August 13, 2012

Barton H. Thompson  
Susan Carter, Assistant  
Jerry Yang and Akiko Yamakazi  
Environment and Energy Building, MC 4205  
473 via Ortega  
Stanford, CA 94305-4205  

RE: Montana v. Wyoming and North Dakota  
No. 137, Orig., U.S. Supreme Court  
Montana Law regarding Intrastate Calls or Demands for Water

Dear Special Master Thompson:

This letter is in response to your request for information regarding calls between water users in Montana. Specifically, at the July 27, 2012 hearing in Denver, you asked the parties to provide any forms or other information “as to the nature of calls or demands that are required by senior appropriators under that state’s procedure.” (7/27/12 Tr. at 83, 122).

The State of Montana does not generate or provide any “forms” for use by senior waters users when making a call for water against a junior appropriator. Nor is there a specific statute detailing how a call between private water users is to be made. The process of water rights enforcement in Montana is best described in the attached Staff Report to the Montana Water Policy Interim Committee under the heading “III. Enforcing water rights in Montana.” This document is available online and includes relevant statutory and case law citations, as well as an historic description of water rights enforcement in this State.

I have attached a copy of the Report, along with the cases and statutes referenced in Part III. I hope these materials are responsive to your request. Please let me know if you require any additional information.

Sincerely,

JENNIFER ANDERS
Assistant Attorney General

Enc.
c:   Peter Michael
       James Dubois
       Jennifer Verleger
       Jeannie Whiting
       Michael Wigmore
TO: Water Policy Interim Committee  
FROM: Helen Thigpen, Staff Attorney  
DATE: February 22, 2010  
RE: The nature of a water right and implications for enforcement

I. Summary

The Water Policy Interim Committee (WPIC) is scheduled to discuss the issue of water right enforcement at the March 2010 meeting. Water right enforcement is not a new area of concern, but the issue has garnered significant attention in the last several years as drought and increased use have strained existing water supplies. Many have suggested that water rights should be more strictly enforced. Some have also suggested that the use of water by someone who does not possess a water right or, conversely, the overuse of water by someone who does possess a water right is a theft that should be enforced in the same manner as, for example, the theft of a car. A water right, however, is a unique form of real property that is characterized by the holder’s right to use water rather than by ownership. The purpose of this memorandum is to provide WPIC members with information on the legal characteristics of water rights and to highlight how these characteristics may be significant to the issue of water right enforcement.

II. Water rights as a unique form of real property

One of the most important yet controversial topics in modern property discourse is whether a particular thing constitutes property. The reason for the controversy is obvious; the classification of something as property has enormous implications for whether an individual will have certain recognized property rights. If something is classified as property, then it may be freely conveyed between parties, devised by will, inherited, or encumbered. The classification of a particular thing as property also determines the availability of certain constitutional protections that are unique to property ownership. For example, the Due Process Clause of the U.S. Constitution prohibits the deprivation of property without due process of law. Likewise, the Takings Clause prohibits the taking of private property without just compensation. Across jurisdictions, it is well-settled that neither a due process claim nor a takings claim will be recognized unless a cognizable property interest is at stake. See e.g. Board of Regents v. Roth, 408 U.S. 564, 69 (1972). In addition, unless a property interest is at stake, a common law claim for trespass, conversion, or nuisance cannot be recognized. Finally, since property rights are generally enforced through equitable remedies, such as injunctions, the classification of something as property may determine the availability of a particular remedy.
The very notion of what constitutes property is abstract and cannot be neatly categorized. In its most basic form, property is the "exclusive right of possessing, enjoying, and disposing of a thing". Blacks Law Dictionary, 1216 (Bryan A. Garner ed., 4th ed., West 1990). In Montana, anything that can be owned is called property, which may be classified as either: (1) real or immovable property; or (2) personal or movable property. Sections 70-1-101 and 105, MCA. Real property consists of: (1) land; (2) that which is affixed to land; (3) that which is incidental or appurtenant to land; and (4) that which is immovable by law. By contrast, anything that is not real property is considered personal property.

Property may be owned privately by individuals or publicly by the government. Section 70-1-102, MCA. Ownership of property gives an individual the right to possess and use property to the exclusion of others. Private property — or property over which a person may enjoy absolute and exclusive possession — is a complex and oftentimes controversial topic. Private property may include any type of property that can be legally held by an individual, including land, fixtures, bank accounts, stocks, homes, and cars. In Montana, an individual may have an interest in numerous forms of property. Under section 70-1-104, MCA, an ownership interest may exist in inanimate things capable of manual delivery, domestic animals, obligations, products of labor or skill such as the goodwill of a business or trademarks, and other rights created or granted by law.

Beyond these broad statutory rules, property rights can be generally described as a set of laws that define how individuals may control and transfer property. The rights associated with property ownership are commonly illustrated as a bundle of rights or a bundle of sticks. Instead of describing a particular thing that a person can own, the bundle of rights theory describes a group of rights, which generally includes the right to exclude others from the property, to use and enjoy the property, to dispose of the property by sale or by will, or to mortgage or lease the property. The removal of one right, such as the removal of exclusive possession by granting an easement, does not eliminate the owner's other rights in the property. Many courts, including the Montana Supreme Court, have indicated that the most valued right encompassed within the bundle of rights is "the right to sole and exclusive possession — the right to exclude strangers, or for that matter friends, but especially the government". Kafka v. Mont. Dept. of Fish, Wildlife and Parks, 2008 MT 460, ¶ 51, 348 Mont. 80, 201 P.3d 8 (citing Hendler v. United States, 952 F.2d 1364, 1374 (Fed. Cir. 1991)).

The bundle of rights or bundle of sticks theory has also been used to describe water rights, which is indicative of the treatment of water rights as a form of property. In general, a water right may be defined as an exclusive right to access and use a specific quantity of water as provided by law. The right is exclusive because the holder of a water right may exclude others from interfering with the specific quantity of water that has been allocated to the holder or the source of supply from which the water is claimed. In Montana, a water right is defined as "the right to use water as documented by a claim to an existing right, a permit, a certificate of water right, a state water reservation, or a compact". Section 85-2-422, MCA. Because Montana is a prior appropriation state, which is characterized by the concept of "first-in-time, first-in-right," a water right cannot be obtained unless the water is actually diverted and applied to a beneficial
use. Most western states have adopted some form of the prior appropriation doctrine, but despite whether a state has adopted the prior appropriation doctrine, the riparian doctrine, or some combination of the two, the character and nature of the water right itself is generally the same across jurisdictions. These characteristics are the subject of the following discussion.

It is well-settled that water rights are legally protected property rights. As the Montana Supreme Court explained in 1936, when a right has been fully perfected by diverting the water and applying it to a beneficial purpose, the right becomes a property right that can "only be divested in some legal manner". Osnes Livestock Co. v. Warren, 103 Mont. 284, 294, 62 P.2d 206, 210 (1936). As a result, water rights are protected by both the U.S. and Montana Constitutions and cannot be taken by the government without due process of law. In addition, water rights have value and may be transferred like other forms of property. Thus, conceptually water rights are very similar to the rights that stem from the ownership of real property. In fact, the general rule in western states that have adopted the prior appropriation doctrine is that water rights are considered real property. Like other forms of real property, water rights may be sold, conveyed, leased, encumbered, or assigned. In addition, although a water right normally passes with the land, it may be reserved if the transfer instrument specifically states that the water right has been reserved. See section 85-2-403, MCA.

The recognition that a water right is a form of real property came early in Montana's history. For example, in Sain v. Montana Power, 20 F. Supp. 843 (D. Mont. 1937), the Court found that water rights were a form of real property and further, that suits to adjudicate the extent and priority of water rights were similar to quiet title actions. This principle was also recognized in a 1924 decision from the Montana Supreme Court, in which the Court stated that "[a]n action to ascertain, determine and decree the extent and priority of the right to use of water partakes of the nature of an action to quiet title to real estate." See Verwolf v. Low Line Irrigation Co., 70 Mont. 570, 227 P. 68 (1924). The comparison of an action to adjudicate the extent and priority of a water right to an action to quiet title to real property (in addition to the explicit recognition that a water right is real property) is significant in the context of water law not only because of the rights that stem from the ownership of real property, but because quiet title actions are actions between private parties to establish title to real property. The government generally does not get involved with these types of transactions. This concept is explored more thoroughly in section IV below.

The substantive nature of a water right as a form of real property is also illustrated by the Montana Supreme Court's recognition that water rights may be acquired through adverse possession or prescription. Adverse possession is a method of acquisition of title to property by possession for a statutory period under certain conditions. A claim for adverse possession requires proof of open, notorious, exclusive, adverse, and continuous possession or use of the property for the statutory period of 5 years. See Shaurs v. Branch, 221 Mont. 390, 720 P.2d 239 (1986). Title by prescription requires the establishment of the same elements for an adverse possession claim, but provides only a right to use another's property for a limited purpose. Persons claiming title by adverse possession or an easement through prescription bear the "heavy burden" of proving each of these elements because according to the Montana Supreme Court,
“One who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it.” Grimsley v. Spencer, 206 Mont. 184, 205, 670 P.2d 85, 92-93 (1983). However, pursuant to section 85-2-301, MCA, adverse possession cannot be used as a method for obtaining a water right after July 1, 1973. Section 85-2-301, MCA, also provides that a person may not acquire a right to appropriate water "by any other method, including by adverse use, adverse possession, prescription, or estoppel".

The nature of a water right as real property is also illustrated by how water rights are treated for purposes of taxation. In Verwolf, the Montana Supreme Court stated that while a right to use water "partakes of the nature of real estate" it was "not land in any sense, and when considered alone and for the purpose of taxation is personal property." Otherwise, according to the Court, a right to use water "is not subject to taxation independently of the land to which it is appurtenant". Verwolf, at 578. Because water rights may be severed from land, the possibility arises that one's land value (and thereby the taxable value of the land) will decrease with the separation of the water right from the land. This question of whether a severed water right should be subject to taxation to make up the difference in decreased property tax revenue is beyond the scope of this memorandum, but it may be something WPIC might want to refer to the Revenue and Transportation Interim Committee for further consideration.

