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

CLAIMANT: Hensley & Daughters LLC

OBJECTORS: United States, DOI Bureau of Reclamation;
United States, DOA Forest Service

CASE 41I-0078-R-2023

41I 29231-00
41I 29232-00
41I 29234-00
41I 29235-00
41I 29236-00
41I 30121109

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

On February 23, 2026, claimant Hensley & Daughters, LLC (“Hensley”) filed a Motion for Partial Summary Judgment (“Motion”). (Doc. 19.00- 21.00). The Motion applies to all claims in this case except 41I 30121109. This Order addresses the Motion.

BACKGROUND

The claims in this case were included in the Preliminary Decree (“PD”) for Missouri River above Holter Dam, Basin 41I, issued on June 24, 2022. All the claims are for irrigation except 41I 30121109, which is for stock. The United States Bureau of Reclamation (“BOR”) filed objections to the irrigation claims. The United States Forest Service filed an objection to the stock claim, 41I 30121109. All six claims were subject to issue remarks as a result of examination by the Department of Natural Resources and Conservation (“DNRC”).

Hensley moves for partial summary judgment on two issues related to the irrigation claims in this case. (Doc. 19.00). First, Hensley asserts objections filed by BOR are barred pursuant to Section 85-2-233(1)(c), MCA. Second, Hensley

asserts the issue remarks on the abstracts in the PD violate the Water Court's December 14, 2012 *Order Addressing Reexamination* and should be removed.

In response, the BOR contends Hensley failed to present facts establishing BOR's objections are not permitted by Section 85-2-233(1)(c), MCA, that there are disputed facts precluding summary judgment, and that BOR meets at least one of the exceptions set forth in Section 85-2-233(1)(c), MCA.

UNDISPUTED FACTS

The following facts are undisputed:

I. Temporary Preliminary Decree Proceedings

1. Claims 41I 29231-00, 41I 29232-00, 41I 29234-00, 41I 20235-00, and 41I 29236-00 ("the irrigation claims") were previously subject to proceedings in a Temporary Preliminary Decree ("TPD") for Basin 41I, issued on March 8, 1995.

2. The BOR filed objections to the irrigation claims in the TPD checking the elements Place of Use/Maximum Acres and Flow Rate/Volume. The BOR's objection for each of the claims in the TPD stated:

The Bureau of Reclamation claims water rights in the Missouri River Basin, including Basin 41I. The Temporary Preliminary Decree reflects an irrigated acreage greater than the acreage that has historically been irrigated by this claimed water right (as determined by the Montana Department of Natural Resources and Conservation and a review of the County Water Resources Surveys). The claimed flow rate may need to be changed to account for any changes in claimed acres.

3. The five irrigation claims were decreed in the TPD with issue remarks, including remarks stating the Water Resources Survey ("WRS") indicated less acres irrigated than claimed. Additionally, irrigation claims 41I 29232-00, 41I 29234-00, 41I 29235-00, and 41I 20236-00 received issue remarks stating the 1978 and/or 1979 aerial photos showed less acres irrigated than claimed.

4. Proceedings were held in TPD case 41I-414 to resolve BOR's objections. On July 9, 1999, a Master's Report was issued in case 41I-414. According to the Master's Report for case 41I-414, the BOR withdrew its objections. The Master's Report concluded the only corrections necessary to the claims was to correct the period of use.

5. On November 26, 2001, the Court issued an Order Amending and Adopting the Master’s Report in TPD Case 41I-414. The Court revised the recommended period of use correction but otherwise adopted the July 9, 1999 Master’s Report.

II. Water Court’s 2012 Order Addressing Reexamination.

6. On December 14, 2012, the Water Court issued an *Order Addressing Reexamination* (“2012 Order”).¹ The 2012 Order addressed the scope of the DNRC examination required on claims that had already gone through an initial DNRC examination in a prior decree. The 2012 Order applied to claims, such as those in this case, which had been examined by DNRC and included in a TPD, but had not – at the time of the 2012 Order – been included in a PD. Moreover, the 2012 Order set the scope of the reexamination to be conducted by DNRC on the claims prior to their inclusion in a PD.

