

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

CLAIMANT: Park Branch Water Users Association

OBJECTORS: United States of America (Bureau of Land
Management); United States of America (Bureau
of Reclamation)

NOTICE OF INTENT TO APPEAR: DePuy Enterprises LLC;
Touch of Paradise LLC

CASE 43B-0587-R-2022

43B 119332-00

43B 119333-00

ORDER ON MOTION TO INTERVENE AND MOTION TO CORRECT

BACKGROUND

The Water Court issued the Preliminary Decree for Basin 43B on May 9, 2019. Basin 43B covers the upper Yellowstone River basin above the Yellowstone's confluence with Bridger Creek. The Preliminary Decree included abstracts describing the elements of various existing rights, including water right claims 43B 119332-00 and 43B 119333-00. Park Branch Water Users Association ("Park Branch") owned the claims as of the date of the Preliminary Decree and continues to own them today.

The Preliminary Decree describes claims 43B 119332-00 and 43B 119333-00 as rights to use water diverted from the Yellowstone River for irrigation use for up to 7,370.00 acres in Park County. The decree abstracts for both claims included an issue remark resulting from the resolution of an objection that the Department of Natural Resources and Conservation ("DNRC") filed at the earlier Temporary Preliminary

Decree (“TPD”) stage of the adjudication. Master’s Report, Case 43B-262 (Mar. 18, 1994, adopted Apr. 19, 1994).

Issuance of the Preliminary Decree commenced an objection period, with deadlines for objections, counterobjections, and notices of intent to appear. The United States of America, on behalf of the Bureau of Land Management and Bureau of Reclamation (“United States”) filed objections based on the decreed place of use and acreage. No one else objected. The Water Court then published an objection list. The objection list identified place of use and maximum acreage as elements at issue. Based on the objection list, two parties filed notices of intent to appear.

On January 14, 2022, the Water Court consolidated claims 43B 119332-00 and 43B 119333-00 into this case to address the objections and appearances. After the senior water master assigned to this case put the case on a hearing track, Park Branch filed a detailed motion to amend the places of use and acreage of the claims, which included a request to recognize a service area.

Park Branch based the motion to amend on its review of numerous historical documents and consultation with DNRC. The motion to amend also states Park Branch vetted “the draft service area place of use to all Park Branch shareholders for their review with an opportunity for commentary, revisions, and questions from each shareholder.” (Doc. 21.00, at 5-6). On December 19, 2023, the Water Court adopted a Master’s Report that recommended resolution of issue remarks and objections. As part of the resolution, the Water Court granted the motion to amend the claims to include a 14,840.00-acre service area place of use, within which up to 7,370.00 acres may be irrigated during any one year.

Nearly two years after the Water Court adopted the Master’s Report and closed the claims and this case, Philip Nichols and Jennifer Nichols (“Nichols”) filed a Motion to Intervene and Motion to Correct Pursuant to Rule 60 of the Montana Rules of Civil Procedure (“Motion”). According to the Motion, the Nichols own property in the northwest quarter of Section 14, Township 5 South, Range 8 East in Park County. The Nichols’ property evidently is not identified as part of the service area place of use for claims 43B 119332-00 and 43B 119333-00. The Motion contends the Nichols’ property

is irrigable from the Park Branch system and historically has been irrigated with Park Branch water. The Motion asks the Court to allow the Nichols to intervene in this case and to “correct” the place of use legal descriptions to add the Nichols’ property.

DISCUSSION

The Nichols base the Motion on Rule 24, Mont.R.Civ.P., which governs intervention either as a matter of right or permissively. The Water Court incorporates Rule 24 into its adjudication rules, unless the context “requires otherwise.” Rule 2(b), W.R.Adj.R. To that end, the Court applies the rule in the context of the Water Use Act and the adjudication rule provisions that provide opportunities to participate in adjudication proceedings through objections, counterobjections, and notices of intent to appear. Each of these participation opportunities come with hard deadlines, so the Court is cautious about authorizing Rule 24, or any other Rule of Civil Procedure to cure the failure timely object or appear. For example, in *In re Erb*, Case 41B-208, 2016 Mont. Water LEXIS 2, the Court denied an appearing party’s request to raise new issues through Rule 24 intervention based when it failed to do so through the objection process. The Court provided a detailed discussion of the interrelationship between Rule 24, the Water Use Act and the Court’s rules, concluding that Rule 24 is not intended to circumvent the specific time deadline absent “extraordinary circumstances.” *Erb*, at *20.