Even though water rights may be considered a form of real property, there are significant differences between water rights and traditional forms of real property, such as land, that are often overlooked. The differences, however, are integral to how water rights are acquired, perfected, and transferred. The most significant yet commonly overlooked distinction between a water right and a traditional property right is that a water right holder does not own the water. Instead, by acquiring a water right, the holder acquires the right to use the water at a particular place in a particular quantity. As a result, a water right is commonly described in property law texts as a usufructuary right. A usufruct is defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing". Powell on Real Property § 65.03. The right to use instead of ownership is significant because the water right holder does not have an "ownership interest in the actual corpus (body) of the water until the water is reduced to possession". Powell on Real Property § 65.03. However, once the water is reduced to possession, the water essentially takes on the character of real property and the holder has a property right in the specific quantity of water that has been authorized under the right itself.

The concept of a water right as a right of use instead of ownership is easily illustrated by Montana law. Under Article IX, section 3(3) of the Montana Constitution, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." In other words, the people of Montana own the water and individuals may use the water if the water is not wasted and is allocated towards a beneficial purpose. The Montana Supreme Court articulated this principle in 1923 when it held that an appropriator is not the
owner of property but acquires the right to use it. *Galahan v. Lewis*, 105 Mont. 294, 72 P.2d 1018 (1937). Thus, in Montana the possession of a water right cannot be characterized as absolute ownership. Instead, by acquiring a water right, an individual acquires a right to use the water at a particular place for a particular purpose.

Water rights are distinct from traditional property rights for a variety of additional reasons. The differences stem largely from various limitations – legal and natural – that are unique to water rights in general. First, the water right holder does not have exclusive possession of the water itself. As noted above, the ability of a property owner to exclude others from using or intruding upon a particular piece of property is one of the most essential characteristics of a property right. While the water right holder is entitled to use a particular quantity of water and may "call" the water right of a more junior appropriator in times of scarcity, the water itself may be characterized as a shared resource. For example, there may be federal, state, and tribal government interests in the same watercourse. The federal government may have an interest in hydroelectric power and ensuring the free flow of commerce. The state may have an interest in the water from a public health and safety standpoint and must ensure the viability of the public trust doctrine in navigable waterways. In addition, an Indian tribe may have a reserved water right in the watercourse, and of course, ecological systems rely on a sufficient and clean source of water. On top of these competing possessory interests, the water resource itself is a dynamic resource that changes with each season according to climatological influences.

Water rights are also unique because they are limited in prior appropriation jurisdictions such as Montana by the beneficial use requirement. Under Montana law, water cannot be appropriated unless it is applied to a beneficial use. Beneficial use is defined as "a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses". Section 85-2-102(4), MCA. While the definition of beneficial use is broad (there are additional uses that will meet the beneficial use standard set forth in section 85-2-102(4), MCA), all water rights are limited by this requirement, which has been characterized numerous times as the basis, measure, and limit of the right. In addition, water rights are limited to the amount of water that is actually put to a beneficial use and to the amount that is reasonably necessary for that use. Also, an appropriator cannot change his or her water right without receiving prior approval from the Department of Natural Resources and Conservation (DNRC). To receive approval, the applicant must demonstrate that the change will not have an adverse effect on another’s existing water rights. Section 85-2-402, MCA. Finally, a water right may be forfeited if it is not used for the statutory period of 10 years in Montana. See section 85-2-404, MCA. On a related note, the uniqueness of water rights is also demonstrated by section 85-2-212, MCA, which codified the Montana Supreme Court’s 1979 order (Order No. 14833) requiring every person, entity, municipality, county, state, and federal agency and tribe to file a

1 Section 85-2-404(1), MCA, states that “[i]f an appropriator ceases to use all or a part of an appropriation right with the intention of wholly or partially abandoning the right or if the appropriator ceases using the appropriation right according to its terms and conditions with the intention of not complying with those terms and conditions, the appropriation right is, to that extent, considered abandoned and must immediately expire.”
statement of claim to an existing right to the use of water arising prior to July 1, 1973. Failure to file a claim resulted in a conclusive presumption that the water right or claimed water right was abandoned. Claims for stock and individual uses based upon instream flow or ground water sources were exempted from the requirement, although the claims could be voluntarily filed.

III. Enforcing water rights in Montana

The scheme for water right enforcement in Montana is a unique hybrid of both private and government enforcement mechanisms. The DNRC is charged with administering and regulating water rights in Montana. Under section 85-2-114, MCA, the DNRC has authority to petition the District Court supervising the distribution of water to uphold a water right. Specifically, the DNRC may petition the District Court to "regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use". The DNRC may also petition the District Court to "order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference". Section 85-2-114(1)(b). Finally, the DNRC may request a temporary, preliminary, or permanent injunction "to prevent a violation of this chapter [Title 85, chapter 2]". Section 85-2-114(1)(c), MCA. The DNRC may direct its attorneys, the Attorney General, or a County Attorney to bring suit to enjoin any of the above referenced actions, although either the Attorney General or a County Attorney may bring such an action on their own accord. Section 85-2-114(3) and (4), MCA. In any event, prior appropriators must be given priority in judicial enforcement proceedings and a violator may be subject to civil penalties in an amount not to exceed $1,000 for noncompliance. Section 85-2-122, MCA. Criminal penalties are not available in Montana.

While the DNRC has some authority to enforce water rights and can petition the District Court in the instances outlined above, for a variety reasons that are discussed more thoroughly below, water rights are most commonly enforced through private litigation. Usually this requires a party to obtain an injunction to prevent an interference with a water right. An injunction is an enforceable court order that requires a party to take a particular action. There are three types of injunctions: (1) temporary restraining orders; (2) preliminary injunctions; and (3) permanent injunctions. The first two are commonly brought together and are usually valid for a very limited duration. A temporary restraining order may be granted without notice and allows a court to enjoin an adverse party until a hearing can be held on an application for an injunction or order for a show cause hearing. Under section 85-2-114, MCA, "a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter [Title 85, chapter 2] is being violated". See Eliason v. Evans, 178 Mont. 212, 583 P.2d 398 (1978).

Like a temporary restraining order, a preliminary injunction is also issued before trial. A preliminary injunction, however, lasts longer than a temporary restraining order and is usually issued to preserve the status quo before trial. As an equitable action, a request for a preliminary injunction (or any injunction for that matter) will not give rise to a trial by jury. A preliminary
Injunction may be granted in the following situations: (1) when it appears that the applicant is entitled to the relief demanded and the relief will restrain the action complained of; (2) when it appears that the commission or continuance of some action during the litigation would produce a great or irreparable injury to the party seeking the injunction; (3) when it appears during the litigation that the adverse party is doing, is threatening to do, or is about to do some act that violates the rights of the party seeking the injunction; or (4) when it appears that the adverse party, during the pendency of the action, is threatening or is about to remove or dispose of the adverse party's property with intent to defraud the party seeking the injunction. Section 27-19-201(1) through (4), MCA; see also Espy v. Quinlan, 2000 MT 193, 300 Mont. 441, 4 P.3d 1212. Finally, a court may order a permanent injunction after a trial is complete and the dispute has been decided. Although similar to a temporary injunction, a permanent injunction may be limited or infinite in duration. Permanent injunctions have been upheld by the Montana Supreme Court on a variety of occasions in the context of water use. See e.g. Wills Cattle Co. v. Shaw, 2007 MT 191, 338 Mont. 351, 167 P.3d 397.

There are additional methods by which a party can enforce a water right. In times of scarcity, a senior appropriator may "call" the water rights of a more junior appropriator when water availability is low. The quintessential component of the first-in-time, first-in-right doctrine is that whoever obtains a water right first has priority over those who obtained subsequent water rights in the same source. As such, priority dates can determine whether a user will have any access to water in times of scarcity. Senior users are entitled to use the total amount of their water rights first. Junior water right holders cannot use water pursuant to their rights unless the use does not adversely affect a senior user.

In addition, in cases where a temporary preliminary, preliminary, or final decree exists, a party may petition a District Court to appoint a water commissioner to settle a water distribution dispute, provided that the owners of at least 15% of the water rights affected by the decree filed the petition. See section 85-5-101, MCA. If 15% of the owners of the water rights affected by the decree cannot be obtained for the petition, a water commissioner may still be appointed if the petitioners can show that they are not receiving the water to which they are entitled. In these cases, the water commissioner will distribute the water according to the decree. Similarly, in the case where the water rights of all appropriators from a source or in a defined area have been determined, the DNRC and one or more water right holders may also petition a District Court to have a water commissioner appointed. Sections 85-5-101(1) and (2), MCA. A water dispute may be easily settled in these cases because the water rights at issue have already been determined. When a temporary preliminary, preliminary, or final decree does not exist, or when all appropriators from a source or area have not been determined, any party may petition the District Court to certify the matter to the Chief Water Judge for a determination of the water rights at issue. Pending a determination by the Water Court, the District Court may issue an injunction or other relief necessary. Section 85-2-406(2)(b), MCA. Any party may also petition the District Court to appoint a water mediator to assist with the resolution of a dispute. Under Montana law, a water mediator does not have formal power to order any water user to take a particular action. Rather, the mediator provides guidance to the parties for the nonjudicial resolution of the dispute. Section 85-5-110, MCA.
In 2009, the Legislature revised many of Montana's laws with respect to water right enforcement. Pursuant to House Bill No. 39, Chapter 103, Laws of 2009, a special water master may now be appointed by a District Court to assist with enforcement. Prior to the passage of House Bill No. 39, water masters were only authorized to assist with various duties before the Water Court. House Bill No. 39 provides specific authorization for a water master to assist with actions brought pursuant to section 85-2-114, MCA. As an officer of the Court, a water master has all the general powers given to a master under Rule 53(c) of the Montana Rules of Civil Procedure. In the Water Court, water masters are responsible for assisting the Court with adjudication matters and are assigned to a particular basin to consolidate claims, conduct conferences, order field investigations, accept or rejecting settlement agreements, and issue a Master's Report. Water masters, however, do not monitor individual water users to determine whether a person is unlawfully using water in violation of another's water rights.

