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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

CLAIMANTS: Jane M. Kleinman; Paul Kleinman

CASE 43D-R276
43D 14963-00

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 above captioned irrigation claim appeared in the Preliminary Decree with 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.

The issue remarks concern:

- an overlapping place of use with claims 43D 39533-00 and 43D 195929-00, and
- the priority date postdates a district court decree on Rock Creek.

Montana law requires the Water Court to resolve issue remarks using the procedures set forth in § 85-2-248, MCA. No objections were filed to the claim. The issue remarks were not addressed and resolved during the objection process. The issue remark concerning priority date is resolved based upon information before the court. The overlapping place of use issue remark was not resolved based upon information before the court. Therefore, claimants were ordered to meet with the DNRC to attempt resolution of the overlapping place of use issue remark.

The place of use identified by the DNRC, according to the Montana Cadastral Survey database (a property ownership database for the state of Montana), may also be owned by Myrna L. Hunt, Herbert M. Hunt, Phyllis J. Wasson, Lacie Boettger, and Brian Boettger.

Issues

Preliminary Decree abstract 43D 14963-00 identifies a March 1, 1913 priority date for irrigation of a 33.72 acre place of use by water from Rock Creek conveyed through Joki Ditch.

- 1a. What is the historically accurate priority date?
- 1b. Is the priority date issue remark resolved?
- 2a. What is the historically accurate maximum number of acres irrigated and place of use?

- 2b. Is the overlapping place of use issue remark resolved?
3. What is the historically accurate ditch name?

Findings of fact

1. Claims junior to claim 43D 14963-00 on Rock Creek are either “use,” “filed,” or “B” late claims.
2. The preliminary decree abstract identifies the historically accurate priority date, March 1, 1913.
3. The DNRC Memorandum reported claimants failed to contact the DNRC to attempt resolution of the overlapping place of use issue remark. DNRC recommended the following modifications to resolve the overlapping place of use issue remark:
 - The place of use should be amended to the S2NE of Section 35, Township 6 South, Range 20 East.
 - The maximum acres irrigated by claim 43D 14963-00 should be reduced to 22.20.
 - The ditch name should be amended to Wallis Ditch.
4. The historically accurate place of use for claim 43D 14963-00 is 22.20 acres located in the S2NE of Section 35, Township 6 South, Range 20 East.
5. The historically accurate ditch name for claim 43D 14963-00 is Wallis Ditch.

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. 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. 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.

6. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

7. Any individual with a valid appropriation not a party to a district court decree may petition the district court to make the individual a party to the decree and establish the right in relation to the other rights in the decree. Section 89-835, RCM (1947) (repealed 1973). Failure to follow this procedure disallows an appropriator to assert a priority against any subsequent appropriator identified by the decree. Section 89-837, RCM (1947) (repealed 1973).

8. Judicial notice of facts may be taken from a source “whose accuracy cannot be reasonably questioned.” Rule 201, M.R.Ev.

Analysis

Issues 1a and 1b –priority date and priority date issue remark resolution

The claim files and information before the court provide a sufficient basis to resolve the priority date issue remark.

The issue remark on claim 43D 14963-00 notes the claim is a filed right with a priority date postdating a district court decree for Rock Creek (Case No. 275). This remark reflects § 89-835 of the Revised Codes of Montana (1947) (repealed 1973), governing the appropriation of junior water rights from a decreed stream. The statute allows an appropriator to petition the district court to open the decree, add the new appropriation, and establish its relation to the other rights affected by the decree. If an appropriator fails to follow this procedure, that water right cannot be exercised against any appropriator mentioned in or bound by that decree. *See also* Section 89-837, RCM (1947) (repealed 1973). In other words, any appropriator who failed to follow these statutes would become junior to a subsequent appropriator who followed the statutes. The issue remark on claim 43D 14963-00 identifies this possibility.

Judicial notice of the Basin 43D Preliminary Decree source index is taken. The index identifies all claims from Rock Creek with a priority date postdating the district court decree. All such claims are “filed” or “use” rights, or “B” late claims. None of the junior “filed” or “use” right appropriators petitioned the district court to be added to the Clear Creek decree. “B” late claims are subordinated to all timely filed claims.

Therefore, neither the “B” late claims nor the junior “filed” or “use” rights can assert a priority date senior to claim 43D 14963-00 based on compliance with § 89-835, RCM. As a result, the issue remark stating the claim postdates the Rock Creek district court decree does not raise a valid issue.

Conclusions of law

The historically accurate priority date for claim 43D 14963-00 is March 1, 1913. The priority date issue remark is resolved.

Issues 2a and 2b – maximum acres irrigated and place of use; overlapping place of use issue remark resolution

The overlapping place of use issue remark identifies an overlapping place of use between the claim in this case and claims 43D 39533-00 and claim 43D 195929-00. The overlapping place of use issue remark concerning claims 43D 39533-00 and 43D 14963-00 was partially resolved based upon information before the court.

The Water Court dismissed claim 43D 195929-00 from the adjudication in 1999. (Feb. 26, 1999 Order Dismissing Claims, Case 43D-81.) Claim 43D 195929-00 is no longer an active claim, and therefore, no longer has an overlapping place of use with claims 43D 39533-00 and 43D 14963-00. The claim should have been removed from the issue remark in 1999.

