

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270
(406) 586-4364
watercourt@mt.gov

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

* * * * *

CLAIMANTS: Alan E. Fairchild; Marsha A. Fairchild

CASE 43B-0189-R-2020

43B 37107-00

43B 37108-00

ORDER ADOPTING MASTER'S REPORT

Claimants Alan E. Fairchild and Marsha A. Fairchild (“Fairchilds”) ask the Water Court to modify the abstracts for two water right claims attached to the Master’s Report issued in this case. For the reasons set forth in this Order, the Court must deny the request.

BACKGROUND

The Fairchilds own claims 43B 37107-00 and 43B 37108-00. The Court included both claims in the Preliminary Decree for the Yellowstone River, above and including Bridger Creek Basin (Basin 43B). The Water Court issued the Basin 43B Preliminary Decree on May 9, 2019. The abstracts included in the decree describe the claims as decreed rights to use water from Mill Creek for irrigation use. The abstracts identify a single point of diversion for each claim. The abstracts for both claims include the following issue remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC
REVIEW UNDER MONTANA WATER COURT REEXAMINATION
ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE

ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The claims did not receive objections.

In addition to the issue remark, the preliminary decree abstract for each claim include several information remarks, two of which state:

AUTHORIZATION TO CHANGE ISSUED 06/24/1988 FOR CHANGE IN POINT OF DIVERSION. NOTICE OF COMPLETION DUE 11/30/1990.

LEASE AUTHORIZATION TO CHANGE THE POINT, PLACE, AND PURPOSE OF USE ISSUED 01/27/1993 TO THE DEPARTMENT OF FISH, WILDLIFE & PARKS. SEE 43B 5862-00.

The senior water master assigned to this basin consolidated the two claims into this case to address the issue remark. On July 7, 2023, the water master issued a Master's Report. The Master's Report clarified the description for the point of diversion and recommended retaining the two information remarks. The Master's Report includes updated abstracts. These abstracts contain a "version" number describing each abstract as "Version: 5 – POST DECREE."

On August 11, 2023, the Fairchilds filed a response to the Master's Report. The response did not specifically object to the modifications the report made to the abstracts. Instead, the response raised a concern that the Master's Report referenced a second point of diversion in an information remark, but did not include the second point of diversion in the description of the elements of the claims. The response attached as exhibits copies of abstracts labeled "General Abstract" dated August 10, 2023. The General Abstracts also contain a version number describing each abstract as "Version 2 – CHANGE AUTHORIZATION." The General Abstracts attached as exhibits also each contain a statement in bolded red font that states: "A version with more recent operating authority exists. Contact DNRC for details."

The General Abstracts attached to the Fairchilds' filing differ from those attached to the Master's Report because they include the second point of diversion the Fairchilds

seek to also have included on the post-decree versions issued by the Court. In a prior filing, the Fairchilds stated their desire “to address the issue of the additional Point of Diversion for this water right located in Section 2, T6S, R9E, as was approved by the DNRC and the Change Application previously submitted in this matter.” (Motion for Status Conference and to Stay Objection Deadline, Doc. 6.00). In an earlier filing, the Fairchilds raised a similar concern, stating:

The Fairchilds would ask the Water Court to note that pursuant to a change authorization issued in late 1988, the subject water rights have an additional point of diversion located in Section 2, Township 6 South, Range 9 East. A copy of this change authorization is attached hereto as Exhibit “A”. The Section 2 point of diversion is in addition to the Section 3 point of diversion which is currently noted in the Abstracts for the subject water rights.

(Resp. to Order Re-opening Case, Doc.4.00, at ¶ 3).

DISCUSSION

The Fairchilds’ request evidently arises out of a change application they submitted to the Department of Natural Resources and Conservation (“DNRC”) in 1988, many years before the Preliminary Decree. The application asked DNRC to change the two claims to add a second point of diversion to each. The second point of diversion evidently involves a pipeline installed sometime after 1973. DNRC conditionally approved the application pursuant to § 85-2-402, MCA.

The Fairchilds’ request highlights a tension that exists in the Water Use Act. The Act instructs the Water Court to adjudicate water rights as they “would be protected under the law as it existed prior to July 1, 1973.” Sections 85-2-102(13) (defining “existing right”); *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 17, 833 P.2d 1120 (“upon passage of the general statewide Water Adjudication Act, the legislature directed the adjudication of all ‘existing’ water rights and specifically identified those rights as those in existence prior to July 1, 1973”); Rule 19, W.R.Adj.R.

The Act also authorizes DNRC to process and approve applications for post-1973 changes to existing rights. Section 85-2-402, MCA. When a DNRC change is approved prior to issuance of a decree, the Court’s post-decree abstracts do not reflect the change

authorization because the change authorization describes post-1973 water use. Water Court orders do not negate changes DNRC approved before the Court decreed a claim. However, the statute does not provide a mechanism for the Court to incorporate DNRC-approved changes in the elements described in the post-decree abstract of a claim. To minimize confusion, the Court’s practice is to reference change authorizations in information remarks that remain on a claim abstract until a final decree is issued.

The confusion with the abstracts in this case was exacerbated by query system’s use of the change authorization version (version 2) of the abstract as the basis for the “General Abstract” rather than the more current post-decree version (version 5). A General Abstract is not a defined term in the Water Use Act, the DNRC rules, or the Water Court’s adjudication rules. However, when a person conducts a search of the State’s centralized water rights record system using DNRC’s water right query tool, the search produces information about a claim on an abstract form titled “General Abstract.” That seems to be how the Fairchilds obtained the abstracts they attached as exhibits. It is not clear why the General Abstract produced by the query system did not reflect the most recent version of the water right claims, or the basis for the bolded red font statement about a version with more recent operating authority. The proper version of the abstract is the most recent version. *See Rule 3(d), W.R.C.E.R.* (specifying when and how abstracts may be modified).

In evaluating the Fairchilds’ response to the Master’s Report, the Water Court reviews the findings of fact for clear error and the conclusions of law for correctness. *Klamert v. Iverson*, 2019 MT 110, ¶ 11, 395 Mont. 420, 425. Based on these standards of review, the water judge “may adopt, modify, or reject the [Master’s] report, in whole or in part, or may receive further evidence or recommit it with instructions.” Rule 23, W.R.Adj.R. In this case, there is no error. The Master’s Report properly reflects the elements of the claims as they existed as of July 1, 1973. Because the Water Court lacks authority to incorporate post-1973 change authorizations in post-decree abstracts other than by information remark, the Master’s Report did not err in failing to include the second point of diversion within the elements section of the abstract. *See generally, In re*

R & S Goffena Ranch, 2019 Mont. Water LEXIS 10 (denying motion to amend to conform claim to change authorization). Instead, the Master's Report properly followed the standard practice of noting the change authorization as an information remark.

ORDER

Therefore, it is ORDERED that pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court ADOPTS the Master's Report and its Recommendations, and APPROVES the changes to the State's centralized water rights database records system reflected on the abstracts included with the report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

Stephen E. Woodruff, Esq.
PO Box 523
Livingston, MT 59047
(406) 222-2023
steve@hswlegal.com
anna@hswlegal.com