In re Erb did not hold that Rule 24 is always inapplicable to Water Court proceedings, though it does impose guardrails. In a subsequent case, the Court granted intervention, but only after applying the four-part test to determine intervention as a matter of right under M.R.Civ.P. Rule 24(a)(2). *In re Haas Ranch LLC*, Case 41M-201, 2020 Mont. Water LEXIS 245. This test requires that a proposed intervenor prove (1) the motion is timely; (2) the proposed intervenor has an interest in the subject matter of the action; (3) protection of the interest may be impaired by the disposition of the action; and (4) the interest is not adequately represented by an existing party. *Matter of Est. of Johnson*, 2024 MT 224, ¶ 18, 418 Mont. 198, 204, 557 P.3d 36, 42. Timeliness is a threshold requirement under this test. Courts look to four factors when evaluating the timeliness of a motion to intervene. These include: (1) the length of time the intervenor

knew or should have known of its interest in the case before moving to intervene; (2) the prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay in making its application to intervene; (3) the prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 24, 305 Mont. 22, 30, 22 P.3d 646, 651; *Erb*, at *14-15.

As to the first part of the timeliness test, more than two years have passed since Court adopted the Master's Report and closed this case. To put this in context, the statutory objection period only lasts 180 days, with the possibility of two 90 day extensions. The counterobjection and notice of intent to appear periods are even shorter. The time lag for the Nichols' Motion is more than double the maximum length of the objection period. The Nichols' contend they were unaware of the issues because Park Branch was using an incorrect mailing address for them. (Doc. 30.00, at 11). However, as the Water Court noted in *Haas*, Montana's "adjudication process is founded on the idea that water users must take reasonable steps to protect their rights." *Haas*, at *6.

Next, although the Nichols' Motion does not address the prejudice to other parties factor directly, the Motion contends adding the property to the service area "will not impact the flow rate, the volume, the maximum number of acres irrigable at a given time, or any other element of the claims beside the service area place of use." (Doc. 30.00). The Court is not convinced. This case was closed on the basis of a service area containing a precise number of acres within the service area boundary (14,840.00 acres) and a precise number of acres (7,370.00 acres) that may be irrigated in any one year. The Park Branch motion to amend also indicates Park Branch consulted its shareholders before filing the motion. The Court has no way of knowing whether that acreage would have been revised had the Nichols' property would have been included.

The third timeliness factor looks to prejudice to the Nichols, as proposed intervenors. The Court is mindful of the importance of confirming water use within the lawful place of use, and the risks to crops and property value if the property is not included. However, as with all decrees, the Water Court provided extensive notice of the Basin 43B Preliminary Decree and the participation deadlines. The Nichols could have

protected their interests by filing timely objections to the claims, or by participating as an appearing party in ensuring the Park Branch service area motion properly included their property.

The final timeliness factor looks to unusual circumstances. This factor takes on added importance in the Water Court process because the existing provisions provide specific timelines to object or otherwise appear. A proposed intervenor must provide some “extraordinary circumstance” for the Court to effectively waive these participation deadlines by allowing intervention after the deadlines have run – and in this situation, after the case has been closed. *Erb*, at *20. For example, *Haas Ranch*, the Court noted a materially misleading statement made in an objection as the unusual circumstance that justified intervention after the notice of intent to appear period ran. *Haas Ranch*, *9. In contrast, in this case the failure to timely object or appear seems to be based only on mailing address errors, which are not that unusual and are easily corrected. To the extent the Nichols or any other water user depend on an association or entity for their water, they bear responsibility to ensure accurate records are maintained.

Based on these factors, the Court concludes the Nichols’ Motion does not clear the timeliness threshold bar. Even if it did, the Nichols still must prove (2) an interest in the subject matter of the action; (3) impairment of the interest by the disposition of the action; and (4) the interest is not adequately represented by an existing party.

Assuming for the sake of argument the Nichols’ interest will be impaired by not having their property included in the service area,¹ the Motion does not establish that their interests are not adequately represented by Park Branch. Park Branch owns these water right claims; they are not owned by any individual water user. In this situation, the Court assumes Park Branch properly advocated on behalf of all its members, as its motion to amend suggests. Any disputes or discrepancies between Park Branch and its members are not matters for the Water Court to resolve because they amount to a collateral attack on Park Branch’s motion to amend. The Nichols do not cite any law that provides a basis to

¹ Whether the Nichols’ concerns could be addressed in a DNRC change application is beyond the scope of this Order, except to note that the Nichols have presented no evidence to prove the relief they seek could not be obtained through the change process.

conclude a water service entity like Park Branch does not advocate for its water users. Allowing the Nichols to intervene at this late date would undermine that assumption and force the Court into a role of overseeing matters internal to the organization. Because Park Branch is the sole owner of these rights, the Court must assume Park Branch appropriately represented the interests of all its members when it filed its motion to amend. The Court also notes Park Branch did not join the Nichols' Motion.

For these reasons, the Court concludes the Nichols do not meet the requisite test for intervention as a matter of right. The Court declines to address the merits of the Nichols' Rule 60(b) motion because the Nichols are not a "party" to this case, nor have they demonstrated party status. As to Rule 60(a), the Court declines to conclude a clerical mistake was made, especially given the extensive process Park Branch followed to prepare and file its motion to amend the place of use.

ORDER

Therefore, it is ORDERED, that the Nichols' Motion is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

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Note: Service List Updated 1-27-2026