

Montana Water Court
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FILED

JUN 25 2020

Montana Water Court

MONTANA WATER COURT, LOWER MISSOURI DIVISION
MILK RIVER BETWEEN FRESNO RESERVOIR AND
WHITEWATER CREEK BASIN 40J

CLAIMANTS: Hilldale Colony Inc.; Dennis P. Keller; Gayle M. Keller

CASE 40J-474
40J 12363-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this report carefully. You may file a written objection to the Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations.

The above stamped date indicates the date the Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to the Master's Report must be filed within 10 days of the date of the Master's Report. Because the 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. This means your objection must be received no later than **13 days** from the above stamped date.

If you file an objection, you must mail 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

Erosion control claim 40J 12363-00 received 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. No objections were filed to the claim.

Montana law requires the Water Court to resolve issue remarks. The following issue remarks were not resolved through the objection process and there was not enough information in the claim file or before the Court to resolve the issue remarks.

THIS CLAIMED PURPOSE IS QUESTIONED AS A BENEFICIAL USE OF WATER EXISTING PRIOR TO JULY 1, 1973.

THE CLAIMED FLOW RATE WAS NOT EXAMINED AS NO FLOW RATE GUIDELINES FOR THIS PURPOSE HAVE BEEN ESTABLISHED BY THE CLAIM EXAMINATION RULES.

THE CLAIMED VOLUME WAS NOT EXAMINED AS NO VOLUME GUIDELINES FOR THIS PURPOSE HAVE BEEN ESTABLISHED BY THE CLAIM EXAMINATION RULES.

The remark questioning whether erosion control is a beneficial use raised the legal issue of nonperfection. The State of Montana –Attorney General was ordered to join this case pursuant to Section 85-2-248(7), MCA.

On May 8, 2020, claimants and the State of Montana – Attorney General filed a Stipulation. On May 27, 2020, the State of Montana – Attorney General filed a motion to be dismissed from the case. The motion was granted.

Issue

Should claim 40J 12363-00 be dismissed from the adjudication?

Finding of fact

Claim 40J 12363-00 should be dismissed from the adjudication.

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. This prima facie proof may be contradicted and 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.

2. The Montana Water Court may accept a settlement agreement that reduces or limits an element of a claim and need not determine whether the burden of proof is met unless there is an unresolved issue remark on the claim. Rule 17(c), W.R.Adj.R.

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. Under Section 85-2-248(6), MCA, when an issue remark cannot be resolved through an informal meeting between the claimant and the DNRC, the Water Court must schedule proceedings to address and resolve the remark. Section 85-2-248(7), MCA, requires joinder of the State of Montana, through the Attorney General, as a necessary party the when the unresolved issues include nonperfection.

Conclusion of law

Claim 40J 12363-00 should be dismissed. The dismissal of claim 40J 12363-00 moots the issue remarks appearing on the claim.

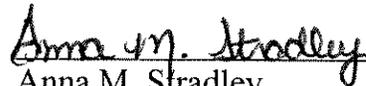
Recommendation

Erosion control claim 40J 12363-00 should be dismissed.

A Post Decree Abstract of Water Right Claim reflecting the claim’s dismissed

status accompanies this report to confirm the recommendation has been implemented in the state's centralized water right record system.

DATED this 25th day of June, 2020.


Anna M. Stradley
Senior Water Master

Service via USPS Mail

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