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43Q-6006-A-2021

September 3, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER BETWEEN THE CLARKS FORK YELLOWSTONE
AND BIGHORN RIVERS BASIN (43Q)

CLAIMANTS: Carol Hurd; Robert Hurd

CASE 43Q-6006-A-2021
43Q 30022461

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. If 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

On May 20, 2021, Robert and Carol Hurd filed a Verified Motion to Amend (Motion) regarding their use of water under Notice of Exempt Water Right no. 43Q 30022461. Through their Motion, the Hurds seek to amend this “Exempt Notice” to an “Exempt Right” with an enforceable priority date and remove an informational remark relating to exempt notices. This case, 43Q-6006-A-2021, was initiated to address the Motion to Amend.

FINDINGS OF FACT

1. On December 28, 1963, Mary Rehberg filed a Declaration of Vested Groundwater Rights (Groundwater Declaration) describing the use of groundwater for livestock and domestic purposes since 1950 on property in the N2 of Section 17, T1N, R25E, Yellowstone County. Robert and Carol Hurd purchased property in the SENENW of Section 17 in 1983.

2. On January 24, 2006, Robert and Carol Hurd filed a Notice of Exempt Water Right, Form 627 (Exempt Notice) with the Montana Department of Natural Resources and Conservation (DNRC) and attached Ms. Rehberg’s Groundwater Declaration.

3. The DNRC filed the Hurds’ Exempt Notice as number 43Q 30022461 in Montana’s water rights database. The database currently shows the following exempt notice informational remark attached to the Exempt Notice:

A PERSON EXEMPT FROM FILING IN THE ADJUDICATION PURSUANT TO § 85-2-222, MCA, AND WHO FILED A FORM 627 (NOTICE) WITH THE DNRC WAS THEREAFTER ABLE TO RECEIVE NOTIFICATION FROM THE DNRC OF PERMIT APPLICATIONS, CHANGE AUTHORIZATIONS, OR RESERVATIONS THAT MIGHT AFFECT THE OWNER’S EXEMPT OR OTHER WATER RIGHT(S). FILING OF THE NOTICE AND ACCEPTANCE BY THE DNRC DID NOT CONSTITUTE THE ESTABLISHMENT OF OR CONFIRM THE EXISTENCE OF A VALID EXISTING WATER RIGHT.

4. In 2017, the DNRC mailed a Notice of Opportunity to File for Exempt Water Rights to all property owners in the State of Montana (DNRC Notice). 2017 Notice of Opportunity to File for Exempt Water Rights, available at:

http://dnrc.mt.gov/divisions/water/adjudication/hb-110-exempt-claim_filing/Noticeletter62017.pdf.

5. The DNRC Notice informed water users that all claims for Exempt Rights must be received or post marked on or before June 30, 2019, and that failure to file a claim would make the right subordinate (junior in priority date) to all other filed water rights.

6. The Notice of Opportunity specifically addressed water users like the Hurds who had filed a form 627 Notice of Exempt Water Right:

Some people previously filed a 627 form Notice of Water Right with the DNRC. This notice is not a water right but it provided a method to ensure exempt water right holders that did not file a claim received notice in accordance with other water users that had water rights on record with the DNRC. The 627 was only for noticing purposes and isn't considered a valid water right filing. If you have one of these filings you may consider filing an Exempt Statement of Claim at this time.

DNRC Notice at ¶4.

7. The Court has no information suggesting that the Hurds or their predecessors ever filed an Exempt Statement of Claim for the use of water described by the Exempt Notice and Groundwater Declaration.

8. On May 20, 2021, Robert and Carol Hurd filed their "Verified Motion to Amend" (Motion), seeking to change their Exempt Notice to an "exempt right" with an enforceable priority date and without the exempt notice information remark.

PRINCIPLES OF LAW

1. Water users claiming existing water rights were required to file statements of claims (on forms provided by the DNRC) by July 1, 1996, or forfeit those water rights. Section 85-2-221(3), MCA.

2. Certain claims were exempt from the initial claim filing requirements, including claims to existing rights for livestock and individual domestic uses based on instream flow or groundwater sources (Exempt Rights). Section 85-2-222, MCA.