House Bill No. 39 also removed various enforcement hurdles for the DNRC. Section 85-2-114(1), MCA, formerly required the DNRC to make reasonable attempts to obtain voluntary compliance from a party before it could file a petition with the District Court for any alleged violation of Title 85, chapter 2, MCA, commonly referred to as the Montana Water Use Act. Following the passage of House Bill No. 39, the DNRC may, but is not required to, obtain voluntary compliance from a party before filing a petition with the District Court. The 2009 amendments to section 85-2-114, MCA, also require the DNRC, the County Attorney, and the Attorney General to "give priority to protecting the water rights of a prior appropriator under an existing water right, a certificate, a permit, or state water reservation" when enforcing any of the provisions of section 85-2-114, MCA. Finally, House Bill No. 39 established a water right enforcement program and account that required fines collected under section 85-2-122(3)(b), MCA, to be deposited into the account.

IV. Considerations

As noted in the discussion above, water right enforcement in Montana is a unique hybrid of both private and government enforcement mechanisms. While other states have also developed shared enforcement schemes for water rights, the degree of involvement by state agencies varies from state to state. In comparison to other prior appropriation states, enforcement of water rights in Montana relies more heavily on individual water right holders and less on government assistance. Some have suggested that water right holders in Montana would benefit from a more robust state role. This section provides some considerations for WPIC members as the committee contemplates changes to the current enforcement scheme.

There are a variety of possible explanations for the emphasis on private rather than government enforcement. The primary reason may stem from the legal characterization of water rights as a form of real property. On one hand, the classification of water rights as real property has resulted in the recognition that water rights have value and can be transferred, inherited, devised, encumbered, and disposed of in much the same way as real property. On the other hand, it may be why much of the enforcement burden has been placed upon private individuals. Real property rights are usually enforced through private party actions without government
involvement. For example, the government does not assist parties with the enforcement of private property rights through quiet title and adverse possession actions (common claims involving disputes over real property). In these cases, the individuals themselves are responsible for establishing their rights in the property at issue. With respect to quiet title actions, an individual files a claim in a District Court with jurisdiction over the property to remove any adverse claims against the title. There is no mechanism whereby the government steps into the shoes of this individual to ensure that adverse claims have been removed and title has been established. Similarly, in the context of adverse possession, an individual is responsible for filing a claim in court and establishing that title has been established through adverse possession. Again, the government does not assist the individual claimant with establishing rights in the property.

Particular aspects of Montana's history may also be a factor in the emphasis on private enforcement. For example, it was not until the passage of the Montana Water Use Act in 1973 that Montana adopted a comprehensive system of water right administration. The creation of the Water Court in 1979 added to the state's capacity to carry out the significant administrative tasks imposed by the Montana Water Use Act, but full adjudication of water rights in Montana is still years away. As a result, comprehensive enforcement of water rights by the state is a difficult prospect. There are additional complications, including the fact that an enforceable decree (one where a commissioner can be appointed to distribute water) is difficult to obtain in many cases. An enforceable decree may be obtained only after federal reserved water rights have been incorporated into a preliminary decree by the Water Court or pursuant to section 85-2-404(4), MCA. Because of the relatively late development of institutions and process for clarifying and protecting water rights, especially the ongoing adjudication processes, Montana's water rights system remains primarily focused on clarifying existing rights rather than on enforcement. This focus on adjudication of existing rights has also likely contributed to the heavy reliance on private party enforcement of water rights.

There are also administrative limitations on the enforcement of water rights in Montana. As illustrated above, neither the DNRC nor the Water Court are charged with broad authority to enforce water rights. The stated mission of the Water Rights Bureau within the DNRC is "to assure the orderly appropriation and beneficial use of Montana's scarce waters". While the DNRC has significant authority to administer the Montana Water Use Act, it does not have the specific statutory authority or resources to implement a broad enforcement scheme. For its part, the Water Court was established to provide jurisdictional authority over the adjudication of Montana's pre-1973 water rights, not to provide enforcement.

Wyoming's centralized system provides a clear contrast to Montana's. Wyoming began permitting and administering water rights on a statewide basis in 1890, the same year Wyoming became a state. Wyoming's State Engineer and Board of Control provide for the ongoing adjudication and administration of water rights. Water rights are derived solely through the Wyoming State Engineer's permitting process, and neither historic use nor adverse possession can be used to establish a water right. In addition, adjudicated water rights in Wyoming exist in perpetuity and can only be lost through abandonment. Anyone wishing to change an existing
An individual water right holder does not own the water. Rather, under Article IX, section 3(3) of the Montana Constitution, "All surface, underground, flood, and atmospheric
water within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." While the DNRC is charged with administering and issuing water rights, there are several institutional and administrative limitations to stricter enforcement of water rights. The primary limitation may be that private property rights are usually enforced by the parties to the dispute through private litigation. The government usually does not intervene in disputes over private property. The states of Wyoming and Utah have more centralized water right administration systems, as well as state engineers to enforce water rights on a comprehensive statewide basis. The cost of establishing a similar program in Montana would be significant and should be considered during these discussions.
TITLE 85 WATER USE
CHAPTER 2 SURFACE WATER AND GROUND WATER
PART 1 GENERAL PROVISIONS

85-2-114 Judicial enforcement.

(1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may, after reasonable attempts have failed to obtain voluntary compliance as provided in subsection (4), petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation. The county attorney may prosecute under 85-2-122(1) or bring an action under 85-2-122(2) without being requested to do so by the department. The attorney general and a county attorney are subject to the voluntary compliance provisions of subsection (4).

(4) The department shall attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). The attempts to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.

85-2-114 Judicial enforcement.

(1) If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may petition the district court supervising the distribution of water among appropriators from the source to:

(a) regulate the controlling works of an appropriation as may be necessary to prevent the wasting or unlawful use of water or to secure water to a person having a prior right to its use;

(b) order the person wasting, unlawfully using, or interfering with another's rightful use of the water to cease and desist from doing so and to take steps that may be necessary to remedy the waste, unlawful use, or interference; or

(c) issue a temporary, preliminary, or permanent injunction to prevent a violation of this chapter. Notwithstanding the provisions of Title 27, chapter 19, part 3, a temporary restraining order must be granted if it clearly appears from the specific facts shown by affidavit or by the verified complaint that a provision of this chapter is being violated.

(2) Upon the issuance of an order or injunction, the department may attach to the controlling works a written notice, properly dated and signed, setting forth the fact that the controlling works have been properly regulated by it. The notice constitutes legal notice to all persons interested in the appropriation or distribution of the water.

(3) The department may also direct its own attorney or request the attorney general or county attorney to bring suit to enjoin the waste, unlawful use, interference, or violation.

(4) The county attorney or the attorney general may bring suit to enjoin the waste, unlawful use, interference, or violation or bring an action under 85-2-122(1) without being requested to do so by the department.

(5) A county attorney who takes action pursuant to subsection (3) or (4) may request assistance from the attorney general.

(6) When enforcing the provisions of this section, the department, the county attorney, and the attorney general shall give priority to protecting the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation.

(7) After considering the provisions of subsection (6), the department may attempt to obtain voluntary compliance through warning, conference, or any other appropriate means before petitioning the district court under subsection (1). An attempt to obtain voluntary compliance under this subsection must extend over a period of at least 7 days and may not exceed 30 working days.
HISTORY: En. Sec. 2, Ch. 259, L. 1955; amd. Sec. 84, Ch. 253, L. 1974; R.C.M. 1947, 60-802.
85-2-122 Penalties.

(1) Except as provided in 85-2-410(6), a person who violates or refuses or neglects to comply with the provisions of 85-2-114, any order of the department, or any rule of the department is subject to a civil penalty not to exceed $1,000 per violation. Each day of violation constitutes a separate violation.

(2) Except as provided in subsection (3), fines collected by the department or a district court under subsection (1) must be deposited in the account established in 85-2-318 for use by the department in the enforcement of 85-2-114.

(3) If a fine is collected by an independent action brought by:

(a) the county attorney, the fine must be deposited in the general fund of the county; or

(b) the county attorney with assistance from the attorney general or by the attorney general, the fine must be deposited in the water right enforcement account created in 44-4-1101 and must be used to enforce the provisions of 85-2-114.

HISTORY: En. 60-149 by Sec. 3, Ch. 260, L. 1974; R.C.M. 1947, 60-149; amd. Sec. 3, Ch. 530, L. 1989; amd. Sec. 2737, Ch. 56, L. 2009; amd. Sec. 11, Ch. 474, L. 2009.
85-5-101  Appointment of water commissioners.

(1) Whenever the rights of persons to use the waters of any stream, ditch or extension of ditch, watercourse, spring, lake, reservoir, or other source of supply have been determined by a decree of a court of competent jurisdiction, including temporary preliminary, preliminary, and final decrees issued by a water judge, it is the duty of the judge of the district court having jurisdiction of the subject matter, upon the application of the owners of at least 15% of the water rights affected by the decree, in the exercise of the judge's discretion, to appoint one or more commissioners. The commissioners have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates, permits, and changes in appropriation right issued under chapter 2 of this title. When petitioners make proper showing that they are not able to obtain the application of the owners of at least 15% of the water rights affected and they are unable to obtain the water to which they are entitled, the judge of the district court having jurisdiction may appoint a water commissioner.

(2) When the existing rights of all appropriators from a source or in an area have been determined in a temporary preliminary decree, preliminary decree, or final decree issued under chapter 2 of this title, the judge of the district court may, upon application by both the department of natural resources and conservation and one or more holders of valid water rights in the source, appoint a water commissioner. The water commissioner shall distribute to the appropriators, from the source or in the area, the water to which they are entitled.

(3) The department of natural resources and conservation or any person or corporation operating under contract with the department or any other owner of stored waters may petition the court to have stored waters distributed by the water commissioners appointed by the district court. The court may order the commissioner or commissioners appointed by the court to distribute stored water when and as released to water users entitled to the use of the water.

(4) At the time of the appointment of a water commissioner or commissioners, the district court shall fix their compensation, require a commissioner or commissioners to purchase a workers' compensation insurance policy and elect coverage on themselves, and require the owners and users of the distributed waters, including permittees, certificate holders, and holders of a change in appropriation right, to pay their proportionate share of fees and compensation, including the cost of workers' compensation insurance purchased by a water commissioner or commissioners. The judge may include the department in the apportionment of costs if it applied for the appointment of a water commissioner under subsection (2).

