

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

CLAIMANT: Deep Springs LLC

CASE 76D-0544-R-2023

76D 216093-00

76D 216094-00

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, conclusions 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

Statement of the case

Domestic claim 76D 216093-00 appeared in the Preliminary Decree for this Basin with the following issue remarks:

CLAIM WAS NOT INCLUDED IN THE BASIN 76D TEMPORARY PRELIMINARY DECREE ISSUED 03/22/84.

CLAIM FILED LATE 07/02/96. IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

USDA AERIAL PHOTOGRAPH NO(S). 379-24, DATED 8/10/1979, APPEARS TO INDICATE 3 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

AERIAL PHOTOGRAPH NO(S). WRS 1BB-105, DATED 7/8/1961, APPEARS TO INDICATE 2 ACRES IRRIGATED. A DESCRIPTION OF THESE ACRES IS IN THE CLAIM FILE.

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

VOLUME MAY REQUIRE MODIFICATION BASED ON RESOLUTION OF MAXIMUM ACRES ISSUE.

Stock claim 76D 216094-00 appeared in the Preliminary Decree for this Basin with the following issue remarks:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 76D TEMPORARY PRELIMINARY DECREE ISSUED 03/22/1984.

CLAIM FILED LATE 07/02/96. IN ADDITION TO BEING SUBORDINATE TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS RIGHT MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221 MCA.

EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.

Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

Montana law requires the Water Court to resolve issue remarks. Claimant, Deep Springs LLC was ordered to meet with DNRC to attempt resolution of the issue remarks. Deep Springs LLC failed to complete the issue remark resolution process. There were no

filings by Deep Springs LLC explaining its failure to contact the DNRC. The court set a show cause filing deadline for Deep Springs LLC. Deep Springs LLC failed to comply with the show cause filing deadline.

Issue

What amendments to claims 76D 216093-00 and 76D 216094-00 should be implemented to accurately reflect historical beneficial use and resolve the issue remarks on each claim?

Findings of fact

1. On March 12, 2024, DNRC filed a Memorandum recommending resolution of the issue remarks. On March 14, 2024, DNRC filed an Addendum to the original Memorandum clarifying the place of use legal land description for domestic claim 76D 216093-00.

2. The historically accurate place of use for domestic claim 76D 216093-00 is 2.25 acres in the W2SE of Section 29, Township 37 North, Range 26 West, Lincoln County.

3. The Preliminary Decree abstract for stock claim 76D 216094-00 identifies its historically accurate elements.

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. This prima facie proof may be contradicted and 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. If the Montana Water Court cannot resolve issue remarks based upon information in the claim file or information available to the Court, claimants shall be required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

6. All parties subject to the jurisdiction of the Montana Water Court in this adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

7. Late claim fees may be waived by the court. Rule 30, W.R.Adj.R.

Analysis

Issues - historical elements for claims 76D 216093-00 and 76D 216094-00 and issue remark resolution

DNRC reported it reviewed the claim files, 1961 and 1979 aerial photos, a USA topographic map, and State of Montana property information.

Based upon its review of aerial photographs, DNRC recommended a reduced number of maximum acres irrigated and modified place of use legal land description for domestic claim 76D 216093-00. DNRC confirmed the prima facie volume claimed by statement of claim 76D 216093-00 does not require adjustment based upon the reduced number of maximum acres irrigated. The claimed 7.40 AF volume remains less than the 2.50 AF/acre guideline for domestic claims with a reservoir.¹

Based upon its review of aerial photographs and a USA topographic map, DNRC confirmed the existence of the reservoir claimed by claims 76D 216093-00 and 76D 216094-00.

Deep Springs LLC failed to participate in the issue remark resolution process. An order provided Deep Springs LLC the opportunity to respond to DNRC's suggested amendments and suggested resolution of the issue remarks appearing on claims 76D 216093-00 and 76D 216094-00. Deep Springs LLC failed to file a response, leaving DNRC's review and recommendations as strong evidence of actual historical use.

DNRC's Memorandum, DNRC's Addendum to Memorandum, and attachments may be viewed on the court's case management system, FullCourt Enterprise, at document sequences 2.00 and 3.00.

The above captioned claims were filed after the April 30, 1982 claim filing deadline expired. As a result, the claims are defined as "late claims" under § 85-2-102(15), MCA, and were deemed forfeit pursuant to § 85-2-226, MCA. In 1993, the Montana Legislature enacted § 85-2-221(3), MCA, and provided for the remission of forfeiture of late claims, subject to specified terms and conditions. These claims are "remitted" late claims.

