

THE STATE OF WYOMING
EIGHTH JUDICIAL DISTRICT

KEITH G. KAUTZ
DISTRICT JUDGE
THOMAS D. BROWNING
COURT REPORTER



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March 16, 2006

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RE: *Williams Production RMT Company v. William P. Maycock, II*
Campbell County Civil Action No. 26099
DECISION LETTER - Declaratory Relief – Watercourse

Dear Counsel:

This letter sets out the Court's findings, conclusions and decision on Williams' request for declaratory judgment on the status of Barber Creek and South Prong Barber Creek as natural watercourses.

Background

Drainages called "Barber Creek" and "South Prong Barber Creek" pass through Maycock's ranch. Williams proposes to discharge water from coal-bed methane wells into these drainages. Williams asserts that Barber Creek and South Prong Barber Creek are natural watercourses. Williams seeks a declaratory judgment under W.S. §1-37-101 et. seq. declaring that Barber Creek and South Prong Barber Creek constitute natural watercourses on the Maycock Ranch.

If these drainages are natural watercourses, then any water legally placed in them belongs to the state, and the state enjoys an easement for that water to flow within the natural watercourse across Maycock's private property. Maycock disagrees that the drainages are natural watercourses. If Barber Creek and South Prong Barber Creek are not natural watercourses then Williams cannot rely on the state's watercourse easement and risks committing a nuisance or trespass by placing water in the drainages.

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The Court received evidence on the issue of whether Barber Creek and South Prong Barber Creek are natural watercourses on January 27, 2006. The parties later submitted written closings.

The only issues to be determined in this declaratory relief action are 1) whether Barber Creek and South Prong Barber Creek, as they exist on Maycock's ranch, constitute natural watercourses, and 2) if they are natural watercourses, how much water may flow without exceeding the state's easement. The source or quality of the water which may be placed into the drainages by Williams (or others) are not issues addressed in this declaratory relief action. For purposes of this decision those issues are immaterial.¹ If Barber Creek and/or South Prong Barber Creek are natural watercourses an easement exists for water legally placed in them from any source.

Law

Courts may declare "status" through declaratory judgments, and those judgments are binding on the parties. W.S. §1-37-102. The burden of proof in a declaratory relief action is the same as in any other civil case – the plaintiff has the burden of proof. *Owens v. Brownlie*, 610 N.W. 2d 860, 866 (Iowa 2000); *Blake v. Plus Mark, Inc.*, 952 S.W. 2d 413, 417 (Tenn. 1997).

Here, Williams has asserted, and asked the Court to declare, the status of Barber Creek and South Prong Barber Creek as natural watercourses.² Williams has the burden of proving that Barber Creek and South Prong Barber Creek are natural watercourses by a preponderance of the evidence.

Section 1, Article 8 of the Wyoming Constitution states that "the waters of all natural streams, springs, lakes or other collections of still water within the boundaries of the state...are declared to be the property of the state." Water in a drainage is either "water of

¹Williams admitted that it would obtain and comply with discharge permits from the Wyoming Department of Environmental Quality. In a companion claim for condemnation of a right of way in this same case the Court heard evidence that initially the water would come from coal-bed methane wells south and east of Maycock's property and would be relatively small amounts. Future development would include wells on Maycock's property. Williams represented that initial water quality tests showed the water from the well to be of higher quality than water now found in Barber Creek just below Maycock's ranch.

²The term "watercourse" is used in this decision to describe a stream or waterway carrying water belonging to the state, and benefitting from an easement for that water. The common definition of "watercourse"—a conduit or channel through which water flows—is not applicable in this decision.

a natural stream" or it is "surface water."³ If the water is water of a natural stream or watercourse, it belongs to the state and the state has an easement for its flow in the stream. On the other hand, if water is surface water the state has no ownership in it nor any easement for its flow.

The Wyoming Supreme Court gave these factors for determining whether a drainage is a natural stream (or watercourse) in *State v. Hiber*, 44 P.2d 1005, 1009 (Wyo. 1935):

1. A watercourse is a stream of water usually flowing in a particular direction.
2. A watercourse has well-defined banks and channels.
3. The water in a watercourse need not flow continuously—the channel may sometimes be dry.
4. The water in a watercourse accumulates in large quantities from rain and melting snow.
5. At regular seasons the water in a watercourse flows and carves out a distinct and well-defined channel.
6. The flow need not be constant in a water course, but "there must be more than mere surface drainage from extraordinary causes; there must be substantial indications of the existence of a stream which is ordinarily a moving body of water." *Id.* (quoting *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1061 (Ida. 1909)).
7. The over-all characteristics of the drainage of a watercourse, even to the casual glance, bears the unmistakable indication of the frequent action of running water.
8. The test for whether a watercourse exists is not simply whether the water in it can be applied to beneficial use.