(5) Upon the application of the board or boards of one or more irrigation districts entitled to the use of water stored in a reservoir that is turned into the natural channel of any stream and withdrawn or diverted at a point down-
stream for beneficial use, the district court of the judicial district where the most irrigable acres of the irrigation district or districts are situated may appoint a water commissioner to equitably admeasure and distribute stored water to the irrigation district or districts from the channel of the stream into which it has been turned. A commissioner appointed under this subsection has the powers of any commissioner appointed under this chapter, limited only by the purposes of this subsection. A commissioner's compensation is set by the appointing judge and paid by each district and other users of stored water affected by the admeasurement and distribution of the stored water. In all other matters, the provisions of this chapter apply so long as they are consistent with this subsection.

(6) A water commissioner appointed by a district court is not an employee of the judicial branch, a local government, or a water user.

(7) A water commissioner who fails to obtain workers' compensation insurance coverage required by subsection (4) is precluded from receiving benefits under Title 39, chapter 71, as a result of the performance of duties as a water commissioner.

85-2-406 District court supervision of water distribution.

(1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision must be governed by the principle that first in time is first in right.

(2) (a) A district court may order the distribution of water pursuant to a district court decree entered prior to July 1, 1973, until an enforceable decree is entered under part 2 of this chapter or the matter has been adjudicated under the procedure set forth in subsection (2)(b).

(b) When a water distribution controversy arises upon a source of water in which not all existing rights have been conclusively determined according to part 2 of this chapter, any party to the controversy may petition the district court to certify the matter to the chief water judge. If a certification request is made, the district court shall certify to the chief water judge the determination of the existing rights that are involved in the controversy according to part 2 of this chapter. The district court from which relief is sought shall retain exclusive jurisdiction to grant injunctive or other relief that is necessary and appropriate pending adjudication of the existing water rights certified to the water judge. Certified controversies must be given priority over all other adjudication matters. After determination of the matters certified, the water judge shall return the decision to the district court with a tabulation or list of the existing rights and their relative priorities.

(3) A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed with the department. The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

(4) A temporary preliminary decree or preliminary decree or a portion of a temporary preliminary decree or preliminary decree as modified after objections and hearings is enforceable and administrable according to its terms. If an action to enforce a temporary preliminary decree or preliminary decree is commenced, the water judge shall accept referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.
(5) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree or a person exercising a suspension under 85-2-217 and part 7 of this chapter may appeal a determination made pursuant to subsection (2).

HISTORY: En. Sec. 2, Ch. 35, Ex. L. 1933; amd. Sec. 1, Ch. 95, L. 1935; re-en. Sec. 349.2, R.C.M. 1935; amd. Sec. 1, Ch. 163, L. 1965; amd. Sec. 3, Ch. 158, L. 1967; amd. Sec. 120, Ch. 253, L. 1974; R.C.M. 1947, 89-102(part); amd. Sec. 3, Ch. 505, L. 1981; amd. Sec. 29, Ch. 298, L. 1983; amd. Sec. 1, Ch. 332, L. 1987; amd. Sec. 1, Ch. 491, L. 1989; amd. Sec. 8, Ch. 478, L. 1993; amd. Sec. 71, Ch. 18, L. 1995; amd. Sec. 415, Ch. 418, L. 1995; amd. Sec. 1, Ch. 436, L. 1997; amd. Sec. 14, Ch. 432, L. 2007.
TITLE 85 WATER USE
CHAPTER 5 WATER COMMISSIONERS AND WATER MEDIATORS
PART 1 APPOINTMENT AND DUTIES

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85-5-110 Appointment of water mediators -- duties.

(1) The judge of the district court may appoint a water mediator to mediate a water controversy in a decreed or nondecreed basin under the following circumstances:

(a) upon request of the governor;
(b) upon petition by at least 15% of the owners of water rights in a decreed or nondecreed basin; or
(c) in the discretion of the district court having jurisdiction.

(2) A water mediator appointed under this section may:

(a) discuss proposed solutions to a water controversy with affected water right holders;
(b) review options related to scheduling and coordinating water use with affected water right holders;
(c) discuss water use and water needs with persons and entities affected by the existing water use;
(d) meet with principal parties to mediate differences over the use of water; and
(e) hold public meetings and conferences to discuss and negotiate potential solutions to controversies over use of water.

(3) If the governor requests or a state agency petitions for a water mediator, the governor or agency shall pay all or a majority of the costs of the water mediator as determined equitable by the district court having jurisdiction.

(4) The governor may use funds appropriated under 75-1-1101 to pay the costs of a water mediator.

(5) This section does not allow a water mediator to require any valid water right holder to compromise or reduce any of the holder's existing water rights.

(6) If an appropriator voluntarily ceases to use all or part of an appropriation right or voluntarily ceases to use an appropriation right according to its terms and conditions as a result of the efforts of a mediator appointed under this section, the appropriator may not be considered to have abandoned all or any portion of the appropriation right.

HISTORY: En. 89-8-102.2 by Sec. 1, Ch. 356, L. 1975; amd. Sec. 1, Ch. 117, L. 1977; R.C.M. 1947, 89-8-102.2; amd. Sec. 1, Ch. 277, L. 1983; amd. Sec. 4, Ch. 448, L. 1983; amd. Sec. 6, Ch. 573, L. 1985; amd. Sec. 15, Ch. 217, L. 2003; amd. Sec. 19, Ch. 337, L. 2005.
LEONARD ELIASON and R. E. INDRELAND, Plaintiffs and Appellants, v.
ROBERT EVANS, Defendant and Respondent

No. 13652

Supreme Court of Montana

178 Mont. 212; 583 P.2d 398; 1978 Mont. LEXIS 621

April 28, 1978, Submitted
August 21, 1978, Decided


DISPOSITION: Order vacated and case remanded for further proceedings.

COUNSEL: Daniels & Mizner, Deer Lodge, M. K. Daniels, argued, Deer Lodge, for plaintiffs and appellants.
Knight, Dahood & Mackay, Anaconda, Conde F. Mackay, argued, Anaconda, for defendant and respondent.

JUDGES: Mr. Justice Shea delivered the opinion of the Court. Mr. Chief Justice Haswell and Justices Harrison, Daly and Sheehy concur.

OPINION BY: SHEA

OPINION

[*213] [**399] Plaintiffs appeal from an order of the District Court, Powell County, dissolving a temporary restraining order, denying plaintiff's motion for an injunction pendente lite, and adopting defendant's proposed findings of fact and conclusions of law.

The action below involved three parties asserting conflicting water rights. The land involved is located in the Deer Lodge Valley in Powell County, approximately 8 miles south of Deer Lodge, Montana. All of the land is bounded on the west by Interstate 90 and on the east by the Clark Fork River. Defendant's land is located south and adjacent to land previously owned by Mr. and Mrs. [***2] Raymond Johnson. The Johnson's property has apparently passed to their daughter, Audrey Ragsdale. [**400] For clarity, this property will hereafter be referred to as the Johnson-Ragsdale land. Plaintiffs' land is situated immediately east of the Johnson-Ragsdale property. It is bounded on the immediate east by the Clark Fork River. All of the property slopes in a northeasterly direction toward the Clark Fork River.

[*214] In approximately 1955, defendant used a drag line to construct a drainage ditch on the western boundary of his property. This ditch is estimated to be 35 feet wide and five to seven feet deep; it extends about one mile north before turning due east into a smaller irrigation ditch. The smaller ditch runs along the northern boundary of defendant's land.

In the past, the excess water from the Evans' irrigation ditch emptied and drained onto the southeast corner of the Johnson-Ragsdale property. From there, it flowed over the Johnson-Ragsdale property and onto the property owned by the plaintiffs. Plaintiffs and their predecessors in interest had, until 1970, utilized this water to irrigate their hay fields and pastureland.

In approximately 1971, [***3] defendant installed a sprinkler system on his property and discontinued using the water from his irrigation ditch. This action increased the volume of water flowing onto the Johnson-Ragsdale property and in turn, provided the plaintiffs with more water for their land. However, the additional water caused extensive flooding and erosion of topsoil on the Johnson-Ragsdale property.

To alleviate the destruction of their property, the Ragsdales built a drainage ditch across the western portion of their property. This ditch extended in a southerly direction until it merged with Evans' drainage and irrigation ditches. At the intersection of the Johnson-Ragsdale ditch and Evans' irrigation and drainage ditches, Evans
built a small earthen dam which diverted all of the water into the Johnson-Ragsdale ditch, to the eventual exclusion of the plaintiffs' land. The Ragsdales then filed an application for water appropriation on all water flowing from the Evans' ditch. With the dam in place, all water which normally flowed to the plaintiffs' land had ceased. The Ragsdales have been using the water to operate their sprinkling system.

On several different occasions, the small earthen dam has [***4] become inoperable and water would resume flowing across the Johnson-Ragsdale property, to be later used by the plaintiffs. To permanently prevent the water from flowing to the plaintiffs, [*215] Evans, in 1975, brought in heavy equipment and built a much larger, more permanent dam.

In response, the plaintiffs filed this action in Deer Lodge County to force the removal of the dam to allow the water to resume flowing to plaintiffs' land. Contemporaneous with filing their complaint, the plaintiffs obtained a temporary injunction against defendant and scheduled a show cause hearing for June 14, 1976. The hearing was actually held on June 21, 1976, at which time the parties produced a total of five witnesses.

The District Court did not enter an official order after the June 21, 1976 hearing. Instead, the District Court judge apparently requested the parties submit proposed findings of fact and conclusions of law.

Defendant submitted his proposed findings and conclusions on August 5, 1976. The District Court adopted the defendant's findings by making a notation at the bottom of the submitted document, and by signing the order which concluded as follows: "Adopted this 6th day [***5] of August, 1976. Let Judgment be entered accordingly."

On August 19, 1976, thirteen days after the Court adopted defendant's findings and conclusions, the plaintiffs submitted their proposed findings and conclusions, and they also filed an amended complaint. The amended complaint was substantially the same as the original except that in the amended complaint the plaintiffs had joined one additional defendant and also were more specific in their prayer for relief.

On September 10, 1976, defendant filed a motion to dismiss the amended complaint on the grounds it did not state a claim upon [***401] which relief could be granted. On September 27, 1976, without further action by the Court, defendant filed his answer, a general denial of plaintiffs' allegations. Defendant's answer was the last action taken by either party.

On November 1, 1976, the District Court entered an order dissolving the temporary restraining order, denying plaintiffs' motion for an injunction pendente lite, and adopting the defendant's findings [*216] of fact and conclusions of law. It is from this last order that plaintiffs appeal.

