Montana Water Court
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FILED
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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)

* *

CLAIMANT: Northwestern Corporation

OBJECTOR: Northwestern Corporation
State of Montana Attorney General

CASE 41I-641
41I 94385-00

ORDER DENYING MOTION TO AMEND, ORDER JOINING ATTORNEY GENERAL, AND ORDER SETTING SCHEDULING CONFERENCE

I. STATEMENT OF THE CASE

This case involves a single water right held by Northwestern Corporation (Northwestern) for storage in Canyon Ferry Reservoir. Northwestern has filed a motion to amend its claim to permit delivery of water to downstream power generation facilities.

Northwestern's water right, claim 41I 94385-00, was filed by Montana Power Company for storage. The claim was based on a water right developed for power generation before the current version of Canyon Ferry Reservoir was built. The original power generation facility included a dam, turbines for power generation, and a reservoir. According to Montana Power Company, the capacity of the original reservoir was 47,500 acre feet. Montana Power Company initially claimed a flow rate of 23,980 CFS, but no flow rate was identified in the Basin 41I Temporary Preliminary Decree. The claimed priority date is October 31, 1898.

In a quitclaim deed dated December 14, 1949, Montana Power Company deeded to the United States property at Canyon Ferry, including the water right used to generate power at its facility, but reserved for itself an October 31, 1898 storage right for 23,980

CFS. The volume of the right reserved was 47,500 acre feet which the United States "agree[s] to store in the Canyon Ferry unit of the Missouri River Basin Project." December 14, 1949 Deed, Section 8 at p. 4, Claim File 41I 94385-00. The details of the arrangement with the United States for storage of Northwestern's right in Canyon Ferry are not clear. The United States built Canyon Ferry Reservoir, and Montana Power Company's power generation facility and the smaller original reservoir were taken out of operation.

Northwestern's claim received the following issue remarks:

> THIS CLAIMED PURPOSE IS QUESTIONED AS A BENEFICIAL USE OF WATER AT HAUSER, HOLTER, BLACK EAGLE, RAINBOW, RYAN, COCHRANE AND MORONY DAMS.
>
> THE USE OF THIS WATER APPEARS TO BE LARGELY NON-CONSUMPTIVE.

Montana Power Company filed an objection to its right on a variety of grounds, including an assertion that the decree was inaccurate and misleading.[1]

In an effort to address the issue remarks, the Water Court ordered Northwestern to meet with the DNRC. The DNRC was ordered to submit a report detailing its recommendations for resolution of the remarks. Northwestern subsequently filed a motion to amend its claim to a power generation right. Northwestern's motion stated, "This is a storage right from Canyon Ferry Lake used for power generation at Hauser, Holter, Black Eagle, Rainbow, Ryan, Cochrane, and Morony Dams." Verified Motion of Northwestern Corporation to Amend Water Right Claim 41I 94385-00 (July 25, 2016).

No other information was supplied to support Northwestern's motion. The DNRC issued a report recommending removal of the issue remarks and addition of language indicating this right was used for power generation at Hauser, Holter, Black Eagle, Rainbow, Ryan, Cochrane and Morony Dams. The DNRC's report was based on Northwestern's motion to amend and contained no separate analysis indicating how, when, or if the original water right from Canyon Ferry had been converted for use in downstream facilities. The DNRC's report did not explain how the concerns raised in the

[1] Northwestern Corporation is Montana Power Company's successor in interest. Montana Power Company's objection has been assumed by Northwestern Corporation.

issue remark it placed on Northwestern's right had been addressed, or why that issue remark should be removed.

II. STATEMENT OF THE ISSUES

1. Should Northwestern's motion to amend its water right be granted?

2. Does the information supplied by Northwestern adequately address the issue remarks attached to its claim?

III. ANALYSIS

The Legislature determined "that it is in the state's best interest to ensure that valid issues raised as a result of claims examination...are resolved before a final decree is issued." § 85-2-247(1), MCA. Issue remarks can be resolved through the objection process or through direct involvement of the Water Court and the DNRC. § 85-2-248, MCA.

Northwestern has the burden of proving that its motion to amend should be granted.

> The effect of a motion to amend a statement of claim is simply that it is judged against the original claim to determine if sufficient evidence supports the requested amendment. W. R. Adj. R. 19 states that the original filed claim is prima facie proof of the elements of the claim, and even a claimant's objection to her own claim must be proven by a preponderance of the evidence to overcome this prima facie proof.

Nelson v. Brooks, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558 (emphasis omitted).

1. Should Northwestern's motion to amend its water right be granted?

Northwestern has an obligation to support its assertion that its storage right in Canyon Ferry was converted for use as a power generation right at downstream facilities. It has not supplied such information, and its motion to amend raises several questions. These questions include fundamental issues such as when water was first released from Canyon Ferry for downstream facilities, how much water was released and actually used in what facilities, and why Northwestern's claimed priority date should apply to such use.

Northwestern has not met the standard of proof enunciated in *Nelson* and its motion to amend is therefore denied.

2. Does the information supplied by Northwestern adequately address the issue remarks attached to its claim?

The same analysis applies to the issue remarks attached to Northwestern's claim. Its motion to amend consists of one sentence, with no evidentiary support. The DNRC's report consists of bare conclusions with no facts to support removal of the issue remarks it placed on this right. The Water Court does not have sufficient information to address the DNRC's issue remarks.

The claimant has requested that downstream power generation facilities be added to this right so that storage water from Canyon Ferry can be used in these facilities. Again, however, there was no information supplied to support these requested changes, and therefore no basis for concluding that a water right for storage was perfected for use downstream.

Montana statutes describe the process used to address unresolved issue remarks involving nonperfection or abandonment of a water right. Section 85-2-248(7)(a), MCA provides: "If an unresolved issue remark involves nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. The water court shall notify the attorney general of the joinder."

In accordance with Section 85-2-248(7)(a), MCA, the Water Court is joining the Montana Attorney General as a party. The purpose of this joinder is to assist the Court with resolution of the issue remarks attached to this claim.

IV. CONCLUSION

1. Northwestern's motion to amend its water right is not supported by sufficient evidence.

2. The information supplied by Northwestern does not adequately address the issue remarks attached to its claim.

V. ORDER

Northwestern's motion to amend claim 41I 94385-00 is denied.

The issue remarks on this claim are not resolved and will remain in place.

The Montana Attorney General is joined as a party.

It is ORDERED that a scheduling conference will be held by telephone on **October 5, 2016** at **10:00 AM**. The instructions for accessing the call are as follows:

1. At the designated conference time dial the toll free telephone number: **1-877-526-1243**
2. At the prompt, enter the participant pin code followed by the pound (#) key: **7685196#**.
3. At the prompt state your name followed by the pound (#) key.

If you have any questions or if you experience problems placing this call you may contact the Water Court at 1-800-624-3270 (in state) or (406) 586-4364.

DATED this 9th day of September, 2016.

Russ McElyea
Chief Water Judge

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