

Montana Water Court
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FILED

JUN 25 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
CLARKS FORK YELLOWSTONE RIVER BASIN (43D)
PRELIMINARY DECREE

CLAIMANT: Finn Ditch Co. Inc.

NOTICE OF INTENT TO APPEAR: Robert B. Kerr

CASE 43D-R232
43D 40385-00
43D 40386-00

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

The Water Court issued two decrees for Basin 43D - the Temporary Preliminary Decree in 1993 and the Preliminary Decree in 2017.

Irrigation claims 43D 40385-00 and 43D 40386-00 irrigate the same place of use. Both claims appeared in both decrees with issue remarks. Issue remarks result from DNRC claims examination. DNRC confirms the historical use of water right claims and identifies issues with claims. If DNRC cannot confirm some aspect of a claim, DNRC adds an issue remark to the claim. Montana law requires the Water Court to resolve issue remarks.

The issue remarks state:

- 2,022.80 acres were irrigated in 1946,
- 1,450.00 acres were irrigated in 1966, and
- 1,354.00 acres were irrigated in 1980.

Robert B. Kerr filed a notice of intent to appear for both claims. On March 16, 2020, the parties filed a Stipulation.

Issues

1. Are the maximum acres irrigated issue remarks resolved?
2. Is Mr. Kerr's notice of intent to appear resolved?

Findings of Fact

1. Finn Ditch Co. Inc. and Mr. Kerr stipulated that no modifications should be made to any elements of claims 43D 40385-00 and 43D 40386-00.

A preponderance of evidence establishes the following fact:

2. The Preliminary Decree abstracts of claims 43D 40385-00 and 43D 40386-00 identify the historically accurate 1,552.50 acre place of use.

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. Judicial notice of law may be taken. Rule 202, M.R.Ev.

Analysis

Issue 1 – maximum acres irrigated issue remark resolution

Judicial notice of the DNRC Water Rights Claim Examination Manual is taken. DNRC utilizes contact points to guide whether the number of acres irrigated claimed by the statement of claim versus the number of acres irrigated confirmed by DNRC during claims examination are within a margin of error that warrants further review.¹ If the examined acres fall within the contact points for the claimed acres, the DNRC accepts the acreage figure and does not contact the claimant, nor does the claim receive an issue remark.

Statements of claim 43D 40385-00 and 43D 40386-00, the Temporary Preliminary

¹ May 2013 DNRC Water Rights Claim Examination Manual, Ch. VII.D.2.e.

Decree abstracts, and the Preliminary Decree abstracts identify a 1,552.50 acre place of use. The contact points for 1,552.50 acres are 1,487.00 acres to 1,618.00 acres. The 2022.80 acres DNRC confirmed in 1946 are above the highest contact point and do not raise an issue. The 1,450.00 acres DNRC confirmed in 1966 and the 1,354.00 DNRC confirmed in 1980 fall just outside the contact points range. This amount of irrigation outside the contact points does not overcome the *prima facie* proof afforded the place of use identified by statements of claim 43D 40385-00 and 43D 40386-00.

Conclusion of law

The maximum acres irrigated issue remarks are resolved.

Issue 2 – notice of intent to appear resolution

No modifications were made to the elements of claims 43D 40385-00 and 43D 40386-00. The stipulated terms of the parties in this case are met.

Conclusion of law

The concerns of notice of intent to appear party, Robert B. Kerr, are resolved.

Recommendations

The elements of irrigation claims 43D 40385-00 and 43D 40386-00 accurately reflect historical use. No modifications to the elements of the claims should be made.

The maximum acres irrigated issue remarks should be removed from the claim abstracts.

Post Decree Abstracts of Water Right Claim confirming the removal of the issue remarks in the state's centralized record system accompany this Report.

DATED this 25th day of JUNE, 2020.


Anna M. Stradley
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Service via USPS Mail

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