In their appeal the plaintiffs contend (1) that the District Court [***6] deprived the plaintiffs of substantive property rights in a summary hearing; (2) that the District Court made an adjudication of the relative rights and priorities of the parties; and (3) that the findings of fact and conclusions of law do not conform to the evidence presented by the parties.

Before addressing the specific issues presented by plaintiffs' appeal, we must resolve one preliminary question. Some disagreement exists among the parties concerning the purpose of the June 21, 1976 hearing. The confusion stems from certain language used by plaintiffs in their complaint and show cause order. A review of the District Court files shows the prayer in plaintiffs' original complaint sought a temporary restraining order, a show cause hearing and such further relief as this Court may deem proper. Then, in his order to show cause signed by another District judge, the plaintiffs used the phrase "show cause why he [defendant] should not be permanently restrained from interfering with said waters and diversions." (Emphasis and brackets added.) Based on this language, defendant contends both parties understood the hearing on June 21st would be on the "merits" and would finally [***7] settle plaintiffs' water right claim. We cannot accept this contention.

It is well settled that a temporary restraining order is an interlocutory order issued often on an ex parte basis. The restraining order is intended to preserve the status quo until a show cause hearing can be held. Electric Co-op Inc. v. Ferguson (1951), 124 Mont. 543, 554, 227 P.2d 597. A temporary restraining order is effective only for the reasonable time necessary to give notice and schedule a hearing to determine the appropriateness of an injunction pendente lite. State ex rel. Cook v. Dist. Court (1937), 105 Mont. 72, 75, 69 P.2d 746. See also: Boyer v. Karagacin (1978), 178 Mont. 26, 582 P.2d 1173.

We conclude that plaintiffs, in scheduling the show cause hearing for June 21, 1976, were trying to follow the standard procedures [*217] set up to obtain injunctions pendente lite. We can find no support for defendant's position that the June 21, 1976 hearing was agreed or understood to be a hearing on the "merits" of plaintiffs' claim. Absent clear evidence of an agreement or an understanding, we must assume plaintiffs intended the hearing to be limited to a finding on the appropriateness [***8] of an injunction pendente lite.

Having determined the purpose of the June 21 hearing, we turn now to the merits of plaintiffs' assignments of error. For convenience, plaintiffs' first and third assignments can be consolidated. Simply stated, plaintiffs
contend the District Court should not have entered any findings of fact or conclusions of law. Plaintiffs take the position that any findings or conclusions dealing with the merits of their complaint are premature. They stress, although extensive testimony was received on June 21, 1976, the trial court did not receive enough evidence to resolve the merits of plaintiffs' claim. Defendant, on the other hand, contends the evidence produced at the hearing was sufficient to support the findings and conclusions of the District Court.

After a careful examination of the conclusions of law, we believe plaintiffs are correct and the findings of fact and conclusions of law should be vacated. The conclusions, as adopted by the District Court, provide:

"Plaintiffs have no water right to the water from the Evans ditch either by right of appropriation or by adverse use."

"[*402] That an appropriation as to this water was filed and completed [*409] by Raymond J. Johnson and Lillian M. Johnson and is first in time to any claim made by Plaintiffs.

"That Plaintiffs have no right to enter upon Defendant Evans property and in any way change, divert or alter the ditches located thereon."

These conclusions were purportedly derived from evidence presented at the June 21, 1976 hearing and were entered on November 1, 1976.

We have already stated that the primary purpose of the June 21, 1976 hearing was to determine the propriety of an injunction [*218] pendente lite. It is well established that substantive property rights cannot be adjudicated in a summary way. *Ryan v. Quinlan (1912), 45 Mont. 521, 124 P. 512.* The general rule is that title to, or right of possession of real estate may not be litigated in an action for an injunction. *Davis v. Burton (1952), 126 Mont. 137, 246 P.2d 236.* In the same vein, water rights should not be resolved in a preliminary proceeding for injunctive relief.

The problems inherent in trying the merits of a case at an injunctive hearing are obvious. Typically, an injunction, or a motion for an injunction is filed very early in the proceedings, usually before discovery has been completed [*410] and often before the pleadings of the parties are complete. At such juncture, the District Courts normally do not have sufficient evidence to conclusively resolve the merits of the case. The present proceedings are a good example of why property rights should not be adjudicated in a summary fashion.

The hearing in this case was scheduled for June 21, 1976, only 11 days after the plaintiffs filed their original complaint. Indeed, because Rules 30 and 31, M.R.Civ.P., contain restrictions as to when discovery can be commenced, it does not appear that plaintiffs could have been prepared on June 21, 1976, for a final trial on the merits.

Additionally, we find defendant had not yet filed his answer on June 21, 1976. This last fact is significant because regardless of how defective plaintiffs' first complaint may have been, under Rule 8, M.R.Civ.P., plaintiffs had an absolute right to amend their complaint prior to the time the answer was filed.

Accordingly, we hold plaintiffs' allegations were not ripe for final decision on June 21, 1976. The trial court should have limited its inquiry to the appropriateness of an injunction pendente lite. Since its inquiry and subsequent decision [*411] went beyond these limits, the findings of fact and conclusions of law must be vacated.

We note that plaintiffs later filed an amended complaint in this action. The new complaint raises the possibility that plaintiffs may recover if they can establish a valid water right. Under the circumstances recovery can possibly be predicated on section 89-801, [*219] R.C.M.1947, which was in effect during the crucial time periods involved in this case. That section allows "waste" water to be appropriated if the requisites of the statute are met. The plaintiffs, of course, bear the burden to prove a valid appropriation and any discussion of the merits of their claim would be premature. Today's decision simply vacates the findings of fact and conclusions of law entered by the District Court. Additionally, since plaintiffs did not challenge the denial of their motion for an injunction pendente lite, the trial court's determination on the matter is affirmed.

The order is vacated and this case is remanded to the District Court for proceedings consistent with this opinion.

MR. CHIEF JUSTICE HASWELL and JUSTICES HARRISON, DALY and SHEEHY concur.
HUGH ESPY, Plaintiff and Respondent, v. JOE QUINLAN and JOAN QUINLAN, Defendants and Appellant.

No. 00-043

SUPREME COURT OF MONTANA


June 8, 2000, Submitted on Briefs
July 18, 2000, Decided

PRIOR HISTORY: APPEAL FROM: District Court of the Sixteenth Judicial District, In and for the County of Rosebud, The Honorable Wm. Nels Swandal, Judge presiding.

DISPOSITION: Affirmed and remanded for determination of Espy's attorney's fees and costs on appeal.


For Respondent: Alan C. Bryan, Crowley, Haughey, Hanson, Toole, & Dietrich, P.L.L.P., Billings, Montana.

JUDGES: Justice Terry N. Trieweiler delivered the opinion of the Court. We Concur: Jean A. Turnage, Chief Justice, Karla M. Gray, William E. Hunt, Sr., Jim Regnier, Justices.

OPINION BY: Terry N. Trieweiler

OPINION

[**442] [***1213] Justice Terry N. Trieweiler delivered the opinion of the Court.

[**P1] The Plaintiff, Hugh Espy, commenced this action in the District Court for the Sixteenth Judicial District in Rosebud County and alleged that the Defendants, Joe and Joan Quinlan, interfered with his ditch easement. The Defendants filed a counterclaim in which they alleged interference with their road easement. Joe Quinlan was subsequently dismissed from the action. The District Court entered judgment for Espy on his claim and for Joan Quinlan on her counterclaim. The District Court ordered Quinlan to pay Espy's attorney's fees and costs pursuant to § 70-17-112(5), MCA. Quinlan appeals the District Court's judgment and order. We affirm the judgment and order of the District Court.

[**P2] The following issues are presented on appeal.

[**P3] 1. Did the District Court err when it found a written agreement which granted Espy an easement over Quinlan's property?

[**P4] 2. Did the District Court err when it ordered Quinlan to pay Espy's attorney's fees and costs pursuant to § 70-17-112(5), MCA?

FACTUAL BACKGROUND

[**P5] The Plaintiff, Hugh Espy, owns real property which is contiguous with and adjacent to real property owned by the Defendant, Joan Quinlan. Both parcels of property are located within Rosebud County, Montana. Espy purchased his real property in February 1993 from the Farmers Home Administration (FmHA) following the FmHA's foreclosure on the property while owned by Timothy Cox.

[**P6] Prior to 1985, Espy's predecessor in interest, Cox, irrigated the property using ditch irrigation. This method required pushing the water uphill at two different points by using pumps. In his deposition, Cox testified that this method was inefficient due to the electricity costs and the amount of water loss. Cox's neighbor, Quinlan was also using a method of ditch irrigation which resulted in an unsatisfactory amount of water seepage.

[**P7] On December 17, 1980, Cox and Quinlan executed a written Pooling Agreement with the United
States Department of Agriculture (USDA) for the construction of an underground pipe irrigation system. The new irrigation system consisted of an underground pipeline originating on Quinlan’s property and extending approximately [**443] 600 feet to Espy’s property where it extended approximately 1200 feet. According to the Pooling Agreement, the purpose of the project was to “provide a water delivery system that will prevent seepage water and an efficient irrigation delivery system.” The Pooling Agreement was approved by the Agricultural Stabilization and Conservation Service (ASCS) of the USDA on March 3, 1981.

[*P8] The Pooling Agreement, signed by both Cox and Quinlan, includes the following conditions:

   Each person signing,, this agreement:
   
   2. Agrees to perform the practice(s), in a professional manner within the specified general location, to repair, maintain, and use for the purpose authorized, the practice(s) covered by this agreement for which cost-sharing is given, and to obtain the authorities, rights, easements or other approvals necessary to perform, maintain, and repair such practices.

   3. Grants such authorities, rights, easements, or other approvals to the other participants in this agreement to enter upon his land as may be necessary to install, maintain, and repair the practices.

   ....

   [**444] [**P11] In July 1997, in an attempt to prevent Espy from using the irrigation system, Quinlan removed the start button for the irrigation pump and shut off the electricity for the irrigation system. In May 1998, Quinlan placed a padlock on the electrical box which provides electricity to the irrigation system. In response, Espy filed this action against both Joan and Joe Quinlan on June 1, 1998, alleging interference with his easement. However, by stipulation of the parties, defendant Joe Quinlan was dismissed from the action. Espy additionally requested that the District Court issue a temporary restraining order to keep Quinlan from interfering any further with his use of the irrigation system. The District Court granted the temporary restraining order and on June 25, 1998 granted a preliminary injunction against Quinlan.

