

Montana Water Court
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FILED

JUN 25 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
CUT BANK CREEK – BASIN 41L

* * * * *

CLAIMANTS: Jo Ann Clark; Gregory P. King; Lorraine King; Raleigh G. King

OBJECTORS: Blackfeet Tribe; United States of America (Bureau of Indian Affairs)

NOTICE OF INTENT TO APPEAR: City of Cut Bank

41L-31

41L 41001-00

41L 41002-00

41L 41003-00

41L 184574-00

Implied Claims:

41L 30146985

41L 30146986

41L 30146987

41L 30146988

41L 30146989

41L 30146990

41L 30146991

41L 30146992

41L 30146993

41L 30146994

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 RECOMMENDING SUMMARY JUDGMENT IN FAVOR OF THE UNITED STATES OF AMERICA (BUREAU OF INDIAN AFFAIRS)

Procedural history

Irrigation claims 41L 41001-00, 41L 41002-00, and 41L 41003-00, and stock claim 41L 184574-00 received an issue remark questioning whether the claims are appropriated pursuant to Montana state water law (state-based) or are part of the tribal water right defined by the Blackfeet Tribe-Montana-United States Compact. Claim 41L 41001-00 also received issue remarks concerning maximum acres irrigated and flow rate.

The United States of America (Bureau of Indian Affairs) ("BIA") and the Blackfeet Tribe filed objections to each claim. The City of Cut Bank filed a notice of intent to appear for claims 41L 41001-00 and 41L 41002-00.

The BIA's and Blackfeet Tribe's objections state that claimants cannot have state-based water rights on land held in trust by the BIA for the benefit of the Blackfeet Tribe, the claims may have been abandoned in whole or part, and priority dates for state-based water rights require reduction to fee patent dates.

Claimants for the most part failed to participate in these proceedings. The court held a status conference for claims 41L 41001-00, 41L 41003-00, and 41L 184574-00 on October 3, 2017. Claimants failed to appear. The BIA moved for an order requiring claimants to show cause why the claims should not be dismissed. Claimants failed to file

any response by the ordered deadline. A November 16, 2017 Master's Report recommended dismissal of claims 41L 41001-00, 41L 41003-00, and 41L 184574-00. On November 30, 2017, claimants filed a request to reinstate the claims. A Water Judge recommitted the claims to a Water Master. The Water Master set a settlement deadline and granted multiple extensions of the settlement deadline.

Claims 41L 41001-00, 41L 41003-00, and 41L 184574-00, along with a request to consolidate claim 41L 41002-00 into these proceedings, transferred to this Master on September 11, 2018. This Master consolidated the claims into Water Court Case 41L-31 and granted two more extensions of the settlement deadline. On March 8, 2019, the Blackfoot Tribe requested referral of the claims to the Montana Department of Natural Resources and Conservation ("DNRC").

On June 20, 2019, DNRC Water Resource Specialist Dixie Brough filed a Memorandum. The Memorandum responded to an order for claimants to resolve issue remarks on claims 41L 41001-00, 41L 41002-00, and 41L 41003-00, and a Rule 12(b), W.R.Adj.R. request for assistance to determine whether the Preliminary Decree abstracts for claims 41L 41001-00, 41L 41002-00, and 41L 41003-00 included post-July 1, 1973 changes. Raleigh King made initial contact with DNRC but failed to follow up. Ms. Brough reported and made recommendations based on the record and resources available to DNRC. Ms. Brough reported the maximum acres irrigated identified by the preliminary decree abstracts for claims 41L 41001-00 and 41L 41002-00 were historically accurate and the maximum acres irrigated issue remarks were resolved. Ms. Brough recommended that the flow rate of claims 41L 41001-00 and 41L 41002-00 be reduced to the 17.00 GPM/acre guideline. Ms. Brough reported the Preliminary Decree abstracts of claims 41L 41001-00, 41L 41002-00, and 41L 41003-00 did not reflect post-July 1, 1973 changes other than the type of irrigation system for claim 41L 41002-00. Ms. Brough correctly made no recommendation concerning resolution of the legal issue remark questioning whether the claims are state-based or part of the tribal water right.

Included with Ms. Brough's Memorandum were comments from the Blackfoot

Tribe. The Blackfeet Tribe suggested a possible resolution for claim 41L 41001-00 and mentioned the possibility that claims 41L 41002-00 and 41L 41003-00 were abandoned.