The abstracts of these claims appeared with an issue remark citing § 85-2-221(3), MCA, advising water users that the claims may be subordinate, and therefore junior, to certain permits and reservations of water. Persons holding a post-June 30, 1973 permit or reservation, who relied to their detriment on the failure of a claimant to timely file a

¹ Rule 19(b)(3)(iii), Water Right Claim Examination Rules.

claim, were required to file an objection and thereby seek the subordination of any remitted late filed claims to their permit or reservation.

The claims received an additional issue remark noting they missed the first decree for Basin 76D issued in 1984. This notice issue remark provided notice to water users that the claims were not previously decreed.

Water users were given the opportunity to review the claims and file an objection. The deadline to file objections passed. No water users filed objections against the claims.

Conclusions of law

Based upon the claim files, evidence included with DNRC’s Memorandum and Addendum to Memorandum, and DNRC’s recommendations, the maximum acres irrigated, and place of use identified by claim 76D 216093-00 should be amended as suggested to reflect historical use and resolve the maximum acres irrigated issue remarks. The prima facie volume identified by statement of claim 76D 216093-00 is within the guidelines for domestic use and does not require adjustment based upon the reduced maximum acres irrigated. The volume issue remark is resolved.

DNRC confirmed the historical existence of the reservoir claimed by both claims. The issue remark questioning existence of the reservoir on both claims is resolved.

The late claim and lack of the claim’s inclusion in the previous decree issue remarks served their notice purpose.

Recommendations

Domestic claim 76D 216093-00 should be amended as follows to accurately reflect historical use.

76D 216093-00

MAXIMUM ACRES: ~~5.75~~ **2.25**

PLACE OF USE:

| | <u>ACRES</u> | <u>GOVT LOT</u> | <u>QTR SEC</u> | <u>SEC</u> | <u>TWP</u> | <u>RGE</u> | <u>COUNTY</u> |
|---------------|-----------------|-----------------|-------------------|---------------|----------------|----------------|--------------------|
| | 5.15 | | SWNWSE | 29 | 37N | 26W | LINCOLN |
| | 2.25 | W2SE | NWSWSE | 29 | 37N | 26W | LINCOLN |
| TOTAL: | 2.25 | | | | | | |

PLACE OF USE IS LOCATED IN C.O.S. MORTGAGE CS3037, GOV’T LOTS 5, 6, 7, & GOV’T

LOT 4 LESS CS #3306 133.893 ACRES.

Stock claim 76D 216094-00 accurately reflects historical use. No changes to the elements of the claim should be made.

The issue remarks should be removed from the claim abstracts. The late claim fee assessment should be waived as authorized by Rule 30, W.R.Adj.R.

Post Decree Abstracts of Water Right Claim accompany this report to confirm implementation of the recommendations in the state's centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Deep Springs LLC
3964 Indian Creek Rd
Eureka MT 59917-9110

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 216093-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: DEEP SPRINGS LLC
3964 INDIAN CREEK RD
EUREKA, MT 59917-9110

Priority Date: MAY 31, 1903

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 07/02/96. AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (Use): DOMESTIC

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

Volume: 7.40 AC-FT

Households: 1

Maximum Acres: 2.25

Source Name: SPRING, UNNAMED TRIBUTARY OF INDIAN 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 | | NENWSE | 29 | 37N | 26W | LINCOLN |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: OFFSTREAM

| <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------------|----------------|------------|------------|------------|---------------|
| | NENWSE | 29 | 37N | 26W | LINCOLN |

Diversion to Reservoir: DIVERSION # 1

Period of Use: JANUARY 1 TO DECEMBER 31

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 | 2.25 | | W2SE | 29 | 37N | 26W | LINCOLN |

Total: 2.25

PLACE OF USE IS LOCATED IN C.O.S. MORTGAGE CS3037, GOV'T LOTS 5, 6, 7, & GOV'T LOT 4 LESS CS #3306 133.893 ACRES.

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

216093-00

216094-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 216094-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: DEEP SPRINGS LLC
3964 INDIAN CREEK RD
EUREKA, MT 59917-9110

Priority Date: MAY 31, 1903

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 07/02/96. AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: SPRING, UNNAMED TRIBUTARY OF INDIAN 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 | 6 | NENWSE | 29 | 37N | 26W | LINCOLN |

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Period of Use: JANUARY 1 TO DECEMBER 31

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 | | | NWSE | 29 | 37N | 26W | LINCOLN |

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

216093-00 216094-00