   [**P12] On November 13, 1998, the parties stipulated to allow Quinlan to file a permissive counterclaim against Espy. The counterclaim was deemed filed on November 18, 1998, and alleged that Espy had interfered with Quinlan’s road easement over Espy’s property. A bench trial was held on April 29, 1999 to consider Espy’s claim and Quinlan’s counterclaim. On June 4, 1999, the District Court entered its findings of fact, conclusions of law, and order, in which it concluded that Espy has a valid easement over Quinlan’s property for the use and maintenance of the irrigation system and that Quinlan has a valid road easement over Espy’s property. The District Court further concluded that both parties were entitled to a permanent order restraining the other party from interfering with their respective easement.

   [**P13] On July 26, 1999, the District Court held a hearing to consider the issue of awarding attorney’s fees and costs. On September 3, 1999, the District Court entered its order which required Quinlan to pay Espy’s attorney’s fees and costs pursuant to § 70-17-112(5), MCA. Following successful motions to amend the findings of fact and conclusions of law, and the judgment the District Court entered its amended judgment on November 26, 1999.

   STANDARD OF REVIEW

   [**P14] The standard of review of a district court’s findings of fact is whether they are clearly erroneous. See Daines v. Knight (1995), 269 Mont. 320, 324, 888 P.2d 904, 906. A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if this Court is left with a definite and firm conviction that the district

DISCUSSION

ISSUE 1

*P15* Did the District Court err when it found a written agreement which granted Espy an easement over Quinlan’s property?

***1215*** *P16* Quinlan asserts that the District Court erred when it concluded that the Pooling Agreement created an easement for an indefinite duration. Quinlan contends that the Pooling Agreement created a contract for the period of ten years based on the language which describes the “life-span” of the project as “ten years following the year of installation.” Espy asserts that the District Court correctly concluded that he has an easement for the use and maintenance of the irrigation system for an indefinite period of time.

*P17* The District Court made the following findings of fact:

1. That Quinlan did not seek legal advice before signing the Pooling Agreement, which clearly states that each participant in the agreement grants an easement or right to the other participants to enter upon their land to install, maintain and repair the irrigation system. Paragraph 4 of the Pooling Agreement refers to securing easements and other documents from other people who are not participants to the agreement.

2. That while Quinlan testified that she never intended to give Cox an easement, that testimony is belied by the plain language of the Pooling Agreement and by Cox himself. The Court finds that Quinlan clearly gave Cox and Espy, Cox’s predecessor in interest, an easement to repair and maintain the irrigation system.

11. That the “life span” of the project is the minimum length of time the irrigation system must be used or a portion of the cost share refunded. It was not meant to limit the life expectancy of the easement, which is indefinite, as long as the irrigation system is properly used, maintained and repaired.

***446***

16. That the plaintiff has an easement to use, maintain and repair the pipeline and the plaintiff’s use of that easement should not be obstructed or impaired by the defendant.

*P18* Our review of the record reveals that the District Court’s findings of fact are supported by substantial evidence and therefore are not clearly erroneous. The language of the Pooling Agreement is clear. The Agreement states that a condition of the Agreement is that each person signing the Agreement “grants such authorities, rights, easements, or other approvals to the other participants in this agreement to enter upon his land as may be necessary to install, maintain, and repair the practices.” Clearly, by signing the Pooling Agreement, both Cox and Quinlan granted each other such authorities, rights, easements, or other approvals to enter upon each other’s land as may be necessary to install, maintain, and repair the irrigation system.

*P19* Quinlan further asserts that the language of a subsequent condition to the Pooling Agreement required that the parties designated agent, Cox, secure the easement on Quinlan’s property. The condition relied on by Quinlan states that each person signing the Pooling Agreement:

4. Agrees that the person shown as such as designated agent and is authorized to act for the parties of agreement in securing the necessary easements, rights-of-way, labor and equipment, construction details, compliance determinations, reports, and certifications, and contracts with the COC and designated technicians.

We agree with the District Court’s finding that paragraph 4 of the Pooling Agreement refers to securing easements and other documents from people who are not participants to the agreement, and therefore does not affect an easement granted by participants to the agreement.

*P20* Moreover, the District Court’s finding that the ten-year “life-span” of the irrigation system was re-
lated to the government's cost-sharing involvement, and not a limitation on the duration of the easement, is supported by substantial evidence. The document which defines the "life-span" of the irrigation project as "10 years following the year of installation" is a document which sets forth the conditions for government cost-sharing. As explained by Rosebud County Farm Service Agency Program Assistant, Diane Wyrick, "each conservation practice has a 'life-span' that requires the practice to be maintained for a minimum length of time or cost share must be refunded. [***1216] The 'lifespan' [***1216] is not the life expectancy of the practice." Accordingly, we conclude that the District Court's finding that the "life-span" often years was for cost-sharing purposes only and that the easement itself lasted for an indefinite period of time was not clearly erroneous.

[*P21] Based on its findings of fact, the District Court made following conclusions of law:

4. An easement may be created by grant, reservation, exception or covenant, by implication, or by prescription. Kuhlman v. Rivera, 216 Mont. 353, 701 P.2d 982, 985 (Mont. 1985). To be a valid grant of an easement created by writing, it must satisfy the formal requirements of a grant. Id. The Pooling Agreement identified the participants, Joan Quinlan and Tim Cox, adequately described what was conveyed, had language of conveyance and was signed, thus satisfying the requirements of § 70-20-103, M.C.A., and granting a valid easement. Id. Specifically, the Pooling Agreement stated that each person signing the agreement granted to the other participants the right to enter onto their land as necessary to install, maintain and repair the irrigation system.

5. The duration of the easement is indefinite since, with proper maintenance and repair, the underground irrigation system could last for an indefinite period of time.

[*P22] We conclude that the District Court's conclusions of law are correct. The Pooling Agreement satisfied the requirements of a grant and created a valid easement for Espy to enter onto Quinlan's property to install, maintain, and repair the irrigation system as long as the system lasts. Therefore, we further conclude that the District Court did not err when it found that the Pooling Agreement created a valid easement on Quinlan's property.

ISSUE 2

[*P23] Did the District Court err when it ordered Quinlan to pay Espy's attorney's fees and costs pursuant to § 70-17-112(5), MCA?

[*P24] Section 70-17-112, MCA, states as follows:

(1) A person with a canal or ditch easement has a secondary easement to enter, inspect, repair, and maintain a canal or ditch.

(2) No person may encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.

....

[**448] (5) If a legal action is brought to enforce the provisions of this section, the prevailing party is entitled to costs and reasonable attorney's fees.

(Emphasis added).

[*P25] Quinlan contends that the District Court erred when it concluded that Espy's interference with Quinlan's road easement was not related to Espy's suit against Quinlan for interference with his ditch easement pursuant to § 70-17-112, MCA. Quinlan asserts that because she prevailed on her counterclaim neither party can be considered a "prevailing party" within the contemplation of § 70-17-112(5), MCA. Quinlan contends that her counterclaim is related to the controversy over whether the Pooling Agreement created a ditch easement because had she not taken the position that Espy did not have a ditch easement, Espy would not have interfered with her road easement.

[*P26] In support of her position, Quinlan relies on Knudsen v. Taylor (1984), 211 Mont. 459, 685 P.2d 354. In Knudsen, the parties brought a claim and a counterclaim involving interference with a ditch. With respect to the issue of whether either party was entitled to attorney's fees and costs pursuant to § 70-17-112(5), MCA, we stated:

The injunctive order issued by the District Court is a victory and a loss for both sides. Knudsen prevailed on his contention that the culvert must be of sufficient size to carry fully the water from the headgate passing through the Ester Ditch. Taylor prevailed in that his right to install
such crossing culverts was recognized in this case. In such circumstances, we determine that the District Court was correct in finding in effect there was no prevailing party in the contemplation of section 70-17-112(5), MCA, and properly denied attorney fees.

Knudsen, 211 Mont. at 463-64, 685 P.2d at 357.

[***1217] [*P27] In this case the District Court concluded as follows:

Here, the counterclaim involved interference with a road easement. It had nothing to do with the ditch easement and was not brought to enforce the provisions of § 70-17-112. The plaintiff, therefore, prevailed on all claims brought pursuant to § 70-17-112 and is entitled to his reasonable attorney's fees and costs.

[*P28] We agree with the District Court's conclusion. Quinlan's counterclaim was not raised pursuant to § 70-17-112, MCA. It was a permissive counterclaim dealing with a road easement. Consequently, our analysis in Knudsen does not apply to this case. Further, [***449] we have previously held that "in order to be deemed a 'prevailing party' for purposes of § 70-17-112(5), MCA . . . a party must successfully prevail on all claims raised pursuant to this statute." Engel, P 40. Accordingly, because Espy successfully prevailed on all claims raised pursuant to § 70-17-112, MCA, he is entitled to his attorney's fees and costs pursuant to § 70-17-112(5), MCA, regardless of the fact that he was not the prevailing party on Quinlan's counterclaim. Therefore, we conclude that the District Court did not err when it determined that Espy was entitled to attorney's fees and costs pursuant to § 70-17-112(5), MCA. Additionally, Espy's costs and reasonable attorney's fees include those fees incurred in this appeal. See Sharon v. Hayden (1990), 246 Mont. 186, 190, 803 P.2d 1083, 1086.

[*P29] The judgment of the District Court is affirmed and we remand for determination of Espy's attorney's fees and costs on appeal.

Terry N. Trieweiler
Justice

Jean A. Turnage
Chief Justice

Karla M. Gray
William E. Hunt, Sr.
Jim Regnier
Justices
WILLS CATTLE COMPANY, Plaintiff and Appellant, v. WILLIAM J. SHA W and E. KATHLEEN SHA W, Defendants and Respondents.

DA 06-0498

SUPREME COURT OF MONTANA

2007 MT 191; 338 Mont. 351; 167 P.3d 397; 2007 Mont. LEXIS 368

June 20, 2007, Submitted on Briefs
August 7, 2007, Decided


PRIOR HISTORY:
Appeal from: District Court of the Fourth Judicial District, In and For the County of Missoula, Cause No. DV-01-755. Honorable John W. Larson, Presiding Judge.