On December 30, 2019, the BIA filed a brief. On January 6, 2020, the City of Cut Bank filed Comments on DNRC Memorandum.

The BIA's brief was akin to a motion for summary judgment. The BIA provided much detailed evidence, including color maps. However, the motion's requested relief required further clarification, and possibly further evidentiary support. The motion was dismissed without prejudice and a March 11, 2020 deadline set for the BIA to file a motion for summary judgment with clarification, and if required, further evidentiary support of its requested relief. The order stated that if no comments to the motion were received from the Blackfeet Tribe and the City of Cut Bank by the time frames set out by Rule 56, M.R.Civ.P., it would be considered their agreement with the relief requested and supported by the BIA.

On March 11, 2020, the BIA filed a Motion for Summary Dismissal and Judgment and Brief in Support of Motion for Summary Dismissal and Judgment ("Motion"). The Motion was placed on the court's motions calendar.

The Blackfeet Tribe and the City of Cut Bank did not file comments, nor did claimants file a response to the Motion within the time set forth by Rule 56, M.R.Civ.P. The parties waived a hearing on the motion. The motion is deemed submitted and this Master will make a recommendation to the Water Judge based upon the record.

The BIA contends: a) Montana state water law does not apply to lands held in trust by the BIA for the benefit of the Blackfeet Tribe; b) claimants could not establish existing state-based water rights pursuant to Montana state water law on land, that previous to July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe; c) the place of use for irrigation claim 41L 41001-00 should exclude trust land and only identify fee land; the priority date for each fee land place of use should be based upon the issuance of the fee patent for that place of use; the type of historical right should be "use"; and the flow rate for each fee land place of use should be the DNRC guideline of 17.00 GPM/acre; d) irrigation claims 41L 41002-00 and 41L

41003-00, and stock claim 41L 184574-00 should be dismissed from the adjudication because they are not existing state-based water rights within the jurisdiction of the Montana Water Court.

Summary judgment - standard of review

Rule 56, M.R.Civ.P. and the case law interpreting this rule govern the process for filing, responding to, and determining motions for summary judgment. Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *First Security Bank v. Abel*, 2008 MT 161, ¶ 10, 343 Mont. 313, 184 P.3d 318; Rule 56(c), M.R.Civ.P. To determine the existence or nonexistence of a genuine issue of material fact, the Court will look to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *First Security Bank*, ¶ 11. All reasonable inferences that might be drawn from the offered evidence will be drawn in favor of the party opposing the summary judgment motion. *First Security Bank*, ¶ 11. The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *First Security Bank*, ¶ 12. Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden then shifts to the party opposing the motion. *First Security Bank*, ¶ 12.

Failure of a party opposing a motion for summary judgment to “either raise or demonstrate the existence of a genuine issue of material fat [sic], or to demonstrate that the legal issue should not be determined in favor of the movant, is evidence that the party's burden was not carried.” Summary judgment is then proper because Mont. R. Civ. P. 56(e)(2) provides that the non-movant may not rest upon the mere allegations or denials of the pleadings, and a court is under “no duty to anticipate proof to establish a material and substantial issue of fact.” *Conboy v. State*, 214 Mont. 492, 500, 693 P.2d 547, 551 (1985).

Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*,

2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. When a party fails to respond to a summary judgment motion, the Court still has a duty to inquire whether summary judgment is appropriate under the applicable law. *Nelson v. City of Billings*, 2018 MT 36, ¶ 11, 390 Mont. 290, 412 P.3d 1058.

If a request for a hearing on summary judgment is not made within the time period prescribed for filing briefs with the court, the right to a hearing on summary judgment is waived. Rule 56(c)(2)(A), M.R.Civ.P.

Issues

1. Are there any genuine issues of material fact regarding:
 - a) The historical accuracy of the requested modifications to irrigation claim 41L 41001-00?
 - b) The points of diversion claimed by irrigation claims 41L 41002-00 and 41L 41003-00, and the point of diversion and place of use claimed by stock claim 41L 184574-00 were located on land, that previously to July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe?
2. Is the BIA entitled to judgment as a matter of law that:
 - a) Claim 41L 41001-00 should be modified as requested to reflect historical beneficial use based upon Montana state water law?
 - b) Claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 should be dismissed because they are not existing state-based rights within the jurisdiction of the Montana Water Court?

Principles of law

1. “‘Existing right’ or ‘existing water right’ means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(13), MCA; *E.g. Hoon v. Murphy*, 2020 MT 50; ¶ 34, 399 Mont. 110, 460 P.3d 849.

2. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights. Section 3-7-224, MCA.

3. A properly filed Statement of Claim for Existing Water Right or an amended 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.

4. 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.

5. Pursuant to § 85-2-227(2), MCA:

A water judge may consider all relevant evidence in the determination and interpretation of existing water rights. Relevant evidence under this part may include admissible evidence arising before or after July 1, 1973.

6. State courts must apply federal law to Indian reserved water rights. *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 219 Mont 76, 95, 712 P.2d 754, 765-66 (1985).

7. *Johnson v. M'Intosh*, 21 U.S. 543, 587-589, 591-592, 604 (1823), held that Indian tribes hold title to their lands by Indian title and tribes have the right to possess and occupy land; by right of discovery, European governments obtained ultimate dominion subject to Indian title; and Indian title is good against all but the sovereign and can only be terminated by the sovereign. 25 U.S.C. § 177 (2018); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 670, 94 S. Ct 772, 777-78 (1974). Only the United States can terminate Indian title. *See generally Mont. v. Blackfeet Tribe*, 471 U.S. 759, 766-68; 105 S. Ct. 2399, 2403-04 (1985); *Swinomish Indian Tribal Community. v. BNSF Ry. Co.*, 951 F.3d 1142, 1153-54 (9th Cir. 2020); *U.S. v. Morrison*, 203 F. 364 (Colo. 1901).

8. *Winters v. U.S.*, 207 U.S. 564, 28 S. Ct. 207 (1908), first acknowledged that Indian tribes and reservations have federal reserved water rights. When the Indians reserved land, the reservation necessarily included the resources to make it a homeland (to serve the purposes of the reservation). The reservation of resources included water. *Winters*, 207 U.S. at 575-577, 28 S. Ct. at 211-212; *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46-47 (9th Cir. 1981). Montana's admission to the Union on February 22, 1889 had no affect on how water was appropriated on the Fort Belknap Indian Reservation. *Winters*, 207 U.S. at 577, 28 S. Ct. at 212; *U.S. v. McIntire*, 101 F. 2d 650, 654 (9th Cir. 1939).

9. When land is held by the United States as trustee for an Indian tribe, there is no ability to acquire title to the water rights reserved for the purposes of the reservation unless Congress so specifies. 25 U.S.C.S. § 1322(b) (LexisNexis, Lexis Advance through Pub. L. No. 116-140, approved Apr. 28, 2020); 28 U.S.C.S. § 1360(b) (LexisNexis, Lexis Advance through Pub. L. No. 116-140, approved Apr. 28, 2020); *McIntire*, 101 F. 2d at 653-654; *Connolly v. Blackfeet Tribe*, 2019 Mont. Water LEXIS 133 at **6-7 (Nov. 27, 2019).

10. The Water Court has acknowledged its authority to generate implied claims during adjudication. If a statement of claim was timely filed and the form contains multiple rights, the statutory deadline set by § 85-2-221, MCA, has been met for the multiple rights. *Bergin v. Nelson*, 2001 Mont. Water LEXIS 5 at * 24 (Feb. 21, 2001); *see* Rule 35, W.R.C.E.R.

11. The following guidelines apply when generating an implied claim. *Eliasson Ranch Co. v. Rodeghiero*, 2004 Mont. Water LEXIS 2 at ** 5-7 (Jun. 28, 2004). An implied claim may be generated based only on the attachments to a statement of claim, but typically it is based on the statement of claim itself. There is usually evidence of two or more claims on the face of the statement of claim, most commonly indicated by an overstatement of an element, or the identification of multiple purposes, multiple priority dates, or multiple sources. The generation of an implied claim must come from the statement of claim as originally filed.

A statement of claim cannot be amended after the filing deadline or changed through the objection process to expand the elements of the filed statement of claim and thereby create the groundwork to add additional water rights through the implied claim process. The implied claim process cannot be used to circumvent the claim filing process in order to cure a failure to file a water right claim in a timely fashion. That practice would be contrary to the late claim provisions of the statutes. Sections 85-2-221 and 85-2-225, MCA. *Adjudication of Water Rights of Yellowstone River*, 253 Mont. 167, 832 P.2d 1210 (1992) (emphasis added).

12. In 2013, the Montana Water Court added an additional layer of review to the above analysis for generating implied claims. *Foss v. Van Arsdale*, 2013 Mont. Water LEXIS 17 at ** 32, 37 (Jan. 31, 2013). Three criteria must be met by the party requesting an implied claim.

