

Montana Water Court
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FILED
APR 11 2016

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BEAVERHEAD RIVER - BASIN 41B

CLAIMANTS: Brooke R. Erb; Calvin Erb; Glenn W. Hayden-
Deceased; Mildred J. Hayden; Thomas W. Meine

OBJECTOR: Calvin Erb

NOTICE OF INTENT TO APPEAR: Geoduck Land & Cattle LLC

CASE 41B-208
41B 88299-00
41B 88312-00
41B 88313-00
41B 88321-00
41B 88324-00
41B 88625-00

**ORDER REGARDING DISMISSAL OF
NOTICE OF INTENT TO APPEAR PARTY AND
ORDER REMANDING MATTER TO WATER MASTER**

I. STATEMENT OF THE CASE

This case involves six water rights in the Beaverhead River Basin. These rights are owned by several claimants collectively referred to as the Erbs. The only other party is Geoduck Land and Cattle LLC (Geoduck), which filed a Notice of Intent to Appear. (NOIA). No other parties challenged the Erb claims.

This matter was assigned to a Water Master, who consolidated the Erb claims into this case. After filing an NOIA, Geoduck asserted a right to contest the priority date of three Erb claims.

Priority date had not been previously raised in this case. Issue remarks placed on the Erb claims during the DNRC examination process were limited to flow rate, means of diversion and point of diversion. Priority date was not separately raised by an objector.

Geoduck asserted that it had a right to raise the priority date issue after filing an NOIA.

The Water Master denied Geoduck's motion to address priority date. The Master reasoned that Geoduck should have raised this issue by filing an objection, rather than by filing an NOIA and then asking to expand the issues later. The Master determined that a party filing an NOIA was limited to issues already raised and could not expand the scope of existing objections or issue remarks.

The Master also dismissed Geoduck from the case because priority date was the only issue Geoduck wanted to pursue. The Master concluded there was no further reason to keep Geoduck as a party given that it could not pursue priority date.

Geoduck objected to the Master's denial of its request to raise the priority date issue and to its dismissal. The Erbs contend the Water Master's order should be affirmed.

II. ISSUES

1. Did the Water Master err by concluding a party filing a Notice of Intent to Appear does not have the right to raise new issues in an existing case?

2. Was dismissal of Geoduck from this case proper?

III. THE HISTORY OF STATUTES AND RULES APPLICABLE TO NOTICES OF INTENT TO APPEAR

Participation in a Water Court case is controlled by statutes and rules. The history and evolution of these statutes and rules are important to this decision.

The adjudication process begins with issuance of a temporary preliminary or a preliminary decree by the Water Court. These decrees contain a compilation of water rights, and are usually organized by basin.

Once a decree has been issued, an objection period opens. The objection period provides an opportunity to contest water rights in the decree. The right to file an objection is conferred by Sections 85-2-232 and 233, MCA. Notice of the right to object is sent to persons who own existing rights within the basin, holders of contracts for deed, parties who have applied for and not been denied permits for water rights, holders of reserved rights, and other interested persons who request notice. § 85-2-232(1)(e)-(f), MCA.

The right to object is finite. Objections must be filed within 180 days of publication of the decree unless the objection period is extended. Extension of the objection period is limited to two extensions of ninety days each. § 85-2-233(2), MCA. No further extensions are allowed. These fixed statutory deadlines allow for meaningful participation, while ensuring the objection process is not open-ended, thereby prolonging the adjudication.

The next procedural step involves filing counterobjections. Once the objection period has closed, a counterobjection can be filed by a claimant against “the claim or claims of the objector.” § 85-2-233(3), MCA. Although the right to file an objection has been a fixture of the adjudication process since passage of the Water Use Act of 1979, the ability to file a counterobjection was not added until 1997.

The counterobjection statute was enacted because many objectors were waiting to file objections until the last hours of the objection period. This tactic was a form of ambush that prevented the claimant from responding to an objection by challenging the objector’s water rights. Report of the Water Adjudication Advisory Committee, October 1, 1996 at 9 (1997 Mt. SB 108, Ex. 1).

Counterobjections are filed after the objection period has closed. The time allowed for filing counterobjections is limited by statute to sixty days.

