

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

CLAIMANTS: Indian Springs Ranch Water & Sewer LLC;
Quirck Cattle Co.; Kit Stoken; Shawn M.
Vandeberg

OBJECTORS: Quirk Cattle Co.; Kit Stoken

COUNTEROBJECTOR: Indian Springs Ranch Water &
Sewer LLC

CASE 76D-0044-R-2022

76D 25311-00

76D 25329-00

76D 118112-00

76D 30149978

ORDER ON MOTION FOR SUMMARY JUDGMENT

PROCEDURAL BACKGROUND

On April 9, 2024, claimant and objector Quirk Cattle Co. (“Quirk”) filed a motion for summary judgment asking the Court to remove an issue remark on Quirk’s claim 76D 118112-00 and dismiss all objections to the claim. Claimant and objector Kit Stoken (“Stoken”) was the only party to respond. The motion now is fully briefed. For the reasons stated in this Order, the Court denies the motion.

FACTS

This case involves four claims of rights to use water from Indian Creek in Lincoln County. Indian Creek is a tributary of the Tobacco River. The Tobacco River is a tributary of the Kootenai River. The Kootenai River Basin, which includes the Kootenai River mainstem and its tributaries in Montana is designated as hydrologic basin 76D.

The claims in this case and their pertinent elements include:

Claim no.	Owner	Priority	Purpose	Flow rate (cfs)
76D 25311-00	Stoken and others	March 25, 1899	Stock	N/A
76D 25329-00	Stoken and others	March 25, 1899	Irrigation	5.70 cfs
76D 118112-00	Quirk	March 25, 1899	Irrigation	7.50 cfs
76D 30149978	Indian Springs	March 25, 1899	Irrigation	1.80 cfs

Quirk's claim 76D 118112-00 is based on a statement of claim Quirk filed on December 10, 1981. The statement describes a right to use water from Indian Creek for irrigation use with a priority date of March 25, 1899. The claim form required claimants to supply a variety of information about their claimed water rights. Item number 13 of the claim form asked the claimant to check one of three boxes labeled "Decreed Water Right," "Filed Appropriation Right," or "Use Water Right." Quirk checked the box for "Filed Appropriation Right." In response to item number 14 on the form which called for the claimant to attach "copies of the Decree, Record of Filing or Proof of Use Right," Quirk attached a copy of a transcribed "Notice of Appropriation" signed by Thomas Quirk and recorded in the records of Flathead County, Montana.

On July 28, 1981, Cate & O'Mea, a Montana Partnership filed a statement of claim to use water from Indian Creek, also with a March 25, 1899 priority date. Like Quirk, Cate & O'Mea also checked the box for "Filed Appropriation Right" and attached what appears to be the same Thomas Quirk notice of appropriation as Quirk. The Cate & O'Mea claim was assigned claim number 76D 25329-00.¹ Stoken is one of the successors in interest to Cate & O'Mea's claim.² On December 9, 2020, the Court approved a split of claim 76D 25329-00 which reduced its flow rate from 7.5 cfs to 5.7 cfs. Order Approving Stipulations, Splitting Water Rights and Granting Motions to Amend, Case 76D-0001-S-2018. The split allocated the remaining portion of the flow rate (1.80 cfs) to claim 76D 30149978, which is owned by Indian Springs Ranch Water & Sewer LLC ("Indian Springs").

The Thomas Quirk filed notice of appropriation relied on by both the Quirk and the Cate & O'Mea (now Stoken and others) claims described a right to "Three hundred inches of the waters of Indian Creek *** for irrigating and other purposes." Three hundred miner's inches is equivalent to 7.5 cubic feet per second ("cfs"). The flow rate

¹ Cate & O'Mea also filed a statement of claim for a stock water filed right with the same priority date, which now is claim no. 76D 25311-00.

² The Court has issued two orders in this case dismissing other co-owners of claim 76D 25329-00. See Doc. 35.00 and Doc. 32.00.

claim 76D 118112-00 is 7.5 cfs. The sum of the flow rates for claims 76D 25329-00 and 76D 30149978 also is 7.5 cfs.