7. According to the 2012 Order, “Any element of a claim that appeared on the objection list shall be considered litigated and shall not be subject to modification” based on reexamination or standardization. *Id.* at 8.

8. Based on the explicit direction in the 2012 Order, DNRC was limited to reexamining claims for specific issues as set forth in the 2012 Order. *Id.*

III. Preliminary Decree Proceedings

9. The claims in this case were included in a PD for Basin 41I, issued on June 24, 2022.

10. The BOR filed objections to the claims in the PD.

a. On the objection form for claims 41I 29231-00 and 41I 20232-00, the BOR checked Place of Use/Maximum Acres, Flow Rate/Volume, and Priority Date and stated:

Historical data, published in the Water Resources Survey, indicated less acres irrigated at the time the Survey was published. Incremental development after the WRS appears to have occurred. The maximum acres, place of use, and flow rate may need correction to conform to historic beneficial use relating to the claimed priority date. An implied claim may need to be generated.

¹ The December 14, 2012 *Order Addressing Reexamination* is available for review on the Water Court’s website.

b. On the objection form for claim 41I 29234-00, the BOR checked Place of Use/Maximum Acres, Flow Rate/Volume, and Priority Date and stated:

Historical data, published in the Water Resources Survey, indicates less acres irrigated at the time the Survey was published. Aerial photography shows less acres irrigated in 1979 than claimed. Incremental development after the WRS and/or after 1979. Maximum acres, place of use, and flow rate may need correction to conform to historic beneficial use relating to the claimed priority date. An implied claim may need to be generated. Post-1973 expansion of use should not relate back to the pre-1973 water right(s) claimed.

c. On the objection form for claim 41I 29235-00, the BOR checked All Elements and Abandonment/Non-Perfection and stated:

Historical data, published in the Water Resources Survey and aerial photography do not support historical or current irrigation occurring as claimed. The claimed water right might not have been perfected and if it was perfected it might have been abandoned. All elements of this water right are questionable.

d. On the objection form for claim 41I 29236-00, the BOR checked Place of Use/Maximum Acres, Flow Rate/Volume and Priority Date and stated:

Historical data published in the Water Resources Survey and aerial photography support less acres than claimed on this water right. It appears the maximum acres, priority date and potentially flow rate may require a reduction to confirm historic beneficial use.

11. The claims also were included in the PD with issue remarks. The issue remarks that appeared on the claims in the TPD continued through to the PD. Additionally, pursuant to the 2012 Order, the claims also received additional issue remarks, many of which are notice-type remarks that are automatically removed after serving notice after the issuance of the PD.

ISSUES

- I. *Should summary judgment be granted, dismissing the BOR's objections to the claims?*
- II. *Should summary judgment be granted, removing the issue remarks from the claims?*

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 is one that 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 must view 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 that no genuine issue as to any material fact exists, 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, 22 P.3d 631. Ultimately, the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

DISCUSSION

I. Should summary judgment be granted, dismissing the BOR's objections to the claims?

Hensley asserts BOR's objections to the place of use and maximum acres of the irrigation claims are barred and should be dismissed based on Section 85-2-233(1)(c), MCA. Section 85-2-233(1)(c), MCA, specifies that a party on a matter that was “previously litigated and resolved as the result of an objection raised in a temporary preliminary decree” cannot raise the matter through an objection in a subsequent decree. Five exceptions are listed in the statute. The exceptions are: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct; (4) a void judgment; (5) any other reason justifying relief from the operation of the judgment. § 85-2-233(1)(c)(i)-(v), MCA.

In response, the BOR contends Hensley has not met the threshold to shift the burden to the BOR to show there are disputed issues of fact. The BOR argues that it withdrew its objections during TPD proceedings in Case 41I-414, thus, its objections were not “litigated and resolved” as required by Section 85-2-233(1)(c), MCA. The BOR further argues that even if the TPD objections were “litigated and resolved,” BOR should be able to pursue its objections because Hensley has not shown BOR does not meet one of the five exceptions of Section 85-2-233(1)(c), MCA.

