

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
TWO MEDICINE RIVER - BASIN 41M

CLAIMANTS: Ila D. Agee; Wayne R. Agee

OBJECTORS: Blackfeet Tribe; United States of America
(Bureau of Indian Affairs)

CASE 41M-0001-I-2024

41M 30112955

41M 30112957

41M 30112971

41M 30112976

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

Each of the above captioned groundwater claims appeared in the Interlocutory Decree for this Basin with a notice issue remark. 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. Issue remarks may also provide some sort of notice to water users concerning a claim.

Each of the claims received an objection from the Blackfeet Tribe and the United States of America (Bureau of Indian Affairs) to the priority date.

Montana law requires the Water Court to resolve issue remarks and objections.

The statement included on the objection forms to each claim appeared to be contrary to Montana law. A show cause order, providing statutory citations to Montana law, set a deadline for objectors to explain why established Montana law should not apply to these claims. The objectors filed a Joint Response to Show Cause Order. The proposed resolution of the objections also appeared to be contrary to Montana law.

Issues

1. What is the historically accurate priority date for each claim?
2. Is the notice issue remark appearing on each claim resolved?

Findings of fact

1. Based upon the current record, the priority date for each of the above captioned

claims should remain the date each Statement of Claim was filed, July 7, 2017.

2. The notice issue remark concerning lack of the claims' inclusion in the previous decree should be removed from each abstract.

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.

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. Montana law required an appropriator of groundwater by means of a well between January 1, 1962 and July 1, 1973 to timely file a Notice of Completion of Groundwater Appropriation with the county clerk of the county in which the appropriation was located. Section 89-2913(d), RCM (1963). Until an appropriator filed a Notice of Completion no right to use the water was recognized. Section 89-2913(e), RCM (1963). These provisions were repealed in 1973 with the enactment of § 85-2-306, MCA. The statute provides:

(4) An appropriator of ground water by means of a well or developed spring first put to beneficial use between January 1, 1962 and July 1, 1973, who did not file a notice of completion, as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (3), with the department to perfect the water right. The filing of a claim of existing water right pursuant to 85-2-221[a Statement of Claim] is sufficient notice of completion under this subsection. The priority date of the appropriation is the date of the filing of a notice as provided in subsection (3), or the date of the filing of the claim of existing water right.

6. Settlement, including the documents filed by a claimant where the claimant is the only party, is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R. The Water Court may rely on the terms of a settlement if they are “not contrary to law, court rule, or public policy.” *In re Marriage of Hill*, 265 Mont. 52, 58, 874 P.2d 705, 708 (1994).

Analysis

Issue 1 – priority date objections

The objections to each claim state, “Claim has a priority date of July 7, 2017; water rights may only be adjudicated and decreed if they arose prior to July 1, 1973.” The objectors’ statement is true. Objectors’ Joint Response to Show Cause Order confirms the date of first beneficial use for each groundwater claim was either 1962 or 1964 and correctly states the definition of an existing water right is “a right to use of water that would be protected under the law as it existed prior to July 1, 1973.” The law that existed for groundwater rights with first beneficial use between January 1, 1962, and July 30, 1973, is the 1961 Ground Water Code.

While each of the above captioned groundwater claims “arose prior to 1973,” pursuant to Montana law, specifically the 1961 Ground Water Code, the appropriate forms were not filed to establish a priority date before July 1, 1973. Appropriators claiming groundwater water rights with a priority date between January 1, 1962, and June

30, 1973, were required to comply with the 1961 Ground Water Code by filing a Notice of Appropriation and a Notice of Completion. Appropriators failed to file the required forms so often in the history of the state that the Montana legislature enacted a legislative band aid (applied to the above captioned claims) for those appropriators that failed to comply with the 1961 Ground Water Code to prevent forfeiture of their existing water rights – Section 85-2-306(4), Montana Code Annotated. *See* court handout included with this Master’s Report (regularly provided to pro se claimants to assist with groundwater priority date issue remark resolution).

The objectors also state that the DNRC introduced error during claims examination. According to Water Right Claim Examination Rule 13(f)(5), the DNRC shall change the priority date

(5) to reflect the date the claim form was received by the department when no indication that a groundwater notice was filed in compliance with the 1961 groundwater statutes. The following remarks shall be added to the water right abstract:

Examples:

THIS IS AN EXISTING RIGHT. ITS POST 1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(2) MCA.

THE PRIORITY DATE OF THIS WATER RIGHT HAS BEEN CHANGED TO THE FILING DATE OF THE STATEMENT OF CLAIM. THE PRIORITY DATE MAY BE CONTESTED BY PROPER OBJECTION.

Each of the above captioned groundwater claims received the date each claim form was received by the Department, July 7, 2017, and the above information remarks under the priority date element, pursuant to Montana law and as directed by the Montana Supreme Court Water Right Claim Examination Rules.

Conclusion of law

The objectors provided no explanation as to why Montana law should not apply to these claims. The Interlocutory Decree abstract for each claim correctly identifies the date the Statements of claim were filed with DNRC – the correct priority date pursuant to

Montana law. No changes should be made to the priority date.

Issue 2 – notice issue remark resolution

The claims appeared in the Interlocutory Decree with the following issue remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 41M DECREE ISSUED 03/20/2015.