1. Evidence corroborating the actual historic use of the implied claim must exist.
2. Supplemental evidence that explains or clarifies the statement of claim may be considered.
3. The creation of an implied claim should not change the historic use of water or increase the historic burden on other water users.

If these criteria are not met, water rights are lost even when “ample evidence of historic use otherwise exists” thereby establishing “an appropriate balance between recognition of legitimate claims and upholding the substance of the forfeiture statute.” Section 85-2-226, MCA.

13. 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.

14. 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.

15. If the Montana Water Court cannot resolve issue remarks based upon information in the claim file or information available to the court, claimants shall be

required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

Analysis

Issue 1. Are there are any genuine issues of material fact regarding:

- a) The historical accuracy of the requested modifications to irrigation claim 41L 41001-00?**
- b) The points of diversion claimed by irrigation claims 41L 41002-00 and 41L 41003-00, and the point of diversion and place of use claimed by stock claim 41L 184574-00 were located on land, that previously to July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe?**

The Declaration (“Decl.”) [Ex. A, Dec. 30, 2019 Objectors’ Brief], and Supplemental Declaration (“Supp. Decl.”) of Kevin Bradley, P.E., included with the BIA’s March 11, 2020 Motion and Brief in Support of Motion for Summary Dismissal and Judgment (“Br.”) support the BIA’s Motion.

1. Mr. Bradley is a Water Rights Engineer for the BIA Rocky Mountain Region. (Decl. at 2.)
2. Mr. Bradley researched the BIA Land Title Records. These records are maintained by the BIA until land loses trust status (goes into fee status). Mr. Bradley reviewed Title Status Reports. Title Status Reports “express the trust status of lands based on LTRO [Land, Titles, and Records Office] records in the Trust Asset and Accounting Management System (“TAAMS”) database.” Mr. Bradley is authorized to generate Title Status Reports for public viewing. Mr. Bradley generated and attached a number of the reports to his Declaration. (Decl. at 6-7.)¹

¹ It is assumed Mr. Bradley reviewed the entirety of the Tract History Report, specifically looking for changes in title status (trust to fee). Mr. Bradley confirms in all relevant situations, the property upon which the claimed pre-July 1, 1973 points of diversion and/or places of use were located never left trust, or protected status, previous to July 1, 1973. An actual copy of the Tract History Report was not included with Mr. Bradley’s Declaration as it contains information that cannot be disclosed under the provisions of the Freedom of Information Act. 5 U.S.C.S. § 552a (LexisNexis, Lexis Advance through Pub. L. No. 116-

3. Mr. Bradley researched fee patents issued by the United States of America (Bureau of Land Management) (“BLM.”) For the purposes of this case, the fee patents “specify the date on which interests in land within the exterior boundaries of an Indian Reservation lost their trust status and transitioned into private fee ownership.” The fee patents are federal government records, available to the public on the BLM’s General Land Office website. A number of fee patents are attached to Mr. Bradley’s Declaration. (Decl. at 8.)

4. Mr. Bradley reviewed a number of historical aerial photographs from the DNRC and the United States Geological Survey website ranging from 1958 to 1982, contemporary photos from the Farm Services Agency – National Agricultural Imagery Program, and satellite imagery from Google Earth. (Supp. Decl. at 6.a.ii-x.)

5. Mr. Bradley consulted the 1969 Glacier County Water Resources Survey. (Decl. at 9.)

6. Mr. Bradley utilized ArcMap to import the photos and “temporarily represent irrigation through the years based on available information,” in part overlaying the irrigation polygon from the Glacier County Water Resources Survey over aerial photographs. (Decl. at 9.)

7. Mr. Bradley conducted a field investigation. (Decl. at 10.)

8. The land claimed by water right irrigation claim 41L 41001-00 includes property owned by Kings, J.R. Clark, and the BIA in trust. Mr. Bradley states, “Over 30 combined fee and trust land parcels are jammed into place of use descriptions associated with these claims.” (Decl. at 14.)

9. Mr. Bradley confirmed 207.60 acres of irrigation for claim 41L 41001-00 by cross referencing the aerial photographs, the Glacier County Water Resources

140, approved Apr. 28, 2020); *Glen v. BIA*, Case 40J-197 at p. 5 (MT Water Court Master’s Report Nov. 23, 2015; Order Adopting Master’s Report Dec. 23, 2015).