1. BOR objections against 41I 29231-00, 41I 29232-00, 41I 29234-00, 29236-00 were previously litigated and resolved in the TPD.

With only a few exceptions, the objections filed by the BOR in the TPD and PD address the same issues. As shown in the table below, comparison of the elements and statements in the TPD objections versus the PD objections shows the objections are almost identical in substance.

CLAIM NUMBER	TPD OBJECTION	PD OBJECTION
41I 29231-00	POU/Max Acres, FR/V: Reflects an irrigated acreage greater than the acreage that has historically been irrigated by this claimed water right (as determined by the DNRC and WRS). The claimed flow rate may need to be changed to account for any change in claimed acres.	POU/Max Acres, FR/V, Priority Date: Historical data, published in the WRS, indicates less acres irrigated at the time the Survey was published. Incremental development after WRS appears to have occurred. The maximum acres, place of use, and flow rate may need correction to conform to historic beneficial use relating to the claimed place of use. An implied claim may need to be generated.
41I 29232-00	POU/Max Acres, FR/V: Same as 41I 29231-00	POU/Max Acres, FR/V, Priority Date: Same as 41I 29231-00.
41I 29234-00	POU/Max Acres, FR/V: Same as 41I 29231-00	POU/Max Acres, FR/V, Priority Date: Same as 41I 29231-00 with additional language: Aerial photography shows less acres irrigated in 1979 than claimed. Post-1979 expansion should not relate back to pre-1973 claim.
41I 29235-00	POU/Max Acres, FR/V: Same as 41I 29231-00	All Elements, Abandonment/Non-Perfection: Historical data published in the WRS and aerial photography do not support

		historical or current irrigation as claimed. The claimed water right may not have been perfected and if it was perfected it might have been abandoned. All elements of this water right are questionable.
41I 29236-00	POU/Max Acres, FR/V: Same as 41I 29231-00	POU/Max Acres, FR/V, Priority Date: Historical data published in the WRS and aerial photography support less acres than claimed. It appears the maximum acres, priority date and potentially flow rate may require a reduction to conform to historic beneficial use.

In both the TPD and PD, the BOR objected to the place of use, maximum acres, flow rate, and volume. Further, a review of the explanation of the objections shows while the language varies slightly, substantively the objections raise the same issues. The BOR's inclusion of priority date in its PD objections relies on the same explanations and evidence presented in the BOR's TPD objections. References to priority date in the BOR's PD objections amount to slight variations in language that substantively implicate the same facts and raise the same issues as the BOR's TPD objections.

There are two exceptions reflecting new issues raised by the BOR's objection in the PD. The first exception is the reference to the 1979 aerial photo analysis for 41I 29234-00. The second exception is the reference to post-1973 abandonment of claim 41I 29235-00. To the extent the PD objections to claims 41I 29234-00 and 41I 29235-00 reference the number or extent of acres irrigated, flow rate, and volume prior to 1973, those objections have already been raised and resolved in the TPD.

The purpose of TPD Case 41I-414 was to resolve the BOR's TPD objections. The BOR's choice to withdraw the objections during proceedings in Case 41I-414 resulted in resolution of the case, a Master's Report and Order Amending and Adopting by the Water Court. In the TPD, proceedings were held on the BOR's objections, the objections were withdrawn, and therefore, resolved, and the case was closed. Moreover, the BOR's objections in the TPD were litigated and resolved. Unless the BOR meets an exception under the statute, the PD objections are barred by Section 85-2-233(1)(c), MCA.

2. The Burden shifted to BOR.

BOR asserts Hensley had the burden to prove BOR did not meet one of the exceptions set forth in Section 85-2-233(1)(c), MCA. With the two allowances related to claims 41I 29234-00 and 41I 29235-00, Hensley has shown that the BOR's TPD objections to maximum acres, place of use, flow rate, and volume are the same as those raised in the PD. The burden shifted to the BOR to show a genuine issue of material fact exists. *Lee*, ¶ 26.

