

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

MONTANA WATER COURT
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM
BASIN (41I)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Winston Realty LLC

NOTICE OF INTENT APPEAR: Staubach Creek Ranch LLC

CASE 41I-0074-R-2023

41I 100356-00

41I 100358-00

**ORDER ON SCOPE OF NOIA AND
ORDER DENYING MOTION FOR JUDICIAL NOTICE**

The claims in this case are owned by Winston Realty LLC (“Winston”). Claim 41I 100356-00 is a mining claim for water use from Iron Age Gulch with a November 20, 1889 priority date. Claim 41I 100358-00 is for irrigation from Beaver Creek with an October 1, 1865 priority date, the most senior on Beaver Creek. A Notice of Intent to Appear (“NOIA”) was filed to the claims by Staubach Creek Ranch, LLC (“Staubach”). Both claims were subject to issue remarks resulting from examination by the Department of Natural Resources and Conservation (“DNRC”). The issue remarks on claim 41I 100358-00, include remarks stating the 1979 aerial photo and 1956 Water Resources Survey show 0 acres of irrigation.

The Water Master required Winston to work with the DNRC to resolve the issue remarks. (Doc. 1.00). DNRC provided a memorandum recommending a modification to the point of diversion and reduction to the flow rate of claim 41I 100358-00. (Doc. 7.00). Otherwise, DNRC concluded the information provided by Winston was sufficient to resolve the issue remarks on both claims. *Id.* There is no apparent disagreement with the

recommendations concerning mining claim 41I 100356-00. However, the parties have disagreement on 41I 100358-00 over the scope of Staubach's NOIA and the extent to which issues were resolved during prior Temporary Preliminary Decree ("TPD") proceedings. (Docs. 9.00 – 16.00).

Staubach asserts its NOIA is not resolved, and it intends to assert the abandonment and invalidity of claim 41I 100358-00. (Doc. 9.00). Staubach disagrees with DNRC's aerial photo analysis and asserts claim 41I 100358-00 was invalidated by a 1964 District Court Ruling. (Docs. 9.00, 12.00). Staubach filed a motion requesting the Court take judicial notice of a July 22, 1964 Judgment and Decree in Case No. 5066, Broadwater County ("Case No. 5066") asserting it "invalidated the Beaver Creek rights formerly decreed to the City of Helena." (Doc. 14.00 at 4). Winston states the priority date and validity of the right are outside the scope of Staubach's NOIA. (Doc. 13.00). Further, Winston asserts that the request for judicial notice should be denied as the priority date and historical basis of claim 41I 100358-00 has already been addressed pursuant to TPD Case 41I-115. (Doc. 15.00).

This order addresses the legal issues concerning proceedings on claim 41I 100358-00, including the scope of the NOIA and Staubach's Motion for Judicial Notice. This order does not address whether the issue remarks are resolved or not.

Background

Claim 41I 100358-00 was included in a TPD issued on March 3, 1995. During the TPD, the claim received objections, including objections from Wesley T. and Evelyn I. Furman ("Furman"). *See* Objection List for 41I TPD. The claim also received issue remarks. One of the issue remarks stated:

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE ARE QUESTIONABLE. THIS RIGHT IS BASED ON CASE NO. 208, BEAVER CREEK, BROADWATER COUNTY, DATED 10/23/1906. HOWEVER, CASE NO. 5066, BEAVER CREEK, BROADWATER COUNTY, DATED 7/22/1964 NULLIFIED THIS RIGHT.

Proceedings were set on claim 41I 100358-00 in TPD case 41I-115. During the proceedings, the DNRC filed a Memorandum concluding the issue remark shown above

was incorrect and should be removed. *See* March 9, 1998 DNRC Memorandum¹. Additionally, Furman's objections regarding priority date and type of historical right were also withdrawn during TPD proceedings. *See* March 31, 1998 Master's Report.

Subsequently, the claim was included in the Preliminary Decree ("PD") with issue remarks stating the 1979 aerial photo and the 1956 Water Resources Survey showed 0 acres irrigated. These issue remarks resulted in "all elements" appearing under the claim on the PD objection list. *See* Objection List for PD. The present case was consolidated to address and resolve the issue remarks and Staubach's NOIA. (Doc. 1.00).