On March 22, 1984, the Water Court issued a Temporary Preliminary Decree (“TPD”) for Basin 76D. The TPD included abstracts for both claim 76D 118112-00 and claim 76D 25329-00. According to the objection list, Quirk objected to Cate & O’Mea’s claim 76D 25329-00 based on the ownership and source elements. The objection list does not identify any objections filed on Quirk’s claim 76D 118112-00 after the TPD. The Court included claim 76D 25329-00 and several other claims in Case 76D-55. On February 10, 1987, the Court adopted a Master’s Report recommending that the elements of claim 76D 25329-00 remain as decreed in the temporary preliminary decree. The Master’s Report did not address the issues relating to the 1899 Thomas Quirk notice of appropriation.

On December 14, 2012, the Water Court entered its Order Addressing Reexamination. (“Reexam Order”).³ The Reexam Order required the Department of Natural Resources and Conservation (“DNRC”) to review all claims that had been included in temporary preliminary decrees or preliminary decrees issued prior to 1987 for certain issues enumerated in the Order. The reexamination issues included examination of “over-filed notices of appropriation.” If DNRC identified over-filed notice of appropriation, the Order instructed DNRC to add a corresponding issue remark. Basin 76D is subject to the Reexamination Order because the TPD was issued in 1984.

On May 6, 2021, the Water Court issued the Basin 76D Preliminary Decree. The Preliminary Decree included abstracts for claims 76D 118112-00 and 76D 25329-00. The preliminary decree abstracts for both these claims includes the following issue remark:

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION. 76D 25329-00, 76D 118112-00, 76D 30149978.

³ The Reexam Order is available on the Water Court’s website.

Following issuance of the Preliminary Decree, Quirk filed a self-objection to claim 76D 118112-00. Quirk’s objection challenges the basis for the issue remark. The Court consolidated claim 76D 118112-00 into this case, along with claim 76D 25329-00 and other claims with the same March 25, 1889 priority date.

Quirk’s summary judgment motion asks the Court to remove the issue remark.

DISCUSSION

A. Summary Judgment Standard.

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3). A material fact involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining whether a material fact exists, the court views the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. “All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment.” *Id.*

Where the moving party demonstrates there is no genuine issue as to any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 26, 304 Mont. 356, 362, 22 P.3d 631, 636. The non-moving party “must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements.” *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990). “Where the material facts are undisputed, the court must simply identify the applicable law, apply it to the uncontroverted facts, and determine who prevails.” *Perl v. Grant*, 2024 MT 13, ¶ 12, 415 Mont. 61, 542 P.3d 396 (citation omitted).

B. Application

Quirk raises two arguments as to why the notice-exceeded issue remark is incorrect as a matter of law. First, Quirk argues the issue remark relates to the “type” of

right, which is not an element the Water Use Act requires the Water Court to adjudicate. Quirk maintains that since no prior court decree was issued prior to the filing of statements of claim, there is no justification for an overclaimed remark.

Quirk is correct that Water Use Act requires the Water Court to describe several specific elements of each state-based existing water right included in a final decree, including the flow rate. Section 85-2-234(6)(b), MCA. Quirk also is correct that the list of elements does not require the Court to adjudicate the type of water right being claimed. The type of right does not matter for purposes of administering water or describing the elements of a water right in a final decree. *In re Danreuther Ranches*, 2013 Mont. Water LEXIS 5, *2 (“[t]he Water Court does not distinguish between use rights, filed rights, or decreed rights when it issues final decrees”). However, the type of right is important to the process of adjudicating claims.

As part of the claim filing process, the Water Use Act requires a statement of claim to include “evidence in support of the claim.” Section 85-2-224(2), MCA. The statement of claim form incorporated this requirement by requiring claimants to identify the “type” of right on a claim form. The “type” of right states “the historical basis of an existing water right.” Rule 2(a)(70), W.R.C.E.R.⁴ (defining “Type of Historical Right”). The Water Court recognizes several types of claims in the adjudication, including decreed rights, filed rights, use rights, and reserved rights. A filed right is a “water right which has been filed and recorded in the office of the county clerk and recorder as provided by statute prior to July 1, 1973.” Rule 2(a)(25), W.R.C.E.R.

In this case, one notice of appropriation is being used to support two (now three) separate filed rights that total 15.0 cfs. The notice of appropriation used to provide evidentiary support for the claims only supports a total of not more than 7.5 cfs (300 miner’s inches).