The *Hiber* court also pointed out that although "the essential characteristics of a watercourse are: A channel, consisting of a well-defined bed and banks, and a current of water," exceptions to this definition exist in case law. *Id.*

Williams urges that the concept of natural stream or natural watercourse should be construed liberally because Wyoming is arid and our state has a policy of making water available for irrigation if possible. The *Hiber* court specifically rejected such a position, stating

The fact that water in the arid regions is necessary for irrigation or

³The term "surface water" often is used when differentiating between water found on the surface of the ground and water produced from underground (ground water). That is not the meaning of the term "surface water" as used in this decision.

domestic use is no reason in itself why the owner of land should be deprived of all rights in connection therewith, for when the benefit accruing from appropriation is offset by the detriment to another, the public welfare is not, in the absence of other circumstances, thereby increased. *Id.*

The Wyoming Supreme Court noted that "too much stress ought not, perhaps, to be placed on any one of the elements (of a watercourse) mentioned, and all should be given due consideration." *Id.* The Court also recognized that whether a drainage is a watercourse "in a specific case is not always easy to determine, and is generally, or often, a question of fact." *Id.* "Such questions have given the courts much trouble." *Id.*

Facts and Discussion

Size of Drainage. The evidence established that Barber Creek is approximately 25 miles long, and drains approximately 74 square miles. Barber Creek runs generally in a north-westerly direction, and drains into the Powder River. However, the evidence was not clear about how much of the total drainage exists above the lowest point of Barber Creek on the Maycock ranch. Topographical maps introduced show Barber Creek meandering through 7 sections (miles) below the Maycock property. Barber Creek crosses about 5 miles of Maycock's ranch. Some of the 74 square miles drained by Barber Creek, perhaps $\frac{1}{4}$ to $\frac{1}{3}$, is downstream from Maycock's property.

South Prong Barber Creek runs north and northwesterly across about five miles before it enters Maycock's ranch. It crosses less than 1 mile of the Maycock property and connects to Barber Creek in the mid section of that ranch. South Prong Barber Creek drains about 11.8 square miles.

Barber Creek is a "4th order" drainage across Maycock's property and South Prong Barber Creek is a "3rd order." This indicates that Barber Creek and South Prong Barber Creek convey water, when it flows, that is gathered from numerous smaller draws, valleys and drainages.

The *Hiber* court was concerned because the claimed watercourse in that case began only "a short distance" above the Hiber property, did not extend "a great length" and had no "natural outlet." *Id.* at 1010-1011. The evidence here is the opposite. Barber Creek and South Prong Barber Creek on the Maycock ranch convey rain or snow melt gathered well above the channels, travel a significant distance, and run into the Powder River.

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Source of Water. The only source of water flowing in Barber Creek and South Prong Barber Creek is precipitation—snow and rain. The evidence indicated that in some places water seeps into the drainage in wet years, but no evidence indicated a flow of water from any source other than rain or snow.

Rain and snow can be the source of water for a natural watercourse. When rain or melting snow runs near the top of a drainage, not in a definite channel and only in response to an immediate storm, a watercourse may not exist. When that rain or snow accumulates in large quantities, and runs at regular seasons through a channel, a watercourse does exist. The evidence here is that water in Barber Creek and South Prong Barber Creek has accumulated and may be a significant quantity. The evidence does not establish a significant season for flowing water.

Channels, Beds, Banks. Most of Barber Creek and South Prong Barber Creek have distinct channels. Those channels were formed by runoff from snow melt and rainfall. The channels have defined bed areas and banks. However, the beds of those channels generally have grass and sometimes sage brush growing in them. (See, for example, photos on pages 24-44 and 48-54 of Lowham's Report, Appendix A).

Two distinct areas on Barber Creek and one area on South Prong Barber Creek have virtually no channel. These areas originally may have had channels, but the channels filled in after the construction of spreader-dikes. However, the grade in these areas is nearly flat, and any channels would have been minimal. (See exhibits M50a, M50b, and M50j). Some of the channels on Barber Creek are significant, and even had standing water in them. (See exhibits M52b, M52c, and M52d). Other channels on Barber Creek and South Prong Barber Creek are smaller, and appear to run water infrequently.