Survey, the Title Status Reports, and the fee patents. (Supp. Decl. at 6a.xi. and Att. 1, and Att. 4 TSR Tract 201-T5314 and TSR Tract 201-TR3; Br. at C.1.a.-j.)

10. Mr. Bradley confirmed the point of diversion identified by the preliminary decree abstract for irrigation claim 41L 41002-00 is located on land that was never public domain and was never open to public settlement. (Decl. at 15e.; Supp. Decl. at 6.b.xv. and Att. 4 TSR Tract 201 T-7008, and Att. 5; Br. at C.2.a.)

11. Fred R. Johnson filed statement of claim 41L 41003-00. The statement of claim identified its point of diversion in the SESW of Section 25, Township 34 North, Range 11 West. Mr. Bradley confirmed the point of diversion identified by statement of claim 41L 41003-00 never left trust status previous to July 1, 1973. (Decl. at 16.a.; Supp. Decl. Att. 4 TSR Tract 739-A.)² Mr. Johnson filed a change application on December 8, 1978 seeking authorization to move the point of diversion identified by irrigation claim 41L 41003-00. Mr. Johnson explained he was moving the point of diversion to his own land because the pre-July 1, 1973 point of diversion was on BIA land. (Decl. at 16c.; Supp. Decl. Att. 6 at 4-5.) On August 27, 1979, DNRC granted Mr. Johnson's post-July 1, 1973 change in the point of diversion to the NWNENW of Section 35, Township 34 North, Range 11 West. (Supp. Decl. Att. 6 at 3; Br. at C.3.a.)

12. Mr. Bradley confirmed the point of diversion and place of use identified by stock claim 41L 184574-00 are located on land that has never left trust status. (Decl. at 17a.; Supp. Decl. Att. 4 TSR Tract 201-1929C; Br. at C.4.)

13. Attached to Mr. Bradley's Supplemental Declaration are fee patents (Att. 3) and photographs and maps (Att. 2) supporting the specific number of acres irrigated on fee land. Mr. Bradley created a table identifying the trust land and

² During claims examination DNRC modified the point of diversion from the SESW of Section 25, Township 34 North, Range 11 West to the NWSWSE of Section 25, Township 34 North, Range 11 West because "someone changed P.O.D. incorrectly! Changed back as claimed and refined to qtr qtr qtr." (Claims Examination Worksheet dated Nov. 23, 1998, claim file 41L 41003-00; Decl. at 16.b.) The claims examiner made an error when modifying the point of diversion back to what was claimed, transposing the quarter quarter sections identified by the prima facie statement of claim, resulting in the different point of diversion identified by the preliminary decree abstract for claim 41L 41003-00.

associated Title Status Reports, and the fee lands and associated fee patents for each place of use parcel identified for the 207.60 acre place of use identified by claim 41L 41001-00. (Sup. Decl. Att. 1.)³ A map depicting the fee land place of use for claim 41L 41001-00 was included with Mr. Bradley's Declaration. ("Maps" Section of Decl.)

Claimants failed to respond to the Motion for Summary Dismissal and Judgment and failed to carry their burden of demonstrating genuine issues of material fact exist. The BIA established that no genuine issues of material fact exist. The BIA conclusively established that: a) the requested modifications to claim 41L 41001-00 are historically accurate, and b) the pre-July 1, 1973 points of diversion for irrigation claims 41L 41002-00 and 41L 41003-00 and the pre-July 1, 1973 point of diversion and place of use for stock claim 41L 184574-00 were located on land, that previous to July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe.

Issue 2. Is the BIA entitled to judgment as a matter of law that:

- a) Claim 41L 41001-00 should be modified as requested to reflect historical beneficial use based upon Montana state water law?**
- b) Claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 should be dismissed because they are not existing state-based rights within the jurisdiction of the Montana Water Court?**

Claimants failed to provide any relevant legal argument rebutting the assertion that a state-based water right claim cannot be appropriated pursuant to Montana state water law on land held in trust by the BIA for the benefit of the Blackfeet Tribe unless Congress states otherwise. Claimants failed to provide any evidence that Congress specified they could appropriate water on land held in trust by the BIA for the benefit of the Blackfeet Tribe.

³ Table 1 includes two errors: 1. Fee patent no. 784077 should read 780477. 2. The date for fee patent 1097692 should be June 20, 1938 not June 10, 1938. Fee patent no. 659950 was not included in Att. 3 of the Supp. Decl. A copy of the fee patent was printed from the GLO website located at <https://gloreCORDS.blm.gov/default.aspx> and placed in implied claim file 41L 30146989.