The Water Court issued its Reexam Order to address a number of issued identified as having not been sufficiently examined by DNRC prior to that time. The Order directed

⁴ For adjudication purposes, the Water Court incorporates the definitions in the Water Right Claim Examination Rules, unless the context requires otherwise. Rule 2(b), W.R.Adj.R.

DNRC to review five specific issues to ensure future Water Court decrees would be usable and readily enforceable. Over-filed notices of appropriation was one of the enumerated issues. An over-filed notice of appropriation exists when the flow rates of claims relying on a single notice of appropriation exceed the flow rate stated in the notice of appropriation. That situation exists with these claims, so DNRC properly included the issue remark on the Preliminary Decree abstracts.

Contrary to Quirk's argument, this is not a question of the Court's authority under the Water Use Act. The Act specifically requires evidentiary support for all claims and gives the Court authority to enforce this requirement. The Court did so in the Reexamination Order. Once DNRC includes an issue remark, the Act instructs the Court to determine whether sufficient information exists to resolve the remark. Section 85-2-248(3). Here there is insufficient information to support multiple water rights from the same source with the same priority date with flow rates that total 15.0 cfs. Quirk's first argument does not prove otherwise.

The parties spend time in their briefing discussing the Water Court's decision in *In re BFR Family Limited Partnership*, Case 41G-0080-R-2021, 2024 Mont. Water LEXIS 12 (Order Denying Joint Objection to the Water Judge and Motion to Transfer Matter to Water Judge). *BFR* involved the Court's rejection of a stipulation where the parties purportedly tried to avoid a notice exceeded situation by changing water right claims from "filed" to "use" rights with more junior priority dates. While the underlying issue of overfiled notice of appropriation is analogous, the proposed solution addressed in *BFR* is different so the case provides little guidance one way or another as to Quirk's motion.

Quirk's second argument is claim 76D 118112-00 was validly filed and is prima facie evidence of its content under § 85-2-221, MCA. Quirk says it "has seen no evidence in this case to counter the prima facie proof in the various statements of claim at issue in this motion and believes that none exists." (Motion, at 10). Quirk's argument runs counter to the Water Use Act. As already indicated, the over-filed notice of appropriation remark is consistent with the Water Court's Reexam Order. The Reexam Order never has been challenged and has been followed for many years in many basins. The remark is

proper and objections have been filed based on the remark. If the objections do not resolve the remark, the Court must have other information before it can do so. Sections 85-2-233; 85-2-248, MCA. Under Quirk's reading of the Act, the prima facie statute would negate all objections and issue remarks as a matter of law. While the prima facie statute offers claimants a measure of protection, it does not insulate claims from objections, issue remarks, and court orders. Without more undisputed evidence of historical use to support two sets of claims with separate flow rates totaling more than 7.5 cfs, Quirk's prima facie argument does not support summary judgment.

As part of its second argument, Quirk also contends the claimants "do not rely on the same flows to satisfy their appropriations." (Motion, at 12). Quirk's statement seems to run contrary to the Water Court's decision in case 76D-55, where the Court concluded: "Indian Creek is a single source of water." (Order adopting Amended Master's Report, Feb. 10, 1987, ¶ I). At most, Quirk raises a factual issue about the accuracy of the Court's prior order, but this is not enough to entitle Quirk to summary judgment.

ORDER

For the foregoing reasons, Quirk's Motion for Summary Judgment is DENIED. The Court will issue a separate order to set further proceedings.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via Electronic Mail:

Richard C. Tappan Jr.
Connlan W. Whyte
Tappan Law Firm PLLC
7 W 6th Ave Ste 516
Helena, MT 59601
(406) 449-3383
rctappan@tappanlawfirm.com
cwhyte@tappanlawfirm.com
jpharmer@tappanlawfirm.com

Charles H. Carpenter
Carpenter Law Firm PLC
210 North Higgins Ave Suite 336
Missoula, Montana 59802
(406) 543-0511
(406) 214-9540
carpentc@carpenterlawfirmplc.com

Scott D. Hagel
Crowley Fleck PLLP
PO Box 759
Kalispell, MT 59903
(406) 752-6644
shagel@crowleyfleck.com
jgold@crowleyfleck.com

Service via USPS Mail:

Shawn M. Vandenberg
P.O. Box 860
Eureka, MT 59917