

Montana Water Court
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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
BLACKFEET TRIBE’S OFF-RESERVATION INSTREAM RESERVED WATER RIGHTS

CLAIMANT: United States of America (Bureau of Indian Affairs)

CASE 41M-352
41M 30058101

OBJECTOR: Pondera County Canal & Reservoir Co.

NOTICE OF INTENT TO APPEAR: State of Montana Attorney
General; State of Montana
Department of Natural
Resources

INTERVENOR: Blackfeet Tribe

ORDER APPROVING STIPULATION

INTRODUCTION

This order addresses whether the Court should approve a stipulation (the “Stipulation”) entered into between the United States of America (Bureau of Indian Affairs) (“BIA”), Pondera County Canal and Reservoir Company (“PCCRC”), and the Blackfeet Tribe (the “Tribe”). The Stipulation requests that certain modifications be made to water right claim 41M 30058101 to resolve objections to the claim filed by PCCRC.

PROCEDURAL BACKGROUND

This case arises out of Water Court Case No. WC-1991-01. Case WC-1991-01 (originally designated as WC-91-01) was opened in 1991 to address certain water right claims filed by the United States, as trustee for the Blackfeet Tribe. The Water Court granted the Tribe’s motion to intervene in the case on November 25, 1997.

The proceedings in Case WC-1991-01 have been lengthy and it is not necessary to describe them in detail. Ultimately in March 2018, the United States and the Tribe filed a “Joint Motion for Incorporation of the Blackfeet Tribe’s Off-Reservation Instream Reserved Rights Into Preliminary and Final Decrees and for a Consolidated Hearing on any Objections to the Preliminary Decree” in the case. The Joint Motion followed a stipulation (the “Blackfeet Off-Reservation Stipulation”) between the Tribe, BIA in its capacity as trustee for the Tribe, the United States National Park Service, and the United States Forest Service. The Blackfeet Off-Reservation Stipulation describes specifically the Tribe’s reserved water right claims for various streams in the Lewis and Clark National Forest and Glacier National Park.

On March 26, 2019, the Water Court issued a Preliminary Decree and Order for the Commencement of Proceedings for Consideration of the Blackfeet Tribe’s Off-Reservation Instream Reserved Water Rights (“Preliminary Decree”). The Preliminary Decree includes abstracts for instream water rights identified in the Blackfeet Off-Reservation Stipulation. These water rights are in four different hydrologic basins, including the Two Medicine River Basin (Basin 41M). Claim 41M 30058101 is included in the Preliminary Decree as an instream flow claim to water in Birch Creek.

Following the issuance of the Preliminary Decree, the Water Court provided a period of time for persons to file objections or appearances as to the water right claims in the decree. PCCRC timely objected to claim 41M 30058101. The State of Montana filed a notice of intent to appear on February 5, 2020. The Court consolidated the claim into this case to address the issues raised by PCCRC’s objections and the State’s appearance.

On April 29, 2020, the BIA filed the Stipulation with the Court, together with a notice requesting that the Court approve the Stipulation. No opposition to the Stipulation has been filed by any party, nor has any person sought leave to intervene in proceedings relating to the Court’s review of the Stipulation.

FINDINGS OF FACT

1. On September 25, 1895, the Tribe and the United States entered into an “Agreement with the Indians of the Blackfeet Indian Reservation in Montana” (“1895

Agreement”). Congress ratified the 1895 Agreement. Act of June 10, 1896, 29 Stat. 321, 353-58. Under the terms of the agreement, the Tribe relinquished to the United States certain lands that later became parts of Glacier National Park and the Lewis and Clark National Forest.

2. As part of the 1895 Agreement, the Tribe reserved and retained certain rights, including “the right to hunt upon said lands and to fish in the streams thereof so long as the same shall remain public lands of the United States” 1895 Agreement, Art. I, 29 Stat. at 354.

3. The BIA, in its capacity as trustee for the Tribe, filed water right claims in the Montana statewide adjudication, including claims for instream flows necessary to protect water rights reserved in the 1895 Agreement.

