

Montana Water Court
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ELECTRONICALLY FILED

43D-0627-R-2021

September 15, 2021

Montana Water Court

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

CLAIMANT: Lewallen & Lewallen LLC

CASE 43D-0627-R-2021
43D 24697-00

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 24697-00 appeared in the Preliminary Decree with issue remarks. Issue remarks may result from Department of Natural Resources and Conservation ("DNRC") claims examination. DNRC confirms the historical use of water right claims and identifies issues with claims. If DNRC cannot confirm some aspect of a claim, DNRC adds an issue remark to the claim. The issue remarks appearing on claim 43D 24697-00 concern priority date. No objections were filed to the claim. Montana law requires the Water Court to resolve issue remarks.

Issues

1. What is the historically accurate priority date?
2. Are the priority date issue remarks resolved?

Finding of fact

The Preliminary Decree abstract identifies the historically accurate priority date, May 15, 1952.

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. Judicial notice of law may be taken. Rule 202, M.R.Ev.

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 1 and 2 – priority date; issue remark resolution

The first issue remark notes the filing date of the notice of appropriation may be the correct priority date instead of the earlier date of appropriation identified by the notice of appropriation. Judicial notice is taken of the DNRC Water Rights Claim Examination Manual. Pursuant to the DNRC’s claims examination guidance, this issue remark was placed on the abstract in error. Chapter VI.J.1 of the May 2013 DNRC Water Rights Claim Examination Manual directs the claims examiner that “the earliest appropriation

date on the filed document (generally the date of posting notice) is the priority date. The statement of claim and documentation should agree.” The priority date identified by statement of claim 43D 24697-00 is also the earliest date identified by the filed notice of appropriation. The claims examiner added the issue remark in error.

The second issue remark notes claim 43D 24697-00 is a filed right with a priority date postdating a district court decree for Bluewater Creek (Case No. 357). 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 24697-00 identifies this possibility.

The Preliminary Decree source index for Basin 43D identifies all claims from Bluewater Creek with a priority date postdating the district court decree. All such claims are “filed” or “use” rights, or are “B” late claims. None of the “filed” or “use” right appropriators junior to claim 43D 24697-00 petitioned the district court to be added to the Bluewater Creek decree. “B” late claims are subordinated to all timely filed claims.

Therefore, neither the “B” late claims, nor the junior “filed” or “use” claims can assert a priority date senior to claim 43D 24697-00 based on compliance with § 89-835, RCM. The issue remark stating claim 43D 24697-00 postdates the Bluewater Creek district court decree does not raise a valid issue.

Conclusions of law

The Preliminary Decree abstract for irrigation claim 43D 24697-00 identifies the historically accurate priority date, May 15, 1952. The priority date issue remarks are resolved.

Recommendations

The elements of irrigation claim 43D 24697-00 accurately reflect historical use. No changes to the elements of the claim should be made.

The issue remarks should be removed from the claim abstract.

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

Anna M. Stradley
Senior Water Master

Service via USPS Mail

Lewallen & Lewallen LLC
4234 Audubon Way
Billings, MT 59106

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
CLARKS FORK YELLOWSTONE RIVER
BASIN 43D**

Water Right Number: 43D 24697-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: LEWALLEN & LEWALLEN LLC
4234 AUDUBON WAY
BILLINGS, MT 59106

Priority Date: MAY 15, 1952

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: SPRINKLER/FLOOD

Flow Rate: 3.75 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 1 - HIGH

Maximum Acres: 205.75

Source Name: BLUEWATER CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | NESWSW | 5 | 6S | 24E | CARBON |

Period of Diversion: APRIL 1 TO NOVEMBER 1

Diversion Means: HEADGATE

Ditch Name: ORCHARD DITCH

Period of Use: APRIL 1 TO NOVEMBER 1

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 40.15 | | E2E2 | 1 | 6S | 23E | CARBON |
| 2 | 143.00 | | W2 | 6 | 6S | 24E | CARBON |
| 3 | 22.60 | 1 | NWNW | 7 | 6S | 24E | CARBON |
| Total: | 205.75 | | | | | | |

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE 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.

| | | | | | |
|-----------|----------|----------|----------|----------|-----------|
| 24697-00 | 24698-00 | 24699-00 | 24700-00 | 24701-00 | 197544-00 |
| 197545-00 | | | | | |