Claimants were ordered to meet with personnel from the Billings Regional Office of the DNRC to address the overlapping place of use issue remark between claims 43D 39533-00 and 43D 14963-00 pursuant to § 85-2-248, MCA. On February 13, 2020, DNRC Water Resource Specialist Brandy Gray filed a Memorandum. Ms. Gray reported claimants did not contact the DNRC. Ms. Gray reported the original claimant, Clifford Wallis, filed this irrigation claim for Lot 14, Wallis Acreage Tracts, Plat No. 474, located in the E2 of Section 35, Township 6 South, Range 20 East. Lot 14 was “later subdivided and amended into Lot 14A Am. & Lot 1 Am. Of Plat No. 474 RB and Lots 2, 3, & 4 of Plat No. 474 4th Am.” Claim 43D 39533-00 identifies a place of use located in the S2SW of Section 35, Township 6 South, Range 20 East, Harnish Tracts (Plat 771).

DNRC incorrectly clarified and corrected the place of use for claim 43D 14963-00 during claims examination to the S2SW of Section 35, Township 6 South, Range 20 East. Ms. Gray recommended that the place of use for claim 43D 14963-00 be amended to the S2NE of Section 35, Township 6 South, Range 20 East. Ms. Gray confirmed 22.20 acres of irrigation on 1962 aerial photos within the corrected legal land description and recommended the maximum acres irrigated for claim 43D 14963-00 be reduced to 22.20 acres irrigated.

An Order was issued setting a deadline for claimants to show cause why the claim should not be amended as recommended by Ms. Gray to resolve the overlapping place of use issue remark. Claimants failed to comply with this filing deadline.

Claimants failure to provide any evidence to address or resolve the overlapping place of use issue remarks leaves the information in the claim file, including the prima facie statement of claim, Ms. Gray's review of historical aerial photos, and Ms. Gray's recommendations as strong evidence of actual historical use.

Based on the information in the claim file, the DNRC's recommendations, and the claimants' failure to comply with Orders issued by the Water Master, the claim should be amended as recommended by the DNRC. The correction to the place of use legal land description results in claims 43D 39553-00 and 43D 14963-00 no longer having overlapping places of use and claims 43D 14963-00 and 43D 197638-00 (Case 43D-R250) becoming supplemental rights. Supplemental rights have the same ownership, same purpose, and an overlapping place of use.

Several maps created by the DNRC, and plat information provided by the DNRC, depicting the reduced place of use reside in the claim file.

Conclusions of law

The historically accurate place of use for claim 43D 14963-00 is 22.20 acres located in the S2NE of Section 35, Township 6 South, Range 20 East. Claims 43D 39553-00 and 43D 14963-00 no longer have an overlapping place of use. The overlapping place of use issue remark is resolved.

Issue 3 – ditch name

DNRC also recommends amendment of the ditch name identified by claim 43D 14963-00. Ms. Gray reports that the amended place of use is located on the east side of Highway 212. The claim currently identifies Joki Ditch as the means of conveying water to the place of use. However, Joki Ditch is on the west side of Highway 212. Wallis Ditch is located on the east side of Highway 212. Ms. Gray recommends, due to the amended place of use, that the ditch name requires amendment to Wallis Ditch.

An Order was issued setting a deadline for claimants to show cause why the ditch name should not be amended as recommended by Ms. Gray. Claimants failed to comply with this filing deadline.

Claimants failure to provide any response to Ms. Gray's recommendation leaves the information in the claim file, Ms. Gray's review of historical aerial photos, and Ms. Gray's recommendations as strong evidence of actual historical use.

Based on information in the claim file, including the prima facie statement of claim, the DNRC's recommendation, and the claimants' failure to comply with Orders issued by the Water Master, the ditch name should be amended as recommended by the DNRC.

Conclusion of law

The historically accurate ditch name for claim 43D 14963-00 is Wallis Ditch.

Recommendations

Based upon the foregoing, claim 43D 14963-00 should be amended as follows to accurately reflect historical use.

<u>MAXIMUM ACRES:</u>	33.72	22.20
<u>DITCH NAME:</u>	JOKI-DITCH	WALLIS DITCH
<u>PLACE OF USE:</u>		
	<u>ACRES</u>	<u>GOVT LOT</u> <u>QTR SEC</u> <u>SEC</u> <u>TWP</u> <u>RGE</u> <u>COUNTY</u>
	22.20 33.72	S2NE S2SW 35 6S 20E CARBON
TOTAL:	22.20 33.72	

AS OF FEBRUARY 2020, THE PLACE OF USE IS INCLUDED WITHIN WALLIS ACREAGE TRACTS, LOT 14A AM COS 474 AND LOT 1 AM COS 474 RB; AND LOTS 2, 3, AND 4 OF BLK 1 COS 474 4TH AM.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 43D 14963-00, 43D 197638-00.

The issue remarks appearing on the claim should be removed.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm implementation of the recommendations in the state's centralized water right record system.

DATED this 25th day of JUNE, 2020.

Anna M. Stradley
Anna M. Stradley
Senior Water Master

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