

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
MAINSTEM BITTERROOT RIVER AND EAST SIDE SUBBASIN (76HA)

CLAIMANTS: Forrest Jeske; Sara Jeske; David J. Beaulieu; Ruth M. Beaulieu; Nikki A. Brion; Peter J. Brion; Cody Cousins; Lori Ann Cousins; Thomas H. Cousins; Katherine Kidwell; Michael R. Kidwell; Ann H. Lee; Loretta M. Moore; Robert P. Moss; Vicki L. Moss; Billie L. Nelson; Brent G. Nelson; Brian L. Reilly; Linda M. Reilly; Leeann Scheffer; Megan Wright; Troy Wright; Donna Wright; Mathew C. Lewis; Christine A. Schneider Lewis; Ruth M. Wiren; Helen R. Abbe

CASE 76HA-3762-B-2020

76H 15445-00
76H 15446-00

OBJECTOR: Daly Ditches Irrigation District

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's 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. If you file an objection, you must serve 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

Background

Daly Ditches Irrigation District (“DDID”) objected to claims 76H 15445-00 and 76H 15446-00.

A Status Conference was conducted. Claimants David and Ruth Beaulieu, Peter J. Brion, Robert P. Moss, Brent G. Nelson, Justin Morris, Kennedy Wanner, and Edward White were present; Richard Barber was present on behalf of the estate of Ann H. Lee; Randy Brimholl was present for Ruth M. Wiren; David Markette appeared on behalf of Daly Ditches Irrigation District along with Tracey Turek.

An Order Setting filing deadline was issued setting a deadline for the parties in this Case to file settlement documents or a status report.

On May 26, 2020, Daly Ditches Irrigation District (DDID) filed a Motion to Address DNRC Issue Remarks Prior to Resolution of Objection and Brief in Support. DDID moved for the Court to address the following DNRC issue remarks appearing on the claims in this Case before resolving the DDID Objections:

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A FILED APPROPRIATION ON SKALKAHO CREEK WITH A PRIORITY DATE PREDATING CASE NO. 2149 , RAVALLI COUNTY.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A DECREED RIGHT.

In its brief, DDID stated “The Court should determine what if any, underlying right exists for the claimed place of use.” This Master denied DDID’s Motion because based on the content of the brief, DDID was not simply an “observing party” without an interest in the outcome of the issue remark resolution process. Another deadline was set for the parties to file settlement documents or a status report.

On December 7, 2020, DDID filed proposed settlement documents in the form of a Stipulation signed by DDID (the Stipulation). The December 7, 2020 filing explained that the Stipulation was mailed to the parties on October 9, 2020 but it was not signed or returned by any of the Claimants. DDID indicated that Claimants also failed to respond

to DDID Motion to Address DNRC issue remarks – suggesting a pattern of nonparticipation on the part of the Claimants in this Case.

To determine if the parties agreed with the proposed changes as described in the Stipulation, an Order Setting Filing Deadline was issued. The Order set a deadline for the parties to agree or disagree with the Stipulation. The Order stated that if nothing is filed by the deadline, this Master would conclude the parties agree with the proposed changes and a Master’s Report will be issued. The following language was included in the Order:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

Claimants Christine Schneider Lewis and Matthew Lewis filed a Statement agreeing with the proposed changes. None of the other Claimants responded.

On January 22, 2021, DDID filed Comments to Court’s Order and Request for Procedural Clarification. The January 22, 2021 filing explained that DDID filed the Stipulation, resolving its Objections to claims 76H 15445-00 and 76H 15446-00 but the Stipulation did not address the issue remarks. As it was apparent DDID’s Objections might not be resolved, a deadline was set for DDID to file documentation indicating whether its Objections in the Case are resolved. On March 12, 2021, DDID responded that its Objections were not resolved, and a Scheduling Order was issued.

At DDID’s request, Settlement Master Nathaniel Block was appointed on July 28, 2021 at DDID’s request to facilitate resolution of the Case. On September 9, 2021, DDID filed a Motion for Summary Judgment and Brief in Support. According to the Settlement Master’s Report, a mediation scheduled for October 20, 2021 was cancelled pending resolution of the Motion. The Case was resubmitted to this Master for further proceedings.

On September 24, 2021, this Master issued an Order Setting Filing Deadlines. The Order set a deadline for the Claimants to file any response to the Motion for

Summary Judgement by October 18, 2021. The deadline for DDID to file a reply was November 5, 2021.

On October 18, 2021, Megan Wright, Troy Wright, and Donna Wright (the Wrights) filed their Response & Objection to Objector's Motion for Summary Judgment. Nothing was filed by any other Claimant. The Wrights' October 18, 2021 filing appeared to request an extension of the deadline for the Wrights to respond to the Motion for Summary Judgment. An Order Denying the Request for Extension was issued on October 20, 2021. On November 5, 2021, DDID filed its Reply to Claimant Wrights' Response to Motion for Summary Judgment.

