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: Danna D. Bertolino; Joel M. Bertolino; Melissa A. Bertolino; Richard L. Bertolino	**43D-R50** 43D 206793-00

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

Fish and wildlife claim 43D 206793-00 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.

Montana law requires the Water Court to resolve issue remarks. The issue remarks on the claim concern:

- the claim filing fee of $40.00 is due,
- a 2016 amendment to volume was submitted but not implemented because all owners of record did not sign the amendment,
- excessive volume,
- DNRC's modification of the reservoir record during claims examination,
- DNRC's addition of period of diversion, and
- validity of the claim.

Claimants met with DNRC personnel to attempt resolution of the issue remarks concerning the outstanding claim filing fee, volume, and the lack of implementation of the 2016 amendment. The remainder of the issue remarks were resolved based upon information in the claim file, or information before the Court.

On March 13, 2020, DNRC filed a Memorandum concerning claimants' attempt at issue remark resolution. Enclosed with the Memorandum were claimants' documents and evidence to support resolution of the issue remarks.

Issues

1. Was the claim filing fee paid thereby resolving the claim filing fee issue remark?

2. Should the 2016 amendment be implemented?

3. What is the historically accurate volume, and are the volume issue remarks resolved?

4. Are the reservoir record and period of diversion issue remarks resolved?

5. Is the validity issue remark resolved?

Findings of Fact

1. The Preliminary Decree abstract for fish and wildlife claim 43D 206793-00 identifies a 100.00 AF volume and a year round period of diversion.

2. Claimants paid the $40.00 claim filing fee.

3. All claimants (owners of DNRC record) agree with the 9.60 AF volume proposed by the 2016 Amendment.

4. No objections were filed to the DNRC's modified reservoir record or the DNRC's addition of a year round period of use.

5. The DNRC filed a Memorandum concerning claimant's attempt at resolution of the amendment and volume issue remarks. DNRC reported claimants' agreement to the proposed reduced volume resolved the amendment and volume issue remarks.

A preponderance of evidence establishes the following facts for claim 43D 206793-00:

6. The historically accurate volume is 9.60 AF.

7. The reservoir record and year round period of diversion are historically accurate.

8. The claim is valid.

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. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

4. 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.

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. 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.

Analysis

Issue 1 – claim filing fee and claim filing fee issue remark resolution

Claimants remitted the $40.00 claim filing fee.

Conclusion of law

The issue remark noting the claim filing fee was not remitted is resolved.

Issues 2 and 3– amendment and volume issue remark resolution; historically accurate volume

Co-claimant Joel Bertolino filed an amendment to reduce the volume identified by fish and wildlife claim 43D 206793-00. The amendment was not implemented because all owners of record did not sign the amendment, thereby signaling their agreement with the proposed reduced volume. DNRC added an issue remark memorializing the lack of agreement to and implementation of the amendment. Co-claimants Danna D. Bertolino, Melissa A. Bertolino, and Richard L. Bertolino filed their agreement with the amendment.

Claimants propose a reduced volume of 9.60 AF. The reduced volume resolves the excessive volume issue remarks.

Conclusions of law

Danna D. Bertolino, Melissa A. Bertolino, and Richard L. Bertolino's agreement with the proposed reduced volume resolves the issue remark noting the lack of their agreement with the amendment. The historically accurate volume is 9.60 AF. The excessive volume issue remarks are resolved.

Issue 4 – reservoir record and period of diversion issue remark resolution

The reservoir record and period of diversion issue remarks instructed claimants and other water users that if no objections were filed to the modifications, the reservoir record and period of diversion would remain as they appear on the Preliminary Decree abstract. No one objected to the reservoir record or period of diversion. No modifications to the reservoir record or period of diversion are required. The issue remarks concerning the reservoir record and the period of diversion served their purpose.

Conclusion of law

The Preliminary Decree abstract identifies the historically accurate reservoir record and period of diversion, thereby resolving the reservoir record and period of diversion issue remarks.

Issue 5 – validity of claim issue remark resolution

Although issue remarks concerning volume, reservoir record, and period of diversion appeared on fish and wildlife claim 43D 206793-00 in addition to the issue remark questioning the validity of the claim, no objections were filed against the claim, all issue remarks on the claim are resolved, and the Water Court has not called the claim in on its own motion. The validity of the claim was never at issue. Accordingly, no hearing will be held concerning the validity of the claim. The issue remark concerning validity of the claim is resolved.

Conclusions of law

Fish and wildlife claim 43D 206793-00 is a valid claim. The validity issue remark is resolved.

Recommendations

Fish and wildlife claim 43D 206793-00 should be modified as follows to accurately reflect historical use.

VOLUME:	~~100.00 AF~~	**9.60 AF**

The issue remarks should be removed from the claim abstract.

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

DATED this 11th day of June, 2020.

Anna M. Stradley

Anna M. Stradley
Senior Water Master

Service via USPS Mail

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