Notices of Intent to Appear are not mentioned in statute. Instead Section 85-2-233(5)(a), MCA states “the water judge shall fix a day when all parties who wish to participate in future proceedings are required to appear or file a statement.” The Water Court has interpreted this statute by providing notice to all water users of the opportunity to file an NOIA. The purpose of the notice is to allow interested parties a final chance to join a pending action.

For many years, the notice stated the rights of an NOIA party were limited. As an example, the notice for Basin 400 on the Milk River stated that persons filing Notices of Intent to Appear “will be limited to discussing those issues that have already been raised by the objections.” Basin 400, *Notice That Objections Have Been Filed*, February 4, 1998.

The language of notices issued by the Water Court has changed over time. The notice applicable to the present case was issued for Basin 41B. It stated:

If you are not already involved in a specific water right claim as the claimant or objector, but you wish to intervene and to participate in the proceeding regarding a specific water right claim, you may file a Notice of Intent to Appear. Those who timely file a Notice of Intent to Appear on a claim will receive notice of all further proceedings relevant to the Court's review of that specific claim.

Basin 41B, *Notice That Objections Have Been Filed*, dated December 18, 2014 (emphasis omitted).

References to Notices of Intent to Appear have been included in Water Court rules since 1983. The latest version of the NOIA rule is Rule 9(b), W.R.Adj.R.

Rule 9(b). Notice of intent to appear

Any person other than the claimant or objector who intends to appear and participate in further proceedings for any claims or issues included on the objection list must file a notice of intent to appear in compliance with § 85-2-233, MCA. The water court shall provide notice of intent to appear forms. The person filing a notice of intent to appear shall specify the claim number and include a statement of the appearing person's legal rights that might be affected by the resolution of the objections or issues involving the specified claim, and the purposes for which further participation is sought. Persons who file notices of intent to appear as provided in this rule shall receive notice of all future proceedings involving the claims specified in their notice and are entitled to participate in the resolution of the issues associated with those claims.

This rule was adopted in 2006 by the Montana Supreme Court after receipt of a petition from Chief Water Judge Loble. *In Re the Matter of the Revisions to the Water Right Claim Examination Rules and the Water Court Practice and Procedure Rules*, No. 86-397, December 6, 2006.

Comments filed during the rule making process suggested that the relationship between notices filed pursuant to Rule 9(b), W.R.Adj.R. and intervention of right discussed in Rule 24(a), M. R. Civ. P. should be clarified. Although a draft version of Rule 9(b) referred to Rule 24, that reference was omitted when the rule was adopted. In

its Order adopting Rule 9(b), the Montana Supreme Court wrote “the better practice would be to resolve any conflicts arising between the Water Court’s application of M. R. Civ. P. 24 and its application of Rule 9(b), W.R.Adj.R., when a case in controversy exists rather than issue what would amount to an advisory opinion.” *In Re the Matter of the Revisions*, No. 86-397 at 3.

IV. ANALYSIS

1. Did the Water Master err by concluding a party filing a Notice of Intent to Appear does not have the right to raise new issues in an existing case?

Does Rule 9(b), W.R.Adj.R. allow new issues to be raised via an NOIA?

Water Court cases applying Rule 9(b), W.R.Adj.R. are inconsistent. In cases 43D-243 and 76HF-205, the Court treated persons filing NOIAs as full parties with the right to raise new issues. In case 43QJ-76, the Court compared intervention of right to filing an NOIA, but declined to allow the intervening party to raise new issues. In case 40M-186 the Court stated that an NOIA party was limited to issues raised in issue remarks or objections. Many of these cases reference Rule 24, M. R. Civ. P. but with different results. In some cases, including this one, Water Masters have compared an NOIA to intervention of right under Rule 24(a), M. R. Civ. P., but have limited an intervenor’s subsequent rights of participation.

The differing results reached in prior Water Court cases applying Rule 9(b), W.R.Adj.R. do not provide clear guidance for deciding the issue presently before the Court. As a consequence, the parties to this action faced conflicting precedent regarding the rights and limitations applied to a party filing an NOIA, the relationship between Rule 9(b), W.R.Adj.R., intervention under Rule 24, M. R. Civ. P., and objections and counterobjections allowed by statute.