Issues

The issues addressed by this Order are:

1. *Does the scope of the NOIA allow Staubach to assert abandonment and invalidity of claim 41I 100358-00?*
2. *Was the application of Case No. 5066 to claim 41I 100358-00 resolved during the TPD proceedings.*
3. *Is the Court required to take judicial notice of Case No. 5066?*

Applicable Law

Pursuant to Rule 9(a) of the Water Right Adjudication Rules, the objection list provides notice of "all claims to which objections or counterobjections were filed, all issue remarks reported by the department, and any claim which the court knows at the time of completion of the list will be called in on the court's own motion." Notices of Intent to Appear are governed by Rule 9(b), W.R.Adj.R. The rule states:

Any person other than the claimant or objector who intends to appear and participate in further proceedings for any claims or issues included on the objection list must file a notice of intent to appear in compliance with § 85-2-233, MCA. ... Persons who file notices of intent to appear as provided in this rule shall receive notice of all future proceedings involving the claims specified in their notice and are entitled to participate in the resolution of the issues associated with those claims.

Rule 9 (b), W.R.Adj.R.

¹ Available in the claim file for 41I 100358-00.

According to § 85-2-233(1)(c), Mont. Code Ann., “a person may not raise an objection to a matter in a preliminary decree if that person was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree unless the objection is allowed for any of the following reasons...” The other reasons include mistake, neglect, and other reasons that have not been raised here. Similarly, § 85-2-233(1)(d), MCA, states, “After March 28, 1997, a person may not raise an objection or counterobjection to a matter contained in a subsequent decree issued under this part if the matter was contained in a prior decree issued under this part for which there was an objection and counterobjection period unless the objection is allowed for any of the following reasons...” The reasons set out in this subsection are the same as those set forth in § 85-2-233(1)(c), MCA, and none have been raised here.

There are two types of judicial notice. First, judicial notice of facts is governed by Rule 201 of the Montana Rules of Evidence: the Court may take judicial notice of facts not subject to reasonable dispute. Second, judicial notice of law is governed by Rule 202, M.R.Evid: the Court may take judicial notice of law such as common law, constitutions, statutes, ordinances, and state records. A Court is required to take judicial notice of any law when requested by a party and supplied with the necessary information. Rule 202(d), M.R.Evid.

Analysis

1. Does the scope of the NOIA allow Staubach to assert abandonment and invalidity of claim 41I 100358-00?

Winston worked with the DNRC on resolution of the issue remarks on claim 41I 100358-00. According to the DNRC Memorandum filed in this case, the DNRC concluded the information provided by Winston was sufficient to resolve the issue remarks concerning 0 acres irrigated. (Doc. 7.00). Staubach made clear it does not agree that the issue remarks on claim 41I 100358-00 are resolved. Staubach states it is entitled to show claim 41I 100358-00 is abandoned, invalid, or that the priority date is incorrect and should be much junior. (Doc. 9.00). Winston’s position is that, as a NOIA party, Staubach cannot make further assertions regarding 41I 100358-00 when the issue

remarks have been resolved to DNRC's standards and that abandonment and the validity of claim 41I 100358-00 are outside the scope of Staubach's NOIA. (Doc. 10.00).

The objection list provides notice of claims subject to objections, counterobjections, and issue remarks and allows NOIA parties to "participate in the resolution of the issues associated with those claims." Rule 9(a), (b), W.R.Adj.R. The Court has confirmed that the language of Rule 9(b), W.R.Adj.R. limits the rights of NOIA parties to participate on issues already raised. *In re Erb*, 2016 Mont. Water LEXIS 2, *9.

The Court has previously stated that 0 acres irrigated remarks raise the issue of potential abandonment. In *Heavirland v. State*, 2013 MT 313, ¶ 6, 372 Mont. 300, 311 P.3d 813, an irrigation claim received issue remarks stating the Water Resource Survey and 1978 aerial photo indicated 0 acres of irrigation. The Court concluded that the remarks "raised an issue of abandonment." *Id.*

Here, claim 41I 100358-00 received analogous issue remarks to those in *Heavirland*. As a result of the issue remarks, all elements appeared on the objection list in the PD. As in *Heavirland*, the issue remarks were sufficient to raise the issue of abandonment.

