily reserved with the small parcel the appurtenant water right, even though not expressly reserved in the deed. The court determined that this water right transferred with each new conveyance and ultimately to the Axtells. In making these determinations, the district court held that summary judgment was appropriate, entitling the Axtells to use all the waters of the spring. M.S. Consulting appealed to the Montana Supreme Court to review the summary judgment ruling. The supreme court reversed and remanded the case back to the district court for further proceedings.

In reviewing the lower court's grant of summary judgment, the supreme court first examined early Montana water law doctrine. Prior to 1973, water right adjudication followed the prior appropriations doctrine. Under that system a person could acquire an exclusive right to use a specific amount of water by applying it to the land for a beneficial use. In 1973, the legislature enacted the Water Use Act which abolished the prior appropriation system and implemented a new adjudication system. This system required new filings for existing claims, and provided a statutory method of filing to establish all new claims. The water right at issue in this case originated prior to the 1973 Water Use Act, and therefore was determined under prior appropriation law.

Under the prior appropriation system, exclusive rights to use a specific amount of water can be acquired by applying it to the land for a beneficial use. Once a water right is acquired, the right is generally appurtenant to the land where it is used, and passes with the conveyance of the land. A water right is severable from the land by conveying

the land and expressly reserving the water right, or by conveying the land and water right separately. The new owner may not enlarge a transferred water right beyond the original owner's use.

Once a water right is acquired, the holder must continue to use the water right for a beneficial purpose or risk losing it through abandonment. Abandonment arises when there is nonuse and intent to abandon. Evidence of a long period of continuous nonuse raises a rebuttable presumption of intent to abandon the water right.

In this instance, the spring water went unused on the small parcel for a period of eleven years. M.S. Consulting argues that such nonuse resulted in a loss of the water right. The Axtells argue that their predecessors in interest did not abandon the water right because the record shows that a water conveyance system existed during that time.

In reviewing the record, the court held that several issues of material fact existed with respect to the abandonment of the water right. These disputes were material to the outcome of this case. If the water right appurtenant to the small parcel was not abandoned, then the Axtells would have acquired the right. If abandoned, the water right was not available to pass with the conveyance of the small parcel. Therefore, the court reversed and remanded the case to the district court for further proceedings.

Tracy Rogers

NORTH CAROLINA

King v. State of North Carolina, 481 S.E.2d 330 (N.C. Ct. App. 1997)
(finding that a refusal to grant a 33 U.S.C.A. § 1341 Clean Water Act certification, which resulted in Plaintiff being unable to subdivide property as she desired, did not constitute a denial of all economically viable use of the property and therefore, no taking had occurred).

Plaintiff desired to build a road and construct a 50 lot subdivision on her property—a peninsula. The originally proposed project called for placing between 10,000 and 20,000 cubic yards of fill material on the property. According to Clean Water Act section 404, Plaintiff must obtain a permit from the Army Corps of Engineers "COE" prior to placing fill material onto wetlands. In addition, Plaintiff must provide the COE with a certification that discharge of fill material is consistent with state water quality standards. The Division of Environmental Management ("DEM"), the department responsible for reviewing section 401 certification requests, refused to issue a certification, finding that the proposed wetland fill would degrade surrounding shellfish waters, and that there were less environmentally damaging alternatives for construction of the road.

Plaintiff appealed the decision, and later filed a claim asserting that the decision to refuse section 401 certification and the section 404 permit had denied Plaintiff all reasonable use of her property and,