Statement of the Case

Claims 76H 15445-00 and 76H 15446-00 were decreed as filed rights with April 28, 1885 priority dates and the following DNRC issue remarks:

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A FILED APPROPRIATION ON SKALKAHO CREEK WITH A PRIORITY DATE PREDATING CASE NO. 2149 , RAVALLI COUNTY.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A DECREED RIGHT.

DDID objected to all elements of claims 76H 15445-00 and 76H 15446-00.

DDID filed a Motion for Summary Judgment arguing that claims 76H 15445-00 and 76H 15446-00 should be dismissed because the basis for both claims was incorporated into the Skalkaho Creek Decree (Case No. 2149), and there is no other historical use of water at the claimed place of use.

Principles of Law

Summary Judgment

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.

The party seeking summary judgment has the burden of demonstrating an absence of genuine factual issues. *Id.* 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 can 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.*

Facts

Anna H. Lee filed Statements of Claims 76H 15445-00 and 76H 15446-00. Claim 76H 15445-00 is an irrigation claim for 29.50 acres in the SWSW Section 8, Township 5 North, Range 20 West; Claim 76H 15446-00 is a multiple use stock water claim. Claims 76H 15445-00 and 76H 15446-00 are based on an April 28, 1885 filed appropriation filed by Henry H. Grant, Murray Grant, W.H. Steel and Charles P. Dye. The place of use described in the filed appropriation included the S2SW Section 8, Township 5 North, Range 20 West.

Case No. 2149 decreed a right to the Ravalli Land & Irrigation Company for lands located in the S2SW of Section 8, Township 5 North, Range 20 West. DDID is the successor to Ravalli Land & Irrigation Company. Claim 76H 119907-00 is based on the April 28, 1885 decreed right in Case No. 2149. Claim 76H 119907-00 is owned by DDID. Claims 76H 15445-00 and 76H 15446-00 were fully incorporated in Case No. 2149.

DDID emphasizes that none of the Claimants have disputed the Objections or the DNRC issue remarks. DDID argues the only rights historically used on the lands in question are owned by DDID and were decreed in Case No. 2149. Furthermore, DDID states that it owns and operates the point of diversion and ditch serving the place.

The Wrights' October 18, 2021 Filing is broad and mostly outside the scope of the Motion.¹ The Wrights argue that they purchased their property and were unaware of any ongoing litigation at the Water Court. The Wrights also list questions including: 1) that the Notice of Appropriation provided by DDID was not certified, 2) questions regarding ditches in 1916, 3) questions regarding the weight of DNRC issue remarks, and 4) questions regarding right of other Claimants.

Discussion

To be successful in a motion for summary judgment, the movant must establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The Motion for Summary Judgment filed by DDID states claims 76H 15445-00 and 76H 15446-00 are invalid because they are based on a filed appropriation that was fully incorporated into Case No. 2149.

DDID established that there is no genuine issue of material fact concerning whether claims 76H 15445-00 and 76H 15446-00 were incorporated into Case No. 2149. Because the Henry H. Grant, Murray Grant, W.H. Steel and Charles P. Dye filed appropriation was incorporated into Case No. 2149, it cannot be used as the basis for any right predating the decree, which was issued on July 16, 1916. DDID successfully shifted the burden to the Claimants to raise a genuine issue of material fact.

The Wrights did not directly respond to the arguments in the Motion for Summary Judgment. None of the other Claimants responded to the Motion for Summary Judgment. The Claimants failed to show that a genuine issue of material fact remains concerning whether claims 76H 15445-00 and 76H 15446-00 are valid.

Accordingly, DDID has successfully carried its Motion for Summary Judgment.

Recommendation

The Court should grant DDID's Motion for Summary Judgment and claims 76H 15445-00 and 76H 15446-00 should be dismissed.

¹ Of note, the Wrights indicate their property is not within the 29.50 acres in the SWSW of Section 8, Township 5 North, Range 20 West. If the Wrights believe they were incorrectly added as co-owners of the claims in this Case, they should contact the Missoula DNRC office to determine if an ownership update is appropriate.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that claims 76H 15445-00 and 76H 15446-00 have been dismissed in the state's centralized record system.

Anika M. Stern
Senior Water Master

Service via Electronic Mail:

David T. Markette
Markette & Chouinard PC
PO Box 515
Hamilton, MT 59840-0515
davidm@mcpattorneys.com
receptionist@mcpattorneys.com
(406) 363-1110

Service via USPS Mail:

Donna Wright
Megan K. Wright
Troy C. Wright
481 Potter Lane
Hamilton MT 59840-9063
(406) 821-0250

Matthew C. Lewis
Christine A. Schneider Lewis
678 Colette Ln.
Hamilton, MT 59840-9011
(505) 250-7424

Forrest Jeske
Sarah Jeske
696 Colette Ln
Hamilton, MT 59840-9011

Helen R. Abbe
385 Ricketts Rd
Hamilton, MT 59840

Service via USPS Mail:

David J. Beaulieu
Ruth M. Beaulieu
458 Skalkaho HWY
Hamilton, MT 59840

Nikki A. Brion
Peter J. Brion
685 Collette Ln
Hamilton, MT 59840
(406) 369-1358

Cody Cousins
76 Bell Xing W
Stevensville, MT 59870

Lori Ann Cousins
Thomas H. Cousins
637 Foley Lane
Hamilton, MT 59840-9026
(406) 961-8321