Rule 9(b), W.R.Adj.R. addresses the ability of an NOIA party to expand the issues in an existing case, although it does so indirectly. The rule allows a party “other than the claimant or objector” to “participate in further proceedings for any claims or issues included on the objection list... .” This passage accomplishes two things. It differentiates a party filing an NOIA from a claimant or objector and it authorizes that

party to participate in “claims or issues *on the objection list.*”¹ (emphasis added). The reference to issues on the objection list is an implicit limitation on the scope of an NOIA.

The Rule also states that persons filing NOIAs are entitled to “receive notice of all future proceedings” and “to participate in the resolution of the issues associated with those claims.” This language again implicitly limits rights of participation to existing issues.

Rule 9(b), W.R.Adj.R. does not contain language expressly authorizing expansion of issues through an NOIA. There is also no direct linkage established between the rights of a party filing an NOIA and those of an intervenor under Rule 24.

The ability of parties to amend claims and objections is addressed in Rule 10, W.R.Adj.R. Rule 10 allows claimants and objectors to amend their claims and objections. Rule 10 does not authorize amendment of NOIAs, although a right of amendment could have been easily included.

Finally, it is important to note Rule 2(b), W.R.Adj.R., which discusses the application of other Montana procedural rules to the adjudication. Rule 2(b) states that the Montana Rules of Civil Procedure and Evidence and the Montana Uniform District Court Rules govern the practice of the Water Court, “[u]nless the context of these Rules requires otherwise....”

Rule 9(b), W.R.Adj.R. must therefore be construed in the context of the statutory framework leading to its creation. An important aspect of this statutory framework is the establishment of clear deadlines for objections, counterobjections, and NOIAs.

There are important policy reasons for these deadlines. This policy is driven by the legislature’s oft repeated command to expedite the adjudication process. Among the duties of the Chief Water Judge is the obligation to assure the adjudication process is administered efficiently. § 3-7-223, MCA. The statute imposing this obligation requires

¹ An objection list is a specific document issued in each basin after the counterobjection period has closed. It lists objections and counterobjections filed against each water right as well as issue remarks. It also includes the specific elements raised by the objections, counterobjections, and issue remarks. A water right claim does not appear on an objection list unless it has received an objection, counterobjection, or issue remark. Although potentially confusing, the phrase “claims or issues” used in Rule 9(b) refers to claims against a water right, not to water right claims themselves.

that information be “expeditiously” transferred to water judges; that water judges move “without unreasonable delay,” and “that any contested or conflicting claims are tried and adjudicated as expeditiously as possible.” § 3-7-223(1)(a)-(c), MCA.

By statute, the Water Court is required to provide detailed quarterly reporting to the legislature on the progress of the adjudication. This reporting includes updates on the numbers of decrees issued, summary reports under consideration, claims resolved on a monthly basis, and the percentage of claims resolved by basin. § 85-2-281, MCA.

The legislature’s current expectation, expressed in statute, is that the Water Court will issue temporary preliminary or preliminary decrees for all basins in Montana by June 30, 2020. § 85-2-270, MCA. These specific performance and reporting obligations are unique to the Water Court, and distinguish it from District Courts.

The process of litigating water rights is also different from conventional civil practice. Water users in the adjudication process receive earlier and more extensive notice than most civil litigants. The timing and breadth of this notice makes enforcement of fixed deadlines more appropriate than in other types of litigation where inconsistent notice may require more flexible deadlines.

As an example, all water users in a basin receive notice when a preliminary decree is issued. Basin wide notice is provided again once objection lists have been compiled. The objection list provides notice of objections, counterobjections, or issue remarks associated with a water right claim. All of this notice is provided *before* the Water Court begins consolidating claims into cases. This practice differs from conventional civil litigation, where interested parties may not receive notice of a lawsuit until after it has proceeded towards completion.

Adherence to filing deadlines is important to timely completion of the adjudication. It also gives claimants and objectors a clear picture of what is expected.

