

Montana Water Court
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FILED
JUN 11 2020
Montana Water Court

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

CLAIMANTS: Douglas D. Seymour; Jeanna R. Seymour

43D-R368
43D 215831-00

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

Irrigation claim 43D 215831-00 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 on the claim concern:

- the claim's late filed claim status,
- the claim missed the first Basin 43D decree issued in 1993,
- the priority date postdates a district court decree, and
- the type of historical right.

The Water Court is required to resolve issue remarks.

Issues

The Preliminary Decree abstract identifies a filed right with an April 14, 1905 priority date, and an enforceable priority date of June 30, 1973.

1a. What is the historically accurate type of historical right?

1b. Is the type of historical right issue remark resolved?

2. Are the late claim, claim missed the decree, and priority date issue remarks resolved?

Findings of fact

1. Preliminary decree abstract 43D 215831-00 identifies a filed right. Statement of claim 43D 215831-00 identifies a use right.

2. The claims examiner modified the type of historical right from use to filed "per documentation in file." (Claims examination worksheet dated Feb. 7, 1997, claim file)

3. An Indenture is attached to the statement of claim. The Indenture conveys property together with “a proportionate amount of water...for the irrigation of said parcel.” The Indenture is not a notice of appropriation, filed pursuant to law, that would support modifying the type of historical right from use to filed. The claims examiner erroneously modified the type of historical right.

4. The historically accurate type of historical right for claim 43D 215831-00 is 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. A clerical mistake or mistake arising from omission or oversight may be corrected by the court at any time. Rule 60(a), M.R.Civ.P.

6. 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).

7. 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 – type of historical right; type of historical right issue remark resolution

The claim file and information before the court provide a sufficient basis to resolve the type of historical right issue remark. The type of historical right identified by statement of claim 43D 215831-00, use, is afforded *prima facie* proof. The type of historical right issue remark brings to light the claims examiner’s clerical error.

Conclusions of law

The historically accurate type of historical right is use. The type of historical right issue remark is resolved.

Issue 2 – late claim, claim missed the decree, and priority date issue remark resolution

Claim 43D 215831-00 was filed after the April 30, 1982 claim filing deadline expired. As a result, the claim is defined as a “late claim” under § 85-2-102(15), MCA, and was deemed forfeit pursuant to § 85-2-226, MCA. In 1993, the Montana Legislature enacted § 85-2-221(3), MCA, and provided for the remission of forfeiture of late claims, subject to specified terms and conditions. This claim is a “remitted” late claim.

The abstract of this claim contains an issue remark citing § 85-2-221(3), MCA, advising water users that the claim may be subordinate, and therefore junior, to certain permits and reservations of water. Persons holding a post-June 30, 1973 permit or reservation, who relied to their detriment on the failure of a claimant to timely file a

claim, were required to file an objection and thereby seek the subordination of any remitted late filed claim to their permit or reservation. No such objections were filed against this claim and the deadline to file objections has expired. The subordination issue remark served its notice purpose.

The first decree for Basin 43D, a Temporary Preliminary Decree, was issued June 9, 1993. The claim was not included in the Temporary Preliminary Decree for Basin 43D. The following notice issue remark appears on the abstract of the claim:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 43D TEMPORARY PRELIMINARY DECREE ISSUED 06/09/1993.

The issue remark served its purpose of notifying other water users that the claim missed the first decree and objections could be filed to the claim after issuance of the second decree on April 7, 2017. No such objections were filed against this claim and the deadline to file objections has expired.

An issue remark on claim 43D 215831-00 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 215831-00 identifies this possibility.

The Preliminary Decree source index for Basin 43D identifies all claims from Rock Creek with a priority date postdating the district court decree. All such claims are “filed” or “use” rights, or are “B” late claims. “B” late claims are subordinated to all timely filed claims. Claim 43D 215831-00 is a “B” late claim, and therefore subordinated to all timely filed claims. As a result, the issue remark stating claim 43D 215831-00 postdates the Rock Creek district court decree does not raise a valid issue.

