

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

CLAIMANT: State of Montana, Department of Fish Wildlife
& Parks

CASE 76D-0575-R-2024
76D 33134-00

NOTICE OF INTENT TO APPEAR: Montanore Minerals
Corp.

NOTICE OF FILING OF MASTER’S REPORT

This Master’s Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master’s Report within **10 days** of the stamped date if you disagree or find errors with the Master’s findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master’s Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master’s Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master’s Report.

MASTER'S REPORT

Statement of the case

Fish raceways claim 76D 33134-00 appeared in the Preliminary Decree for this Basin with issue remarks. Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. The following issue remarks appeared on claim 76D 33134-00:

THE CAPACITY OF THE DIVERSION AND CONVEYANCE SYSTEM CANNOT BE DETERMINED AND THE FLOW RATE REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

THIS CLAIMED WATER RIGHT MAY BE QUESTIONABLE. THE RIGHT APPEARS TO HAVE LAST BEEN USED IN 1970.

THE VOLUME OF THIS CLAIM CANNOT BE DETERMINED FROM AVAILABLE INFORMATION, AND VOLUME REMAINS AS ORIGINALLY CLAIMED. THE CLAIMED VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

Montana law requires the Water Court to resolve issue remarks. The court set a filing deadline for claimant, the State of Montana, Department of Fish Wildlife & Parks, to file evidence that the claim was put to beneficial use after 1970. The State of Montana, Department of Fish Wildlife & Parks did not file evidence by the deadline.

On April 2, 2024, Kevin Rechkoff filed a Notice of Appearance on behalf of claimant State of Montana, Department of Fish Wildlife & Parks. The service list reflects Mr. Rechkoff's appearance.

Issue

Should fish raceways claim 76D 33134-00 be dismissed?

Finding of fact

Fish raceways claim 76D 33134-00 should be dismissed.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. Prima facie proof may be overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

4. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

5. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

Analysis

A Montana Department of Fish, Wildlife and Parks Explanation of Water Claim at Libby Fisheries Station attached to the Statement of Claim explained that, “The hatchery operation was curtailed in 1970 due to economic considerations.... A fire destroyed the

main hatchery building on May 23, 1979. The Montana Department of Fish, Wildlife and Parks may decide to rebuild the hatchery in the future if funds become available.”

This information resulted in the issue remark questioning use of the claim since 1970 and the order setting filing deadline for the State of Montana, Department of Fish Wildlife & Parks to support beneficial use of the claim since 1970. The order setting filing deadline stated that if the State of Montana, Department of Fish Wildlife & Parks did not file evidence of beneficial use since 1970 by the deadline, “the Court will conclude that there is no additional evidence to be filed and will proceed with dismissal of the claim based on the current record.”

Conclusion of law

Based upon the issue remark stating beneficial use of the claim has not occurred since 1970, information in the claim file, and the lack of additional evidence filed by the State of Montana, Department of Fish Wildlife & Parks supporting beneficial use of the claim since 1970, fish raceways claim 76D 33134-00 should be dismissed. Dismissal of claim 76D 33134-00 moots the issue remarks appearing on the claim and the concerns of notice of intent to appear party Montanore Minerals Corp.

Recommendation

Fish raceways claim 76D 33134-00 should be dismissed.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm dismissal of the claim in the state’s centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Last Order:

**State of Montana Department of Fish Wildlife & Parks
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Helena MT 59620-0701**

Service via Electronic Mail

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Note: Service List Updated 4/4/2024

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 33134-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: **DISMISSED**

Owners: MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS
PO BOX 200701
HELENA, MT 59620-0701

Priority Date:

Type of Historical Right:

Purpose (Use): FISH RACEWAYS

Flow Rate:

Volume:

Source Name: LIBBY CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.