In summary, the language of Rule 9(b) and Rule 10, W.R.Adj.R. prohibit an NOIA party from expanding the issues in a water rights case. Under these rules, such a party is limited to participating in resolution of issues raised by objections, counterobjections, issue remarks, or issues raised on motion of the Water Court.

Does Rule 24, M. R. Civ. P. Allow Geoduck to Raise the Issue of Priority Date?

Rule 24 allows both intervention of right and permissive intervention.

Both types of intervention are subject to threshold review for timeliness. There is no question that Geoduck's NOIA was timely filed. The question is whether an NOIA party may raise new issues under Rule 24, M. R. Civ. P. once it enters a case. Because timeliness applies to both intervention of right and permissive intervention, timeliness can be addressed before deciding which version of intervention applies.

Geoduck and Erbs cite case law interpreting Rule 24, M. R. Civ. P. to support or rebut their arguments that a party filing an NOIA may or may not raise new issues. The cited cases discuss the rights of an intervenor under Rule 24 to expand the issues in conventional civil actions *after the right to intervene has been granted*.

In *State Bank of New Salem v. Schultze*, 63 Mont. 410, 209 P. 599 (1922), a defendant failed to answer a complaint in intervention, and default judgment was entered. Although the ability of the intervening party to raise a new issue in its complaint was not squarely before the Court on appeal, the Court stated that “[w]hile it is true that an intervenor must accept the action pending as he finds it at the time of intervention yet thereafter his rights are as broad as those of the other parties to the action.” *Schultze*, 63 Mont. at 420 (citations omitted).

In *Allman v. Potts*, 140 Mont. 312, 371 P.2d 11 (1962), the question was whether an intervenor had a right to disqualify a judge. After citing a number of authorities, the Court concluded “that an intervenor [*sic*] is a party to the action and as a result must necessarily have the same power as the original parties.” *Allman*, 140 Mont. at 315, 371 P.2d at 13.

These cases do not discuss Rule 9(b), W.R.Adj.R or the interplay between Rule 9(b) and the water right objection and counterobjection process. Both Rule 9(b), W.R.Adj.R. and Section 85-2-233, MCA attach limits to intervention, including scope and timing, not found in Rule 24, M.R.Civ.P. Accordingly, Rule 24, M. R. Civ. P. and the cases construing it are not directly analogous to NOIAs. The issue before the Court

in the present case is about the scope and timing of intervention in a water rights case, not a conventional civil action.

Despite the differences between civil procedure and Water Court procedure, Rule 24, M. R. Civ. P. and Rule 9(b), W.R.Adj.R. both govern late entry into a case and therefore have similarities. A threshold requirement applicable to intervention generally is timeliness. *Estate of Schwenke v. Bechtold*, 252 Mont. 127, 827 P.2d 808 (1992).

The question of timeliness is “largely committed to the sound discretion of the trial court,” and appellate courts will not overturn the trial court’s determination absent an abuse of discretion. *In re C.C.L.B.*, 2001 MT 66, ¶ 23, 305 Mont. 22, 22 P.3d 646. Here, the question of timeliness is applied not to the filing of the NOIA by Geoduck, but to its later request to raise the issue of priority date.

Courts look to four factors when considering the timeliness of a motion to intervene: (1) the length of time the intervenor knew or should have known of its interest in the case before moving to intervene; (2) the prejudice to the original parties, if intervention is granted, resulting from the intervenor’s delay in making its application to intervene; (3) the prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. None of these factors are dispositive by themselves. *Id.* at ¶ 24.

The first question in considering timeliness requires determining how long Geoduck knew or should have known of its ability to raise the priority date issue.

Geoduck asserts that its ability to protect its interests will be impaired if it cannot challenge the priority date of Erbs’ rights. Geoduck asserts it is entitled to challenge Erbs’ priority dates because those dates were amended after the claims were filed. Implicit in this argument is the assumption that Geoduck did not have an opportunity to challenge priority date earlier.

In responding to this assertion, it is appropriate to observe that all water users in a source are presumed to be adverse to one another. This means that resolution of any water dispute has the potential to impact other water users in a basin.

It is also important to keep in mind that “the intervention rule is a discretionary judicial efficiency rule used to avoid delay, circuitry and multiplicity of suits.” *Schwenke*, 252 Mont. at 132-33, 827 P.2d at 811 (quoting *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982)).