4. Prior to the issuance of the Preliminary Decree, the water rights reserved by the Tribe in the 1895 Agreement had not previously been decreed by the Water Court and are not part of the Blackfeet Tribe-Montana-United States Compact (the “Compact”).

5. The Blackfeet Off-Reservation Stipulation became effective when the Tribe’s membership ratified the Compact. Following ratification of the Compact, and the March 2018 Joint Motion, the Court issued the Preliminary Decree. The Court incorporated into the Preliminary Decree all the water rights quantified in the Blackfeet Off-Reservation Stipulation for the following basins: the Milk River above Fresno Reservoir Basin (Basin 40F); the St. Mary River Basin (Basin 40T); the Cut Bank Creek Basin (Basin 41L); and the Two Medicine River Basin (Basin 41M).

6. The Blackfeet Off-Reservation Stipulation identifies the various streams within Glacier National Park and the Lewis and Clark National Forest that are subject to the Tribe’s reserved water rights. The designated streams include Birch Creek, the North Fork of Birch Creek, and the South Fork of Birch Creek. Separate claims for each of these streams are included in the Preliminary Decree.

7. Claim 41M 30058101 appears in the Preliminary Decree as a reserved water right claim for instream flow purposes in Birch Creek and its tributaries within the boundary of the Lewis and Clark National Forest. The Preliminary Decree also includes

separate abstracts for the North Fork of Birch Creek (claim 41M 30058127) and the South Fork of Birch Creek (claim 41M 30058137).

8. PCCRC claims and owns state-based water rights within Basin 41M, including claims for the storage and beneficial use of the waters of Birch Creek and its tributaries in the storage facility known as “Swift Dam” and the accompanying reservoir related to Swift Dam. PCCRC objected to claim 41M 30058101 because the point and means of diversion is identified as Government Lot 1, NE of Section 27, Township 28 North, Range 10 West, Pondera County, Montana, which corresponds to the location of Swift Dam under PCCRC’s state-based water rights.

9. The Stipulation proposes to resolve PCCRC’s objection by changing the source of claim 41M 30058101 from Birch Creek to the Middle Fork of Birch Creek, and moving the point of diversion to its headwaters in the NENESE, Section 30, Township 27 North, Range 10 West, in Teton County, Montana. The Middle Fork of Birch Creek is a tributary of the South Fork of Birch Creek.

10. The Stipulation includes maps that depict the location of the proposed new point of diversion in relation to the various forks of Birch Creek. The maps are attached to and incorporated into these Findings of Fact.

11. Modifying the source and point of diversion elements of claim 41M 30058101 as requested in the Stipulation is unlikely to adversely affect any other water rights because the Middle Fork of Birch Creek is located wholly within the Lewis and Clark National Forest and the modifications do not expand the scope of the reserved rights described in the Preliminary Decree.

ISSUE

Should the Court approve the Stipulation and modify claim 41M 30058101 as proposed in the Stipulation?

ANALYSIS

A. Standard for Approving Stipulations.

The Water Court encourages parties to resolve objections and address issue remarks through settlement. Rule 16(a), W.R.Adj.R. In Water Court proceedings, parties

often use a stipulation to memorialize their agreements to address issue remarks and settle objections. *E.g.*, *In re Pondera Cty. Canal & Reservoir Co.*, Case 41M-202, 2020 Mont. Water LEXIS 19 (Jan. 9, 2020).