Water users were given the opportunity to review the claims and file an objection.

The deadline to file objections expired. The only objections filed to the claims are resolved by these proceedings.

Conclusion of law

The issue remark noting lack of the claims' inclusion in the previous Basin 41M decree served its notice purpose.

Recommendations

The Interlocutory Decree abstract for each of the above captioned claims identifies the correct priority date. No changes to the priority date element should be made.

The notice issue remark should be removed from each claim abstract.

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

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

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Groundwater Filing Issue Remark

In 1961, the Montana legislature enacted the Montana Ground Water Code of 1961. Title 89, Chapter 29, R.C.M. 1947.

Per section 89-2912 of the 1961 Ground Water Code, all appropriations of ground water completed *after January 1, 1962* had to comply with the Code's specific filing provisions which included filing both a Notice of Appropriation and a Notice of Completion with the county clerk and recorder in order to secure a priority date based on when the well excavation began. Failure to file both resulted in a priority date based on the date the Notice of Completion was filed.

Section 89-2913(b) of the 1961 Ground Water Code provided a ground water appropriator may file a Notice of Appropriation with the county clerk and recorder office in order to relate the priority date back to the well excavation. Section 89-2913(e) of the 1961 Ground Water Code provided a ground water appropriator who failed to file a Notice of Appropriation lost the ability to relate the priority date back to when the well excavation started.

Section 89-2913(e) also provided if a Notice of Completion *was not filed* by the appropriator upon completion of the well, no use of groundwater initiated after January 1, 1962 would be recognized as a valid appropriation.

The above wording of the 1961 Ground Water Code means if you, or your predecessor, started digging your well after January 1, 1962 and did not file a Notice of Completion, then there was no valid ground water appropriation because the filing process was not completed. The Montana Water Use Act of 1973 provides some relief. It allows a Statement of Claim, timely filed in this adjudication, to serve as the Notice of Completion. The priority date is the date the Statement of Claim was filed. See Section 85-2-306(4), MCA.

Please visit your county clerk and recorder office to determine if a Notice of Appropriation and a Notice of Completion were filed for your ground water right to confirm your priority date between January 1, 1962 and July 1, 1973 as claimed. If there are both, the priority date for the well is the date the well excavation began. If there is only a Notice of Completion, the priority date is the date the Notice of Completion was filed. If there is only a Notice of Appropriation, the priority date is the date the Statement of Claim was filed. If there is no Notice of Appropriation and no Notice of Completion, the priority date is the date the Statement of Claim was filed.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: 41M 30112955 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: ILA D AGEE
PO BOX 197
DUPUYER, MT 59432

WAYNE R AGEE
PO BOX 197
DUPUYER, MT 59432

***Priority Date:** JULY 7, 2017

THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(4) MCA.

***Type of Historical Right:** FILED

Purpose (Use): DOMESTIC

Flow Rate: 20.00 GPM

Volume: 4.00 AC-FT

Households: 1

Maximum Acres: 1.00

Source Name: GROUNDWATER

Source Type: GROUNDWATER

***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	14	NESWSW	10	28N	7W	PONDERA

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	1.00	14	NESWSW	10	28N	7W	PONDERA

Total: 1.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: 41M 30112957 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: ILA D AGEE
PO BOX 197
DUPUYER, MT 59432

WAYNE R AGEE
PO BOX 197
DUPUYER, MT 59432

***Priority Date:** JULY 7, 2017

THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(4) MCA.

***Type of Historical Right:** FILED

Purpose (Use): DOMESTIC

Flow Rate: 20.00 GPM

Volume: 4.00 AC-FT

Households: 1

Maximum Acres: 1.00

Source Name: GROUNDWATER

Source Type: GROUNDWATER

***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	12	NESWSW	10	28N	7W	PONDERA

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	1.00	12	NESWSW	10	28N	7W	PONDERA

Total: 1.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: 41M 30112971 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: ILA D AGEE
PO BOX 197
DUPUYER, MT 59432

WAYNE R AGEE
PO BOX 197
DUPUYER, MT 59432

***Priority Date:** JULY 7, 2017

THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(4) MCA.

***Type of Historical Right:** FILED

Purpose (Use): DOMESTIC

Flow Rate: 20.00 GPM

Volume: 4.00 AC-FT

Households: 1

Maximum Acres: 1.00

Source Name: GROUNDWATER

Source Type: GROUNDWATER

***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	9	NESWSW	10	28N	7W	PONDERA

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	1.00	9	NESWSW	10	28N	7W	PONDERA

Total: 1.00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
TWO MEDICINE RIVER
BASIN 41M**

Water Right Number: 41M 30112976 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: ILA D AGEE
PO BOX 197
DUPUYER, MT 59432

WAYNE R AGEE
PO BOX 197
DUPUYER, MT 59432

***Priority Date:** JULY 7, 2017

THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(4) MCA.

***Type of Historical Right:** FILED

Purpose (Use): DOMESTIC

Flow Rate: 20.00 GPM

Volume: 4.00 AC-FT

Households: 1

Maximum Acres: 1.00

Source Name: GROUNDWATER

Source Type: GROUNDWATER

***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	16	NESWSW	10	28N	7W	PONDERA

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	1.00	16	NESWSW	10	28N	7W	PONDERA

Total: 1.00