The BOR's burden to identify a genuine issue of material fact included providing facts to show it met one of the exceptions under Section 85-2-233(1)(c), MCA. Rather than showing there is a genuine issue of material fact including that it meets an exception, the BOR's response uses the opportunity to present evidence it alleges supports the objections. An "Additional Factual Background" section and a "Special Considerations in Basin 41I" section are included in BOR's response. The "Additional Factual Background" consists of the BOR's interpretation of information BOR gathered to support its PD objection and the information within the section is irrelevant to determining whether the objection can be brought. A determination of whether the objection can be heard under Section 85-2-233(1)(c), MCA, is necessary before this Court will entertain evidence alleged to support such an objection.

Further, the BOR's section entitled "Special Considerations in Basin 41I" consists of policy considerations outside the scope of the motion or this adjudication proceeding. The Court agrees with Hensley, that these sections are not only irrelevant to the issue at hand, but also "speculative, statements of opinion, or misleading." (Doc. 28.00 at 1). Alleged facts or policy to support an objection are not relevant to determining whether the objection is barred under Section 85-2-233(1)(c), MCA.

3. BOR does not meet an exception under § 85-2-233(1)(c), MCA.

The Water Use Act was structured with deadlines and limitations designed to produce finality without unreasonable delay or expense. *See, e.g., In re Erb*, Case 41B-208, 2016 Mont. Water LEXIS 2, 19-20 (April 11, 2016). For example, in the context of amendments to claims, this Court has stated, "An unfettered right to amend a water right claim risks creating a perpetual cycle of litigation that prevents finality." *In re Doll*, 2022

Mont. Water LEXIS 805, *5. Section 85-2-233(1)(c), MCA, is another example of a limitation within the Act. Just as there is no unfettered right to continually amend one's own claim, there is no unfettered right to continually raise objections. Raising the same objections in a subsequent decree also reflects a "perpetual cycle of litigation" which prevents finality and causes undue expense and uncertainty for water users in Montana.

BOR asserts it has "newly discovered evidence" applicable to claims 41I 29232-00, 41I 29234-00, and 41I 29235-00 concerning use around 2011. In Rule 60(b), M.R.Civ.P., newly discovered evidence is listed as a circumstance under which relief from judgment may be granted. Section 85-2-233(1)(c), MCA likewise lists newly discovered evidence as an exception. In the context of Rule 60(b), M. R. Civ. P., newly discovered evidence may constitute grounds for relief if the following conditions are met: (A) the alleged newly discovered evidence came to the moving party after trial; (B) it was not for want of due diligence which precluded its earlier discovery; (C) the materiality of the new evidence is so great that it would probably produce a different result; and (D) the new evidence is not merely cumulative, not tending only to impeach or discredit a witness in the case. *Moore v. Frost*, 2021 MT 74, ¶ 12, 403 Mont. 483, 483 P.3d 1090 (citing *In re Matter of B.B.*, 2001 MT 285, ¶ 40, 307 Mont. 379, 37 P.3d 715; *Fjelstad v. State ex rel. Dep't. of Highways*, 267 Mont. 211, 220-21, 883 P.2d 106, 111-12 (1994)).

No analysis was provided as to how the BOR meets newly discovered evidence standards. Regardless, newly discovered evidence related to use in 2011, i.e. post-1973, does not allow the BOR to raise pre-1973 issues again in the PD. Therefore, the newly discovered evidence assertion is not persuasive.

There is no evidence BOR meets any of the exceptions set forth in Section 85-2-233(1)(c), MCA. Other than the objections to post-1973 abandonment of claims 41I 29234-00 and 41I 29235-00, there are no genuine issues of material fact that the BOR's PD objections to the maximum acres, place of use, flow rate, volume, and priority date were raised and resolved in the TPD. Therefore, those objections are barred pursuant to Section 85-2-233(1)(c), MCA.