Katherine Kidwell
Michael R. Kidwell
680 Colette Ln
Hamilton, MT 59840

Loretta M. Moore
688 Hedges Lane
Hamilton, MT 59840

Robert P. Moss
Vicki L. Moss
707 W Desta St, Unit B
Hamilton, MT 59840
(406) 253-6189

Service via USPS Mail:

Billie L. Nelson
Brent G. Nelson
PO Box 774
Darby, MT 59829
(406) 821-4844

Brian L. Reilly
Linda M. Reilly
PO Box 59
Hamilton, MT 59840

Ann H. Lee
% Barbara Barber
PO Box 30
Willow Creek, MT 59760

Ruth M. Wiren
254 N Gold Creek Loop
Hamilton, MT 59840
(406) 363-3158

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
BITTERROOT RIVER
BASIN 76H

Water Right Number: **76H 15445-00** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: DISMISSED

Owners:

DAVID J BEAULIEU
458 SKALKAHO HWY
HAMILTON, MT 59840 9001

RUTH M BEAULIEU
458 SKALKAHO HWY
HAMILTON, MT 59840 9001

NIKKI A BRION
685 COLLETTE LN
HAMILTON, MT 59840 9011

PETER J BRION
685 COLLETTE LN
HAMILTON, MT 59840 9011

CODY COUSINS
76 BELL XING W
STEVENSVILLE, MT 59870 6521

LORI ANN COUSINS
PO BOX 1116
CORVALLIS, MT 59828

THOMAS H COUSINS
PO BOX 1116
CORVALLIS, MT 59828

FORREST JESKE
696 COLLETTE LN
HAMILTON, MT 59840 9011

SARAH JESKE
696 COLLETTE LN
HAMILTON, MT 59840 9011

KATHERINE KIDWELL
680 COLETTE LN
HAMILTON, MT 59840

MICHAEL R KIDWELL
680 COLETTE LN
HAMILTON, MT 59840

ANN H LEE
% BARBARA BARBER
3240 HEEB RD
MANHATTAN, MT 59741

MATTHEW C LEWIS
678 COLETTE LN
HAMILTON, MT 59840 9011

Owners: LORETTA M MOORE
PO BOX 831
HAMILTON, MT 59840 0831

ROBERT P MOSS
707 W DESTA ST, UNIT B
HAMILTON, MT 59840 2607

VICKI L MOSS
707 W DESTA ST, UNIT B
HAMILTON, MT 59840 2607

BILLIE L NELSON
PO BOX 774
DARBY, MT 59829

BRENT G NELSON
PO BOX 774
DARBY, MT 59829

BRIAN L REILLY
PO BOX 59
HAMILTON, MT 59840

LINDA M REILLY
PO BOX 59
HAMILTON, MT 59840

LEEANN SCHEFFER
658 HEDGE LN
HAMILTON, MT 59840 9067

CHRISTINE A SCHNEIDER LEWIS
678 COLETTE LN
HAMILTON, MT 59840 9011

RUTH M WIREN
254 N GOLD CREEK LOOP
HAMILTON, MT 59840

DONNA WRIGHT
481 POTTER LANE
HAMILTON, MT 59840 9063

MEGAN K WRIGHT
481 POTTER LANE
HAMILTON, MT 59840 9063

TROY C WRIGHT
481 POTTER LANE
HAMILTON, MT 59840 9063

Priority Date:

Enforceable Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: SKALKAHO CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

WATER COURT
ABSTRACT OF WATER RIGHT CLAIM
BITTERROOT RIVER
BASIN 76H

Water Right Number: **76H 15446-00** STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: DISMISSED

Owners:

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458 SKALKAHO HWY
HAMILTON, MT 59840 9001

RUTH M BEAULIEU
458 SKALKAHO HWY
HAMILTON, MT 59840 9001

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HAMILTON, MT 59840 9011

PETER J BRION
685 COLLETTE LN
HAMILTON, MT 59840 9011

CODY COUSINS
76 BELL XING W
STEVENSVILLE, MT 59870 6521

LORI ANN COUSINS
PO BOX 1116
CORVALLIS, MT 59828

THOMAS H COUSINS
PO BOX 1116
CORVALLIS, MT 59828

FORREST JESKE
696 COLLETTE LN
HAMILTON, MT 59840 9011

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696 COLLETTE LN
HAMILTON, MT 59840 9011

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PO BOX 774
DARBY, MT 59829

BRENT G NELSON
PO BOX 774
DARBY, MT 59829

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MEGAN K WRIGHT
481 POTTER LANE
HAMILTON, MT 59840 9063

TROY C WRIGHT
481 POTTER LANE
HAMILTON, MT 59840 9063

Priority Date:

Enforceable Priority Date:

Type of Historical Right:

Purpose (Use): STOCK

Flow Rate:

Volume:

Source Name: SKALKAHO CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.