Notice of the preliminary decree for the Beaverhead River was provided to all water users in the basin, including Geoduck. That notice included abstracts of the three water rights Geoduck now seeks to challenge.

Although the priority dates for the three claims at issue were amended after filing, the revised priority dates were shown for each right in the preliminary decree. That means Geoduck, like every other water user in the Beaverhead River basin, received notice of Erbs’ amended priority dates.

Additional notice was given in the form of information remarks attached to each right. These remarks explained that the Erbs had previously amended their priority dates. For example, claim 41B 88313-00 contains the following information remarks:

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 02/11/2009: POINTS OF DIVERSION, FLOW RATE, PRIORITY DATE AND TYPE OF RIGHT.

THE FOLLOWING ELEMENTS WERE AMENDED BY THE CLAIMANT ON 08/31/2012: FLOW RATE, PRIORITY DATE.

The other two claims of interest to Geoduck contain similar remarks. In sum, each of the three Erb claims contains multiple references to priority date.

The receipt of such notice at the start of litigation places Geoduck and other water users in a different position than intervenors in conventional civil litigation, who may or may not be aware of threats to their property interests when a lawsuit begins.

Geoduck also had notice of the right to object. Although the right to object is given by statute, additional notice was provided directly to water users by the Water Court. That notice explained what the preliminary decree was, advised recipients to “review the abstracts of all other water rights that affect your water right,” informed them that a claim that does not receive an objection may remain unchanged, and notified them that objections could be filed against water rights claims that do not reflect historical

beneficial use. *Notice of Entry of Preliminary Decree* for Red Rock River (Basin 41A) and Beaverhead River (Basin 41B), May 9, 2013.

Although it could have done so, Geoduck did not object to Erbs' water rights.² Filing objections would have given Geoduck the ability to protect its property interests by raising the priority date issue within the time limits contemplated by the legislature when it enacted Section 85-2-233(2), MCA.³

By electing not to object, an NOIA party jeopardizes its ability to raise new issues later. Although Geoduck's interests may be impaired if it cannot address priority date, that problem could have been avoided by filing objections to Erbs' rights.

Geoduck asserts that the overarching goal of the adjudication is to fully and finally determine the proper water right claims for any given basin. On this basis, Geoduck asserts NOIA parties should have broad latitude to raise new issues. Geoduck argues it must go where the facts take it, regardless of when those facts are developed. While the goal of uncovering every possible issue with a water right is laudable, it must be balanced against constraints of time, expense, and fairness to all litigants.

The legislature designed an adjudication process that gave claims *prima facie* status. The burden for identifying and correcting inaccurate claims falls on the DNRC via claims examination, upon litigants who are expected to protect their interests by objecting, and upon the Water Court through resolution of issue remarks and issuance of decisions based on correct interpretation of facts and law.

The Water Use Act does not guarantee a perfect adjudication of water rights, nor could any process deliver such an outcome, even with unlimited time and money. The success of the adjudication, like most judicial endeavors and democracy itself, depends on the active involvement of its stakeholders.

The Montana Water Use Act anticipates that there will be disagreements over the use of water among varying interests and the integrity of Montana's adjudication process depends upon the assertion and ultimate

² Geoduck filed over eighty NOIAs to various water rights in the Beaverhead. This indicates a high level of interest in water issues.

³ Given the lack of clarity regarding treatment of NOIAs that preceded this case, nothing in this order is intended as a criticism of Geoduck's litigation strategy.

resolution of these varying interests. The provisions of the Act charge all water users with the duty of asserting and defending their interests. This Court has recognized the importance of... comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims.

Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, ¶ 42, 361 Mont. 77, 255 P.3d 179 (citations and quotations omitted).

As the foregoing passage reveals, a key structural feature of the Water Use Act is providing all water users the opportunity to protect their interests. This opportunity comes in the form of an objection window which remains open long enough to allow participation but closes in time to produce finality without unreasonable delay or expense.