III. Should summary judgment be granted, removing the issue remarks from the claims?

Hensley asserts this Court should grant summary judgment, removing issue remarks that were “previously litigated” in the TPD or that exceed the scope of the December 14, 2012 *Order Addressing Reexamination*.

In 2005, after the 41I TPD was issued in 1995 and before the 2022 41I PD, the Montana Legislature required the Water Court to resolve issue remarks through adjudication proceedings. *See* §§ 85-2-247 through 85-2-250, MCA (2005). The Court may resolve issue remarks based on information submitted by the DNRC or any other data and information it obtains. §§ 85-2-248 through 85-2-250, MCA (2025).

The 2012 Order set forth the scope of re-examination to be conducted by DNRC for claims that had already been through a DNRC examination in a prior decree. Elements that were on an objection list in a prior decree were considered litigated and not subject to modification by the DNRC. The intent of the 2012 Order, as indicated in the title, was to address DNRC’s reexamination to ensure DNRC did not tinker with elements previously modified as a result of settlement or resolution of objections.² It was not the intent of the 2012 Order to deem issue remarks pending from a prior decree resolved.

The irrigation claims in this case contain several notice-type issue remarks that do not require additional evidence to be resolved. Other than the notice-type remarks, all the issue remarks on the irrigation claims are remarks that were on the claims in the 1995 TPD, prior to the 2012 Order. Those issue remarks were not resolved in proceedings. The only additional, non-notice-type issue remarks added in reexamination prior to the PD, are the issue remarks on claims 41I 29231-00 and 41I 29232-00 concerning volume.

Hensley requests summary judgment determining the issue remarks are resolved based on the 2012 Order. However, Hensley has not shown that the issue remarks

² The only element modified as a result of the resolution of objections in Case 41I-414 was the period of use for claims 41I 29235-00 and 41I 29236-00; no issue remarks pertaining to the period of use were decreed on either claim in the Preliminary Decree.

decreed on the irrigation claims in the TPD were resolved as required by Section 85-2-248, MCA.³ Therefore, summary judgment on the issue is not proper.

CONCLUSION

Except for objections to post-1973 abandonment of claims 41I 29234-00 and 41I 29235-00, there are no genuine issues of material fact that the BOR's PD objections to the maximum acres, place of use, flow rate, volume, and priority date of the irrigation claims were raised and resolved in the TPD. BOR does not meet any of the exceptions set forth in Section 85-2-233(1)(c), MCA. Therefore, the objections to maximum acres and place of use filed against the irrigation claims are barred.

The issue remarks were not resolved during the TPD. The 2012 Order did not invalidate unresolved issue remarks placed on the claims in a prior decree. Therefore, the issue remarks are not resolved through summary judgment.

ORDERED that summary judgment is **GRANTED** that the BOR's objections relating to maximum acres, place of use, flow rate, volume, and priority date are **DISMISSED** as to claims 41I 29231-00, 41I 29232-00, 41I 29235-00, and 41I 29236-00. The BOR may pursue its objections regarding post-1973 abandonment of claims 41I 29234-00 and 41I 29235-00.

ORDERED that summary judgment is **DENIED** as to resolution of issue remarks.

Further proceedings in this case will address the remaining issues: BOR's objections to post-1973 abandonment related to claims 41I 29234-00 and 41I 29235-00; the resolution of issue remarks on all claims; and the United States Forest Service's objection to stock claim 41I 30121109.

ELECTRONICALLY SIGNED AND DATED BELOW.

³ Under Section 85-2-233(1)(c), MCA, the BOR may not now raise objections relating to the maximum acres, place of use, flow rate, volume, or priority date for claims 41I 29231-00, 41I 29232-00, 41I 29235-00, and 41I 29236-00 because the BOR "was a party to that matter when the matter was previously litigated and resolved as the result of an objection." The matter that was resolved in Case 41I-414 involved the BOR's objections, not the issue remarks remaining after the TPD. The issue remarks continued to "identify potential factual or legal issues" that were only required to be resolved through adjudication proceedings after Sections 85-2-247 through -250 were enacted in 2005.

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