Flow of Water. The evidence did not establish that water ever flowed in either Barber Creek or South Prong Barber Creek on the Maycock Ranch in 2005. Williams installed 6 devices to measure stream flow on Barber Creek, but placed all these devices downstream from Maycock. The uppermost flow measuring device was about 2 miles below Maycock's property. Neither that gauge nor the next one below it recorded any water flow in the summer of 2005.

Barber Creek and South Prong Barber Creek are mostly dry channels. They experience rare, intermittent flow. If there is substantial snow these drainages may flow for a short time in the spring. Thereafter, they only flow briefly, for a few hours or a day or two, if a large rainfall occurs. Williams' expert estimated that a peak discharge at the upper end of Maycock's property would be about 64 cfs, and may occur every 1½ to 2 years.

Gauges measuring stream flow more than 2 miles below Maycock's property recorded flows in July and August, 2005, resulting from thunderstorms. Significant portions of those flows lasted only a few hours, and no water flow lasted more than about 1½ days. (See p. 30, Lowham's Report). This sporadic, highly temporary type of flow apparently is typical for this area. The photographs of Barber Creek and South Prong Barber Creek are consistent with very sporadic, short-term flows of water. Data from Dead Horse Creek, presented by Williams as representative of the Barber Creek area, shows the same type of sporadic, very temporary water flow combined with significant periods of no flow of water.

While it is true that a watercourse need not flow continuously to be recognized as containing waters of the state, the flow needs to occur at "regular seasons," not at irregular portions of days. The water should be "so continuous in its flow that it takes upon itself the character of a watercourse." *Id.* at 1010.

A preponderance of the evidence shows that water flows in Barber Creek and South Prong Barber Creek only a few days each year, if it flows at all. If water flows, that flow is very temporary. Water may not flow at all for months. Williams' expert believes there generally would be some type of flow in Barber Creek each year, but no evidence shows that such a flow would last more than a few hours after a thunderstorm.

Appropriation. Downstream users recently filed to appropriate water from Barber Creek. Williams argues that the Wyoming State Engineer recognized Barber Creek as a watercourse by granting a permit for this appropriation.

The evidence establishes that no appropriations existed on Barber Creek before this recent permit. The evidence also shows that the recent appropriation was filed in anticipation of additional water flowing down Barber Creek as a result of coal bed methane production. If the status of appropriation on Barber Creek indicates anything about whether it is a "watercourse," the Court concludes that without additional water there has never been enough regular supply of water in Barber Creek to appropriate it.

Over-all Characteristics of the Drainage. *Hiber* suggests that the over-all characteristics of a watercourse show, "even to the casual glance...the unmistakable impress of the frequent action of running water." *Id.* at 1009. Some portions of Barber Creek meet this test. (For example, see exhibits M52a, M52b, M52c, and M52d). If all of Barber Creek resembled these portions, the Court's decision would be easier. Some portions of Barber Creek do not give any impression of frequent running water. (See exhibits 9-1, 9-2, M50a, M50b, and M50j). If all of Barber Creek resembled these sections, the Court's decision would be easier. Much of Barber Creek, however, and all of South Prong Barber Creek, fit somewhere in between the areas clearly indicating frequent water flow and the areas showing little or no effects of flow.

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Conclusion

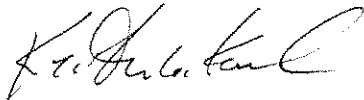
Taken as a whole, the evidence does not show, by a preponderance, that either Barber Creek or South Prong Barber Creek, as they exist on Maycock's property, fit the technical definition of watercourses. Although they largely have banks and beds, and sometimes flow accumulated water, the flow of water is rare. Water may not flow at all for a period of a year or more. When water flows, it may only run for a few hours. Long periods of time may pass between events when water flows. Although some portions of Barber Creek, viewed in isolation, may give the impression of frequent flowing water, the entire drainage, viewed as a whole, does not.

Williams has not met its burden of demonstrating that Barber Creek or South Prong Barber Creek are watercourses.

Order

Mr. Wendtland should prepare an Order and Judgment based on this decision and obtain approval as to form.

Sincerely,



KEITH G. KAUTZ
District Judge

KGK/glb