In summary, under the first prong of threshold timeliness analysis, every NOIA party has notice of each claim in the adjudication process. Every party has an opportunity to object to each claim in the process. Those opportunities occur at the beginning of the process and are designed to encourage early participation and a predictable conclusion. Once that objection period passes, the ability to raise new issues diminishes. A party who elects not to file an objection must point to extraordinary circumstances before raising new issues. Those circumstances do not exist here.

The second consideration in assessing timeliness is prejudice to the original parties. The question is whether prejudice will result from the intervenor's delay in making its application to intervene, if intervention is granted. While the Erbs have suffered some prejudice associated with delay in the adjudication of their rights, that prejudice is not great.

The real prejudice is the loss of the Erbs' right to file counterobjections to Geoduck's water rights. The Erbs' right to counterobject is triggered by the filing of a timely objection to their claims. § 85-2-233(3), MCA. Had Geoduck filed a timely objection, the Erbs could have filed a counterobjection to Geoduck's claims. Without an objection by Geoduck, the Erbs cannot contest Geoduck's rights unless they file a motion to intervene in cases involving Geoduck's rights. There is no guarantee such a motion

would be granted, and no guarantee that cases involving Geoduck's rights have not already been concluded. In contrast, the right to file a *timely* counterobjection is automatic, and has the additional benefit of arising at the start of the process. These features of the counterobjection process prevent adjudication by ambush.

If Geoduck is permitted to expand the issues without filing an objection as contemplated by statute, then the objection and counterobjection process will become meaningless. Sophisticated litigants will avoid filing objections altogether in an effort to avoid counterobjections to their own rights. That would frustrate the legislature's intent when it designed the objection process. Fewer objections and counterobjections also mean less participation by stakeholders, and potentially less accurate final decrees.

The third element of the test for timeliness is prejudice to the intervenor if the motion is denied. Geoduck had the chance to avoid prejudice by filing an objection. It cannot now claim prejudice after choosing not to object.

The fourth and final consideration is whether unusual circumstances mitigate for or against a determination that the application is timely. These factors include the need to move the adjudication forward in an expeditious manner, as well as the need to protect the integrity of the objection and counterobjection process designed by the legislature.

Based on application of the four timeliness factors applicable to intervention, it is clear that Geoduck's ability to raise the issue of priority date has passed.

Although Geoduck implies that prohibiting it from raising new issues may compromise the accuracy of the adjudication by preventing an enquiry into the validity of Erbs' priority dates, that result could have been avoided here by the filing of timely objections.

The right to file an NOIA under Rule 9(b), W.R.Adj.R. is not the same as a request for intervention under Rule 24, M. R. Civ. P. It confers a right to participate in resolution of existing issues, including those raised in previously filed objections or counterobjections, identified in issue remarks, or raised on motion of the Water Court. It does not confer a right to raise new issues.

Whether Rule 24, M. R. Civ. P. can be used to raise new issues depends on a threshold analysis of timeliness. Given the opportunities to participate early in the adjudication and the many factors weighing against late expansion of a water rights case, a party making such a request has a heavy burden.

Under the facts of this case, the Master correctly denied Geoduck's motion.

2. Was dismissal of Geoduck from this case proper?

Geoduck seeks reversal of the Master's decision to dismiss it from this case. Dismissal occurred because the Master concluded Geoduck was solely interested in priority date.

Although the record contains statements from Geoduck indicating its primary interest was priority date, Geoduck was entitled to participate in resolution of existing issues. In the absence of an explicit waiver or withdrawal of its right to pursue those issues, or in the absence of a properly supported motion to dismiss by the claimant, *sua sponte* dismissal of Geoduck was inappropriate.

Accordingly, Geoduck is reinstated as a party. Its rights of participation are limited in accordance with this opinion.

V. CONCLUSIONS OF LAW

1. The Water Master correctly concluded a party filing a Notice of Intent to Appear does not have the right to raise new issues in an existing case.
2. Dismissal of Geoduck was improper.

VI. ORDER

The Water Master's January 13, 2016 Order Denying Motion to Expand Issues and Order Dismissing NOIA Geoduck Land and Cattle is affirmed in part and rejected in part. This matter is remanded to the Master for further proceedings consistent with this opinion.

DATED this 11th day of April, 2016.


Russ McElyea
Chief Water Judge

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