Therefore, Staubach may participate in resolution of the issue remarks. Staubach's participation may include disagreement with the DNRC's conclusion that the issue remarks are adequately resolved. Staubach may also participate in the issue of potential abandonment based on the 0 acres irrigated issue remarks.

2. Was the application of Case No. 5066 to claim 41I 100358-00 resolved during the TPD proceedings?

In the TPD, an issue remark was included on claim 41I 100358-00 that questioned the type of historical right and priority date based on proceedings in Case No. 5066. *See* Basin 41I TPD. The issue remark specifically stated claim 41I 100358-00 may have been "nullified." During TPD proceedings, the DNRC filed a memorandum concluding the issue remark was incorrect.² *See* March 19, 1998 DNRC Memorandum. The Master's Report in TPD case 41I-115 concluded the information was incorrect, the issue remark

² At the time of proceedings in case 41I-115, § 85-2-248, MCA did not yet include a requirement that the Court address and resolve issue remarks.

was resolved, and recommended removing the issue remark. *See* March 31, 1998 Master's Report. The Master's Report was adopted by the Water Court. *See* May 8, 1998 Order Adopting Master's Report. Claim 41I 100358-00, thus, appeared in the PD without the issue remark.

Pursuant to § 85-2-233(1)(c) and (d), MCA, a party cannot raise an objection in a PD to a matter that was litigated in a TPD except under specific circumstances, which have not been alleged here. Although the statute does not explicitly include NOIA parties, the statute applies to NOIA parties through the Rule 9, W.R.Adj.R., limitation that NOIAs may only participate in issues already raised by objection, counterobjection, or issue remark.

Although Staubach is correct that it may participate in resolution of the issue remarks pursuant to Rule 9(b), W.R.Adj.R., the application of Case No. 5066 was already decided in TPD Case 41I-115. The TPD proceedings resulted in the resolution of the issue remark concerning Case No. 5066. This Court previously adopted recommendations that specifically resolved the issue of whether Case No. 5066 invalidated or "nullified" claim 41I 100358-00. The same issue cannot be raised again in the PD. Moreover, Staubach may not attempt to challenge the validity of claim 41I 100358-00 based on Case No. 5066.

3. *Is the Court required to take judicial notice of Case No. 5066?*

Staubach requests the Court take judicial notice of Case No. 5066. (Doc. 14.00). "By the present motion, Staubach requests that this Court take judicial notice of the Case No. 5066 Decree which invalidated the Beaver Creek rights formerly decreed to the City of Helena. Claim 41I 100358-00 claims to be based upon one of these rights invalidated by Case No. 5066." *Id.*

As Case No. 5066 is a record of a court, it falls under Rule 202(b)(6), M.R.Civ.P., judicial notice of law. Judicial notice of law is mandatory "when requested by a party and supplied with the necessary information." Rule 202(d)(6), M.R.Evid.

Case No. 5066 was previously determined not to apply to claim 41I 100358-00. There is no other information regarding why judicial notice of Case No. 5066 is

necessary. As no other information has been supplied, judicial notice is not mandatory and is inappropriate in this case.

Conclusion

The scope of the NOIA allows Staubach to participate in resolution of the issue remarks concerning claim 41I-100358-00. The 0 acres irrigated issue remarks sufficiently raised the issue of potential abandonment. However, the application of Case No. 5066 was resolved in TPD proceedings and may not be raised again here. Staubach may not use Case No. 5066 as a basis to assert claim 41I 100358-00 is abandoned or invalid.

Therefore, it is

ORDERED that as a NOIA party, Staubach may participate in proceedings on resolution of the issue remarks on claim 41I 100358-00, including potential abandonment raised by the 0 acres irrigated issue remarks.

ORDERED that the request for judicial notice of Case No. 5066 is DENIED as the issue remark concerning Case No. 5066 that appeared on claim 41I 100358-00 in the TPD was addressed and resolved.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service Via Electronic Mail:

Betsy R Story
Parsons Behle & Latimer
bstory@parsonsbehle.com
ecf@parsonsbehle.com

Rick C Tappan
Connlan W. Whyte
Tappan Law Firm, PLLC
rctappan@tappanlawfirm.com
cwhyte@tappanlawfirm.com
office@tappanlawfirm.com