

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

CLAIMANT: David B. Anderson

OBJECTORS: Aretta Papez; Wally J. Papez; Quarter Circle JP
Ranch LLC

CASE 43D-R68
43D 200156-00

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 this Master's 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 this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

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 this 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

FINDINGS OF FACT

1. Claim 43D 200156-00 appeared in the 43D Preliminary Decree with issue remarks and received an objection from Aretta Papez, Wally Papez, and Quarter Circle JP Ranch LLC.

2. Claim 43D 200156-00 is a domestic claim owned by David Anderson. The issue remarks appearing on the claim concern ownership and volume. The ownership remark provides that Robert Stichman, and Quarter Circle JP Ranch, LLC are potential owners of the claim.

3. A status conference was held in May 2019, all parties appeared, including potential owner Robert Stichman. The parties agreed that ownership updates were needed. The parties were directed to contact the DNRC for ownership updates and were provided a 60-day settlement period.

4. After several extensions to the settlement deadline, the case was placed on a hearing track. On February 28, 2020, the objectors/potential owners Aretta Papez, Wally Papez, and Quarter Circle JP Ranch LLC filed a motion to dismiss claim 43D 200156-00. The motion indicates that it is unopposed by potential owner Stichman, but that David Anderson's position concerning the motion is unknown.

5. The motion to dismiss is treated as a motion for summary judgment. The motion establishes that claim 43D 200156-00 has not been used for several decades and that the conveyance system for the water right (a pipeline) has been cut and therefore not functional since the early 1980s. As evidence, the moving parties provide an affidavit of Wally Papez, who is familiar with the use of water under claim 43D 200156-00. Papez' affidavit indicates that claim 43D 200156-00 has not been used since the 1970s.

6. A deadline was set for David Anderson to show cause why claim 43D 200156-00 should not be dismissed from the adjudication. Nothing was filed by the deadline.

PRINCIPLES OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 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 the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. 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. § 85-2-248(3), MCA.

3. If a claimant fails to comply with an Order issued by the Water Court in its review of issue remarks, including an Order issued by a Water Master appointed by the Court, the Court on its own initiative may amend or dismiss the claim to conform with information in the claim file or information obtained as part of the adjudication process. Section 85-2-248(9) MCA.

4. Once an appropriator abandons a water right, the right ceases. *Holmstrom Land Co. v. Meagher Cnty. Newlan Creek Water Dist.*, 185 Mont. 409, 423, 605 P.2d 1060, 1068 (1979) (citation omitted). “Abandonment of a water right is a question of fact.” *79 Ranch v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983). A finding of “[a]bandonment...requires both non-use and intent to abandon.” *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶ 52, 375 Mont. 327, 328 P.3d 644 (citing *79 Ranch*, 204 Mont. at 432, 666 P.2d at 218). “The objector bears the initial burden of showing a long period of continuous non-use of the claimed water right.” *Skelton Ranch*, ¶ 53. A showing of a long period of continuous non-use raises a “rebuttable presumption of abandonment.” *Id.* (citing *79 Ranch*, 204 Mont. at 432-33, 666 P.2d at 218).

5. 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. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶16, 321 Mont. 432, 92 P.3d 620 (citing M.R.Civ.P. 56(c)). 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. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 24, 304 Mont. 356, 22 P.3d 631.

All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing the summary judgment motion. *Lee*, ¶ 25.

6. The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues. *Lee*, ¶ 25. Proof is required to establish the absence of genuine issues of material fact; a party may not rely on the arguments of counsel. *Montana Metal Buildings, Inc. v. Shapiro*, 283 Mont. 471, 476, 942 P.2d 694, 697 (1997). Where the moving party is able to demonstrate that no genuine issue of material fact remains in dispute, the burden shifts to the party opposing the motion. *Lee*, ¶ 26. To raise a genuine issue of material fact, the party opposing summary judgment must “present material and substantial evidence, rather than merely conclusory or speculative statements.” *Id.*

7. The objectors/potential owners established that there was no genuine issue of material fact regarding whether claim 43D 200156-00 was abandoned. The claim has not been used for several decades, which constitutes a long period of continuous non-use and raises the presumption of abandonment. Claimant Anderson did not rebut the presumption of abandonment. Claim 43D 200156-00 has been abandoned and should be dismissed.

RECOMMENDATIONS

1. Claim 43D 200156-00 should be dismissed from the adjudication.

A Post Decree Abstract of Water Right Claim is served with the Report to confirm that the claim has been dismissed from the state-wide adjudication.

DATED this 11th day of June 2020.

 Digitally signed by
Madeleine Weisz

Madeleine Weisz
Senior Water Master

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