The contractual agreements made by parties in stipulated settlement agreements are not binding on the Water Court. Instead, the Court must review and approve all settlement agreements to ensure the contractual commitments properly address any issue remarks. Section 85-2-233(5)(b), MCA; Rule 17(a), W.R.Adj.R. Settlement agreements seeking to enlarge an element of a water right must be supported by sufficient evidence to meet the burden of proof applicable to that right. Rule 17(b), W.R.Adj.R. The burden of proof does not need to be met where changes proposed in a settlement agreement reduce or limit an element of a water right. Rule 17(c), W.R.Adj.R. Additionally, stipulations contrary to evidence also are not binding on the Court. *Allen v. Petrick*, 69 Mont. 373, 380, 222 P. 451, 454 (1924). Stipulations that do not meet these standards may be rejected by the Court. *See In re Dana Ranch Co.*, Case 41J-265, 2017 Mont. Water LEXIS 13; *In re Argabright*, Case 41I-265, 2014 Mont. Water LEXIS 9 (Dec. 12, 2014).

B. Application to Claim 41M 30058101.

The Stipulation filed by the parties meets the Water Court's standards for approval of a stipulation. The facts stated by the parties in the Stipulation describe the potential conflict between claim 41M 30058101 and PCCRC's water right claims related to Swift Dam and its associated reservoir. The potential conflict is eliminated by identifying the source more specifically and using the point of diversion convention that is used for other claims in the Preliminary Decree. Specifically, each instream right has a designated "point of diversion" that identifies the upstream point at which the right applies but the streams are protected for their entire reaches within Glacier National Park and the Lewis and Clark National Forest. Thus, as modified, claim 41M 30058101 will protect instream use on the Middle Fork of Birch Creek from the designated point of diversion downstream to the confluence with the South Fork of Birch Creek, which has its own instream right.

By executing the Stipulation, both the BIA in its capacity as trustee for the Blackfeet Tribe and the Tribe itself have confirmed that the proposed modification to the source is consistent with the terms of the Blackfeet Off-Reservation Stipulation. The parties also submitted evidence establishing that the Middle Fork of Birch Creek is within the Lewis and Clark National Forest, which also makes it consistent with the terms of the Blackfeet Off-Reservation Stipulation.

When the Water Court modifies a water right after a preliminary decree is issued, the Court considers whether the proposed modification amounts to a motion to amend that may adversely affect other water rights. If so, additional notice is required if the modifications were not subject to prior notice. Section 85-2-233(6), MCA. The modifications proposed in the Stipulation do not reach this level because the scope of the instream right is not being expanded. Rather, the instream rights on the various forks of Birch Creek within the Lewis and Clark National Forest will be clarified.

CONCLUSIONS OF LAW

1. Each of the findings of fact is supported by a preponderance of evidence.
2. Proper foundation exists for the documents filed as evidentiary support of the Stipulation.
3. The Stipulation is not contrary to law, court rule, or public policy. Because all parties were given notice and the opportunity to object to the Stipulation, both by way of the Stipulation itself and also by the request to approve the Stipulation, the Stipulation is binding on and enforceable by and against each of the parties, including the State of Montana.
4. The proposed modifications to claim 41M 30058101 are clarifications to the Tribal Instream Flow Water Rights described in the Blackfeet Off-Reservation Stipulation for purposes of decreeing the water rights and the modifications do not conflict with the terms of the Blackfeet Off-Reservation Stipulation.
5. Modifying the source and point of diversion elements of claim 41M 30058101 as requested in the Stipulation is unlikely to adversely affect any other water rights.

6. The modifications to the elements of claim 41M 30058101 requested in the Stipulation do not require additional notice.

7. To the extent any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated into these Conclusions of Law.

ORDER

Based upon the foregoing, it hereby is ORDERED that:

1. The Stipulation is APPROVED subject to the provisions of this Order.
2. The request to modify the source and point of diversion elements of claim 41M 30058101 is GRANTED.
3. All objections to claim 41M 30058101 raised by PCCRC's objection and the State of Montana's appearance are DISMISSED as resolved.
4. A copy of the Stipulation shall be placed and maintained in the claim file for claim 41M 30058101.

A modified post-decree version of the abstract for claim 41M 30058101 is included with this Order to confirm that the modifications identified in this Order have been made in the State's centralized water right record system.

DATED this 18th day of June, 2020.



Stephen R. Brown
Associate Water Judge

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