For Respondents: W. Carl Mendenhall, Worden Thane PC, Missoula, Montana.

JUDGES: W. WILLIAM LEAPARTH. We concur: KARLA M. GRAY, JAMES C. NELSON, BRIAN MORRIS, JIM RICE. Justice W. William Leaphart delivered the Opinion of the Court.

OPINION BY: W. William Leaphart

OPINION

[**352]


[**P1] Wills Cattle Company (the Company) appeals from a judgment of the Fourth Judicial District Court, Missoula County, which decreed that the Company had no ownership interest in two irrigation ditches on land owned by William J. Shaw and E. Kathleen Shaw (the Shaws) and dismissed the complaint. We affirm.

[*P2] We restate the issues on appeal as follows:

[*P3] 1. Did the District Court err in concluding the 1964 deeds conveying water rights were ambiguous?

[*P4] 2. Did the District Court err in determining that Wills Cattle Company has no ownership interest in either the middle or north [**353] McDonald irrigation ditches on the Shaws' property?

BACKGROUND

[*P5] The factual background giving rise to this case begins over a century ago when two brothers, Tom McDonald and John McDonald, established homesteads in the Union Creek valley, east of Bonner, Montana, on Sections 15 and 16, Township 13 North, Range 16 West. The brothers appropriated water from Union Creek and dug irrigation ditches to flood irrigate their land. Both Sections 15 and 16 were eventually purchased by W.K. Wills and were operated as a single ranch called the Wills Ranch Company. W.K. Wills sought adjudication that he was the owner of the McDonald water rights. In a district court decision and in Wills v. Morris, 100 Mont. 514, 50 P.2d 862 (1935), it was decreed that W.K. Wills was the owner of the Tom McDonald water right in the amount of 162 inches of water and of the John McDonald water right in the amount of 124 inches of water.

[*P6] W.K. Wills irrigated Sections 15 and 16 with the McDonald water rights using four ditches: the main McDonald ditch, the north McDonald ditch, the middle McDonald ditch, and the Lower Arkansas ditch. The main McDonald ditch and the Lower Arkansas ditch started on Section 15 and ended on Section 16. The middle and north McDonald ditches started on Section 15,
ran west toward Section 16, but ended before reaching Section 16.

[*P7] In 1964, the Wills family dissolved the Wills Ranch Company and divided the ranch, creating a self-sustaining ranch for each of W.K. Wills' sons, Ernest, Roy, and William. The property granted to Ernest included the north half of Section 16. The grant to Ernest also provided the following:

Together with the following rights, and all ditches, dams, flumes and rights of way appurtenant thereto, all of which rights were adjudicated in Cause No. 12038, W. K. Wills vs. H. W. Morris, et al, Fourth Judicial District Court, Missoula County, Montana, to-wit:

(a) An undivided one-fourth interest in and to 120 inches of water from Union Creek appropriated through the McDonald ditches;

(b) An undivided one-half interest in and to 100 inches of water from Union Creek, appropriated May 1, 1892, for use in Sections 15 and 16, Township 13 North, Range 16 West;

(c) 75 inches of water from Arkansas Creek, appropriated July, 1892, through the Vaughn ditch.

(d) Two-thirds of the waters of Nelson Creek.

Similarly, the property granted to William included parts of Section 15 and an undivided one-fourth interest in the McDonald water rights only, with identical paragraphs (a) and (b) above. No maps or legal descriptions accompanied the deeds which showed or described the location of the ditches. According to the dissolution agreement, the parties were to exercise their water rights on a rotating week basis. The parties also agreed to each bear the cost of maintaining the water rights, ditches and flumes in proportion to their ownership interests. The dissolution agreement was signed by W.K.'s sons, Ernest, Roy and William, and grandsons, Sidney, William and Roy.

[*P9] Ernest's family continued to ranch Section 16, eventually forming the Wills Cattle Company. Sidney Wills, Ernest's son, now currently operates the Company. Likewise, sons William and Roy, and Roy's son William (Bill), continued to ranch Section 15 until they sold their parcels outside the family. For a time after that, Sidney leased Section 15. It was later leased by Leslie Woldstad who owned other property in the area.
In 1999, the Shaws purchased the land in Section 15 previously held by William and Roy, and accordingly, also acquired a one-half interest in the McDonald water rights. While both sections were traditionally flood irrigated with their respective water rights, [**355] the Shaws immediately began to install a sprinkler irrigation system. To facilitate the sprinkler system, the Shaws filled in the middle and north McDonald ditches.

[*P10] Upon seeing the destruction of the ditches, the Company filed a complaint for declaratory relief, injunctive relief, damages, and certification to the water court. The Company alleged that the Shaws failed to recognize that the parties held an undivided joint interest in the ditches, and requested that the court declare the Company's interest. The Company argued that the 1964 deed to Ernest clearly granted a one-half interest in all the McDonald ditches, plural, which included the north and middle ditches the Shaws destroyed.

[*P11] A bench trial was held on February 15 and 16, 2005, where several witnesses testified regarding the use of the ditches in watering each section. Sidney Wills, born in 1940 and president and stockholder of the Company, had resided on the ranch all his life. According to Sidney, even though the middle McDonald ditch did not reach Section 16, it was important for fully irrigating that section. He testified that the middle ditch was used early in the season because it was the hardest ditch to fill, that it topographically ended on high ground so that it would flow onto lower ground on Sections 15 and 16, and that there were approximately fifteen acres on Section 16 that could only be watered by using the middle ditch. Further, Sidney stated [***401] that the water from the middle ditch would moisten the ground so that water from other ditches would more easily cover the ground.

[*P12] Sidney also described the north McDonald ditch, which traveled north from where it was appropriated on Section 15 and diverted over Union Creek through a flume, then turned west and ended before reaching Section 16. The Shaws had filled in the portion of the ditch that ran east to west. Sidney testified that this ditch was also on high ground and Section 16 was downhill from where the ditch ended. He stated that approximately six to eight acres on Section 16 could only get water through the north McDonald ditch. Sidney testified that the only time he cleaned or maintained the ditches on Section 15 was when he leased Section 15 property, and in fact, the flume that carried water north over the top of Union Creek had been unused since the late 1970s. Thus, the last time McDonald water reached the north McDonald ditch was in the late 1970s.

[*P13] When asked about the language of the 1964 deed from W.K. to Ernest, Sidney stated that his understanding of the words "McDonald ditches" in paragraph (a) of the 1964 deeds referred only to the McDonald ditches and not the Arkansas ditch, but then admitted he [**356] was not sure if it included the Arkansas ditch. He stated that one could not tell from looking at the deed itself, and if historic use was taken into account, "ditches" would include the Arkansas ditch.

[*P14] William Shaw testified that prior to purchasing the property, he had told Sidney he was going to install a sprinkler irrigation system, but they did not discuss ditches. He stated that when inspecting the property prior to purchase, he noticed that the north McDonald ditch was not operating because the flume had washed out and the ditch was overgrown. He observed that the main McDonald ditch and the Lower Arkansas ditch were set up to carry McDonald water over Section 15 and into Section 16. Shaw stated that he saw no physical evidence nor had any conversations that led him to believe Sidney had an interest in the middle and north McDonald ditches, especially since they ended on Section 15. Shaw further testified that after purchasing the property, he never saw Sidney maintain the ditches, and that neither Sidney or Shaw used the middle ditch in the summer of 2001--the summer after Shaw installed the sprinkler lines, but before he filled in that ditch.

[*P15] Another Wills family member testified about the irrigation ditches, William (Bill) Wills, W.K.'s grandson and Sidney's cousin. Bill testified that he was born in 1939, and had resided on the ranch property in the Union Creek valley until 1981. Apart from two years in the Army and some part-time logging, Bill was actively involved in the operation of his father, Roy, and Uncle William's ranch property, including Section 15. Bill testified that he never saw water from the middle McDonald ditch go over the surface of the ground onto Section 16. He stated that it "just sinks and subs up down below." He stated that the subbing would occur on Section 16, which would benefit Section 16, filling up the ground water. He stated that he was not aware of anyone from Section 16 ever coming on the property to run water down the middle ditch or the north ditch to irrigate Section 16 lands, but admitted that if subbing occurred when he, his father, or his uncle filled the ditch, there was no need for Ernest or Sidney to come over and use the ditch. He stated the water from the north ditch would run over the surface back into Union Creek. He also testified that he never saw anyone from the Company maintain or repair the ditches. Bill stated that he did not believe that the Company had any ownership interest in the middle or north McDonald ditches.

[*P16] Leslie Woldstad had leased property on Section 15 starting in 1987 after the Willses sold it, and continued to do so after the Shaws' purchase. He testified that he was familiar with the irrigation ditches. [**357] He said he had never seen anyone from the Company
come on the land and flood irrigate that property, nor had he seen anyone maintain or repair the north or middle McDonald ditches. Woldstad stated that he used the middle ditch on a regular basis, so the Company would have received a benefit. He stated that Sidney claimed that if Woldstad used the middle ditch first, it made his area [*P402] easier to irrigate. Woldstad said that he was never able to get water to the north side of the creek through the north McDonald ditch because the flume was out.

[*P17] The District Court concluded that the 1964 deeds were ambiguous as they did not contain maps or any other specific identification of the number or location of the ditches used with the water rights conveyed by the deeds. Thus, the court looked to extrinsic evidence to determine the intent of the parties at the time the deeds were signed and recorded. Of note, the court found that when operated as a single ranch, both sections were irrigated by using the four historic ditches, and that the "use of all four historic ditches is necessary to fully and adequately irrigate Sections 15 and 16 with the McDonald water rights. The four McDonald ditches are all permanent ditches constructed to conform to the topography of the land and to most efficiently flood irrigate the properties." The court further found:

While the middle and north McDonald ditches end near the property line on what is now the Shaws' property, due to the elevation of the property, there is conflicting testimony concerning whether they have always been used to flood irrigate the Wills Cattle Company property in a manner similar to that described by Tom McDonald in his testimony at the Wills v. Morris trial. At best, there is indication of some seep or sub-irrigation from those ditches (middle and north McDonald).

[*P18] The court concluded that the best interpretation of the deed language was that the parties to the deeds only intended to convey an interest in those ditches that actually historically conveyed water to the respective ranches. Thus, the District Court determined that the Company had no ownership interest in the middle or north McDonald ditches. The Company's complaint was thereby dismissed and attorney fees were awarded to the Shaws. The Company appeals.