3. In 2017, Montana's legislature set out a process for filing Exempt Rights via House Bill 110, which required all Statements of Claim for Exempt Rights to be filed by June 30, 2019, on a form provided by the DNRC containing information set out in §§85-2-241(1) and (2). Section 85-2-222 (2)-(7), MCA. The DNRC was not permitted to accept any statement of claim submitted or postmarked after June 30, 2019. Section 85-2-222(7), MCA.

4. The DNRC was required to provide notice of this exempt claim filing deadline by publishing it once a week for two consecutive weeks in a daily newspaper of general county circulation, posting it clearly in each county courthouse, and sending it to the last-known address of each unique property owner. Section 85-2-222(6), MCA.

5. Unlike non-exempt existing rights, failure to file a claim for an Exempt Right by the 2019 deadline did not result in forfeiture of the right. However, it did subordinate the existing right to all other water rights except those Exempt Rights for which a claim has not been filed. Section 85-2-222(5), MCA.

DISCUSSION

I. *Whether the Hurds can convert their Exempt Notice to an exempt right claim.*

1. House Bill 110 provided water right claimants an opportunity to file Statements of Claim for Exempt Rights until June 30, 2019. That statutory deadline ensures that the DNRC has sufficient time to process and examine all claims for Exempt Rights and that those claims can be included in a Water Court decree and subject to the adjudication process prior to the issuance of a final decree.

2. Water users who complied with the filing deadline received water right claims with enforceable priority dates, which are included in the Water Court's statewide adjudication. Those who failed to file statements of claim by the deadline did not receive water right claims and their unclaimed existing exempt rights were subordinated to all filed water right claims. Section 85-2-222, MCA.

3. The DNRC notified the Hurds, as property owners in the state, of their opportunity to file statements of claim for any Exempt Rights they might have. The 2017

DNRC Notice specifically explained that the Exempt Notice (form 627) the Hurds filed was not a valid water right filing and urged owners who had filed such forms to consider filing Statements of Claim for Exempt Rights. DNRC Notice, at ¶ 4.

4. The Hurds failed to timely file a Statement of Claim for the Exempt Right covered by their Exempt Notice, and now ask that the Court create an exempt claim out of their Exempt Notice.

5. The Hurds' Motion argues that because the Hurds' predecessor filed a Groundwater Declaration in compliance with the 1961 Groundwater Code, they are entitled to a water right claim reflecting the priority date stated in that declaration. However, the exempt claim filing deadline in 85-2-222 (2)-(7), MCA contains no explicit exception for previously filed groundwater rights, and compliance with prior filing procedures does not relieve a water right owner of statutory claim filing requirements. *See, e.g., In re the Existing Rights ex rel. All the Water*, 1992 Mont. LEXIS 192, 253 Mont. 167, 832 P.2d 1210 (describing and upholding the constitutionality of §85-2-226, MCA's conclusive presumption of forfeiture for non-exempt water rights when no statement of claim was filed by the statutory deadline).

6. The two cases cited in the Motion's argument were decided prior to the enactment of 85-2-222, MCA, which imposed the Exempt Claim filing deadline, and neither case supports the contention that compliance with the 1961 Groundwater Code excuses a water user from that deadline. *Axtell* held that filing a *Statement of Claim* in compliance with the *Water Use Act* entitles that claim to prima facie status, regardless of whether that claim was exempt from filing. Likewise, in *Lockwood*, the Court looked to a groundwater declaration to support a priority date that the claimants included on their timely filed Statements of Claim. *Lockwood Area Yellowstone County Water & Sewer Dist.*, 2015 Mont. Water LEXIS 12 at *26-28 (June 8, 2015). Here, the Hurds never filed a Statement of Claim for Exempt Rights as required by the statute.

7. Granting the Hurds' request to create a water right claim from their Exempt Notice would violate the statutory deadline set out in §85-2-222(6), MCA, and risks

delaying the adjudication process and issuance of final decrees. The Hurds' Motion should be denied.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Motion to Amend be denied and this case be dismissed.

Eyvind Ostrem
Water Master

Service via Electronic Mail

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