The BIA is entitled to judgment as a matter of law that: a) claim 41L 41001-00 should be modified as requested to reflect historical beneficial use based upon Montana state water law, and b) claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 should be dismissed because they are not existing state-based water rights within the jurisdiction of the Montana Water Court.

Conclusions

The BIA established that no genuine issues of material fact exist.

The BIA is entitled to judgment as a matter of law.

Prior to the fee patent dates, the claimed points of diversion and places of use for claim 41L 41001-00 were on Indian lands - lands subject to the trust relationship between the BIA and the Blackfoot Tribe - there was no ability to acquire title to the water rights reserved for the purposes of an Indian reservation without specific congressional approval. That portion of the place of use identified by claim 41L 41001-00, held in trust by the BIA on behalf of the Blackfoot Tribe cannot be claimed by an individual as part of a state-based water right claim. The Title Status Reports provide sufficient evidence to overcome prima facie statement of claim 41L 41001-00 and supports removal of that portion of the place of use held in trust by the BIA on behalf of the Blackfoot Tribe. Claim 41L 41001-00 should be modified to exclude all trust land from its place of use.

Upon the date, or after the date, a fee patent was issued by the United States, such lands become subject to the laws of the United States and Montana state water law. The fee patents establish private ownership of the place of use, the ability to establish a state-based water right claim on the place of use, and the priority date (instead of the filed notice of appropriation attached to the statement of claim). The fee patents provide sufficient evidence to overcome prima facie statement of claim 41L 41001-00 and support reducing the priority date and modifying the type of historical right from “filed” to “use.” Claim 41L 41001-00 should identify its place of use on fee land only.

The flow rate and places of use identified by statement of claim 41L 41001-00 support the request to generate an implied claim for each fee patented place of use identified by statement of claim 41L 41001-00. The irrigated acres confirmed by DNRC

review and Mr. Bradley's review, along with the fee patents for each place of use, provide the requisite evidence corroborating the actual historic use of the implied irrigation claims. The generation of implied claims from claim 41L 41001-00 will not increase the historic burden on the source or change the historic use of the claim. Implied irrigation claims 41L 30146985 through 41L 30146994 should be generated from statement of claim 41L 41001-00 for each ownership and identify the reduced priority date for each fee land place of use established by the issuance date of the fee patent for that particular fee land place of use. The flow rate for each fee land place of use should be the DNRC guideline of 17.00 GPM/acre. These modifications resolve the maximum acres irrigated, flow rate, and legal basis issue remarks on claim 41L 41001-00.

A copy of the relevant fee patent and map resides in claim files 41L 41001-00 and 41L 30146985 through 41L 30146994.

The jurisdiction of the Montana Water Court is to determine existing water rights. The pre-July 1, 1973 location of the points of diversion for irrigation claims 41L 41002-00 and 41L 41003-00 and the pre-July 1, 1973 location of the point of diversion and place of use for stock claim 41L 184574-00 on land, that previous to July 1, 1973, was continuously held in trust by the BIA for the benefit of the Blackfeet Tribe foreclosed the appropriation of water pursuant to Montana state water law. The water rights identified by claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 could not be appropriated pursuant to Montana state water law as the law existed previous to July 1, 1973. These water right claims are not existing water rights within the jurisdiction of the Montana Water Court. Claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 should be dismissed. The dismissal of the claims moots the issue remarks appearing on each claim.

Recommendations

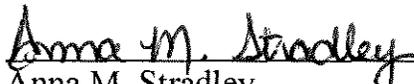
The BIA's Motion for Summary Dismissal and Judgment should be **GRANTED**.

Judgment should be entered that claim 41L 41001-00 should be **MODIFIED** to accurately reflect historical use. The issue remarks are resolved and should be removed from the claim.

Judgment should be entered that claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 should be **DISMISSED**.

Post Decree Abstracts of Water Right Claim are served with this Report to confirm the modification of claim 41L 41001-00 and the generation of implied claims from claim 41L 41001-00, and the dismissal of claims 41L 41002-00, 41L 41003-00, and 41L 184574-00 in the state's centralized record system.

DATED this 25th day of JUNE, 2020.


Anna M. Stradley
Senior Water Master

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Note: Caption Updated 6.10.20