STANDARD OF REVIEW

[*P19] A transfer of property is to be interpreted in like manner with contracts in general. Section 70-1-513, MCA; Van Hook v. Jennings, 1999 MT 198, P10, 295 Mont. 409, P10, 983 P.2d 995, P10. The construction and interpretation of a contract is a question of law. [**358] Baker Revocable Trust v. Centex Harvest States, 2007 MT 159, P19, 338 Mont. 41, P19, 164 P.3d 851, P19 (citations omitted). The initial determination of whether an ambiguity exists in a contract is also a question of law. Baker Revocable Trust, P19 (citations omitted). If the language of a contract is ambiguous, a factual determination must be made as to the parties' intent in entering into the contract, which is a question of fact for the court to decide in a case that is tried without a jury. Baker Revocable Trust, P19 (citations omitted); Security Abstract & Title v. Smith Livestock, 2006 MT 265, P17, 334 Mont. 172, P17, 146 P.3d 732, P17. We affirm the factual findings of a district court sitting without a jury unless those findings are clearly erroneous. Steiger v. Brown, 2007 MT 29, P16, 336 Mont. 29, P16, 152 P.3d 705, P16 (citations omitted). A district court's findings are clearly erroneous if they are not supported by substantial evidence, if the district court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed. Steiger, P16 (citations omitted).

DISCUSSION

[*P20] ISSUE 1: Did the District Court err in concluding the 1964 deeds conveying water rights were ambiguous?

[*P21] The determination of whether an ambiguity exists in a contract is to be made on an objective basis. Baker Revocable Trust, P20 (citations omitted). An ambiguity exists if the language of the contract is susceptible to at least two reasonable but conflicting meanings. Baker Revocable Trust, P20 (citations omitted).

[*P22] In this case, W.K. Wills granted each of his sons certain tracts of land and certain water rights, as well as "all ditches, dams, flumes and rights of way appurtenant" to the water rights. Each son received a [***403] percentage of the Tom McDonald water right from Union Creek appropriated through the McDonald ditches, as well as a percentage of the John McDonald water right, although the deeds did not specify which ditch carried the John McDonald water. The deeds made no mention of the Lower Arkansas ditch, which was also historically used to carry McDonald water.

[*P23] The District Court found that the four historic ditches (three McDonald ditches and the Lower Arkansas ditch) were all used to convey McDonald water, and that all of these ditches were "necessary to fully and adequately irrigate Sections 15 and 16 with the McDonald water rights." The Company argues that because the deeds referred to [**359] "McDonald ditch-
es" in the plural, W.K. expressly granted an easement in the three McDonald ditches, not just the main McDonald ditch which ends in Section 16. However, Sidney admitted that because of the historic use of the Lower Arkansas ditch to convey McDonald water to the Company's property, the word "ditches" in the deeds could have meant to include the Lower Arkansas ditch. The court concluded that the language in the deeds was ambiguous, and further, there were no maps or any other specific identification of the number or location of the ditches which would clarify which ditches were included in the conveyance of the different properties. Therefore, the District Court looked to other evidence to ascertain the intent of the parties with regard to which ditches were conveyed in the deeds to each son.

[*P24] We agree with the District Court that the language of the deeds is ambiguous, and that other evidence must be used to ascertain which ditch rights were conveyed in the 1964 deed to Ernest Wills.

[*P25] ISSUE 2: Did the District Court err in determining that Wills Cattle Company has no ownership interest in either the middle or north McDonald irrigation ditches on the Shaws' property?

[*P26] Section 70-15-105, MCA, provides that a "thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air, or heat from or across the land of another." Ditches are easements that attach to land. Section 70-17-101, MCA. A transfer of real property also transfers easements which are to be used in the same manner and to the same extent as at the time the property was transferred. Section 70-20-308, MCA. An easement is created by reservation through written conveyances. Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, P16, 311 Mont. 82, P16, 53 P.3d 381, P16. If a document fails to adequately fix the location of an easement, a court may ascertain the location by use. Ponderosa Pines Ranch, Inc., P16.

[*P27] A water right and an easement to carry water across another's land, also known as a ditch right, are separate and distinct property rights. Lincoln v. Pieper, 245 Mont. 12, 15, 798 P.2d 132, 134 (1990) (citations omitted). Water rights and ditch rights "may be conveyed separately and the loss of one does not necessarily require loss of the other." Lincoln, 245 Mont. at 15, 798 P.2d at 134 (citations omitted). However, if a water right passes as an appurtenance, the means of conveyance of the water also passes. Lincoln, 245 Mont. at 15, 798 P.2d at 134. This Court has stated that where a right of way attaches to the

[**360] "use of a certain ditch and water for irrigating of a farm, they will pass by the deed, even without the use of the word 'appurtenances'; for the acquisition of the easement or servitude was intended for the benefit of the estate, and by destination is to be considered as incidental to the use of and as part and parcel of the realty." Tucker v. Jones, 8 Mont. 225, 231, 19 P. 571, 573 (1888). Thus, this Court has held that the conveyance of a tract of irrigated land with its appurtenances also conveys the ditch, as well as the water right, necessary to the cultivation, use and enjoyment of the land, just as fully as though the grantor had described it in express terms in the deed itself.

Lincoln, 245 Mont. at 15-16, 798 P.2d at 135 (citations omitted).

[*P28] Necessity and historical beneficial use are critical factors in determining whether a ditch right is appurtenant to a water right. Lincoln, 245 Mont. at 16, 798 P.2d at 135; Castillo v. Kunnemann, 197 Mont. 190, 196, 642 P.2d 1019, 1023-24 (1982). In Lincoln, the plaintiffs sued when the defendants disconnected water pipes leading from a water tank on the defendants' property to the plaintiffs' property. Lincoln, 245 Mont. at 14, 798 P.2d at 134. To determine whether the water conveyance system was appurtenant to the plaintiffs' property, the Court looked at whether the water conveyance system was necessary for the plaintiffs to exercise their water right. Lincoln, 245 Mont. at 16, 798 P.2d at 135. In that case, the water conveyance system was necessary as it was the only means of carrying water from the water tank and allowing the plaintiffs to use their water right. Lincoln, 245 Mont. at 16, 798 P.2d at 135.

[*P29] In Castillo, to determine whether ditch and water rights were appurtenant to the plaintiffs' property, the Court relied on testimony of the defendant that he, as prior owner of two tracts of land now owned by the plaintiffs, had irrigated those tracts with the water rights in question and the water was conveyed through the ditches running through the plaintiffs' property. Castillo, 197 Mont. at 196, 642 P.2d at 1023-24. Thus, based on historical beneficial use, the Court determined that the water and ditch rights were appurtenant to the plaintiffs' land. Castillo, 197 Mont. at 196, 642 P.2d at 1024.

[*P30] Unlike in Lincoln, the middle and north McDonald ditches in this case are not necessary for the Company to exercise its water rights. In making its finding that the Company had no ownership interest in the middle and north McDonald ditches, the court relied on
testimony of a disinterested witness, Bill Wills, that in Bill's tenure on Section 15, no one had used those ditches to irrigate Section 16. Bill and Woldstad [*361] similarly testified that, at most, Section 16 got a benefit from the sub-irrigation that occurred during the on-weeks that those ditches were being used to irrigate Section 15, but neither the Company nor its predecessors actually used those ditches during its week of irrigation. Rather, the Company was able to exercise its water rights through the main McDonald ditch and the Lower Arkansas ditch. This is further supported by Shaw's testimony that, in 2001, before he filled in the ditch but after he started using a sprinkler system, neither he nor the Company used the middle ditch for irrigation that season. Finally, the only time the Company repaired or maintained the middle or north McDonald ditches was when Sidney leased Section 15, thus indicating the Company did not recognize an ownership interest in or a beneficial use of those ditches in Section 16.

[*P31] To support its position that the middle and north McDonald ditches were historically used for the benefit of Section 16 through flood irrigation, the Company points to the testimony of Tom McDonald in Wills, 100 Mont. at 526, 50 P.2d at 866-67, where McDonald stated that the "original ditch" was used to flow water onto Section 16. However, there is no evidence that was the use at the time of the 1964 conveyances, or that Tom McDonald was even talking about the same ditches since, according to his testimony, the "original ditches were plowed up . . . . " Wills, 100 Mont. at 526, 50 P.2d at 866-67. Furthermore, this decree is not conclusive as to whether the north and middle ditches were appurtenant specifically to Section 16 because it adjudicated water rights to Sections 15 and 16 as one ranch.

[*P32] Another factor the Court looked at in Lincoln in determining whether the water system was appurtenant to the plaintiffs' land was whether inspection of the chain of title or of the property would have revealed the existence of the plaintiffs' interest in the water system. Lincoln, 245 Mont. at 16, 798 P.2d at 135. In that case, inquiry or inspection of both the chain of title and property would have revealed that the defendants' land was "burdened with easements . . . for access to the water system." Lincoln, 245 Mont. at 16, 798 P.2d at 135. In this case, Shaw inspected the property and saw that both ditches ended before reaching Section 16. Further, being that the 1964 deeds were ambiguous with respect to which ditch rights were conveyed to each section, a search of the chain of title would not have revealed that the Company had an easement in the middle and north McDonald ditches.

[*P33] These findings support the court's conclusion that W.K. Wills' intent, in providing each of his sons with a self-sustaining ranch, was to include only those ditch rights that were historically used to convey [*362] water to the respective ranches, which, for the Company, only included ditches that actually reached the Company's land. It is within the province of the District Court, as the trier of fact, to weigh conflicting evidence, and this Court will not substitute its judgment for that of the trier of fact. Ray v. Montana Tech Univ. of Montana, 2007 MT 21, P50, 335 Mont. 367, P50, 152 P.3d 122, P50. The District Court did not err in concluding that the Company did not have an ownership interest in the middle and north McDonald ditches. As the prevailing party, the Shaws are entitled to attorney fees on appeal. Section 70-17-112(5), MCA.

[*P34] We affirm the judgment of the District Court and remand for determination of attorney fees on appeal.

/S/ W. WILLIAM LEAPHART
We concur:
/S/ KARLA M. GRAY
/S/ JAMES C. NELSON
/S/ BRIAN MORRIS
/S/ JIM RICE