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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 SUMMARY JUDGMENT

On June 24, 2026, notice of intent to appear, Staubach Creek Ranch LLC (“Staubach”) filed a Motion for Summary Judgment. (Doc. 28.00). On July 15, 2026, claimant, Winston Realty LLC (“Winston”), filed a Response and Cross Motion for Summary Judgment. (Doc. 30.00). This Order addresses both the Motion for Summary Judgment and Cross Motion for Summary Judgment.

BACKGROUND

Claim 41I 100358-00 is the most senior right on Beaver Creek. As included in the Preliminary Decree, the claim is for irrigation of 55.00 acres and 1.50 CFS, with an October 1, 1865 priority date.

In 1995, the claim was included in a Temporary Preliminary Decree (“TPD”) for the Upper Missouri River Above Holter Dam. During the TPD proceedings, 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.

TPD proceedings on claim 41I 100358-00 were held in TPD Case 41I-115. In that case, the Department of Natural Resources and Conservation (“DNRC”) filed a Memorandum concluding the issue remark concerning Case No. 5066 was incorrect and should be removed. *See* March 9, 1998 DNRC Memorandum. Additionally, Furman’s TPD objections regarding priority date and type of historical right were withdrawn. *See* March 31, 1998 Master’s Report.¹

On June 24, 2022, the claim was included in the Preliminary Decree (“PD”) for Basin 41I. In the PD, the claim was subject to DNRC issue remarks indicating the 1956 Water Resources Survey and 1979 aerial photo showed 0 acres irrigated, a corresponding flow rate remark resulting from the acres remarks, and a remark noting the correct legal description of the point of diversion may be SENWSE rather than SWNWSE of Section 11, Township 8 North, Range 1 West. The claim did not receive any PD objections. Based on the issue remarks, the PD Objection List issued for Basin 41I pursuant to Rule 9(a), W.R.Adj.R., noted “all elements” for claim 41I 100358-00. Staubach filed a notice of intent to appear (“NOIA”).

This case was consolidated to address and resolve the issue remarks and Staubach’s NOIA. (Doc. 1.00). The Water Master previously assigned to the case required Winston to work with the DNRC to resolve the issue remarks. *Id.* The DNRC recommended that the acres and place of use be reduced to 21.24 with a corresponding reduction to the flow rate based on the DNRC’s 17.00 GPM per acre standard for a total of 361.08 GPM and recommended a correction to the legal description of the point of diversion. (Doc. 7.00). After the DNRC Recommendations were filed, both Winston and Staubach filed responses. (Docs. 9.00, 11.00, 13.00).

Winston filed a statement accepting the DNRC’s recommendation concerning acreage and the location of the point of diversion but disagreeing with the recommendation to reduce the flow rate. (Doc. 11.00). Winston asserted the full 1.50 CFS flow rate is necessary to reach the place of use. Winston explained that the point of

¹ TPD documents, including the DNRC Memorandum in Case 41I-115 and March 31, 1998 Master’s Report, are publicly available in the claim file for 41I 100358-00.

diversion is 1.70 miles away from the place of use and that there is significant seepage and ditch loss along the ditch. *Id.*

Staubach filed a notice stating the NOIA was not resolved and that Staubach intended to assert abandonment and invalidity of claim 41I 100358-00. (Docs. 9.00, 13.00). Staubach also filed a motion asserting that Case No. 5066 (identified in the TPD issue remark) invalidated the claim and requested this Court take judicial notice of Case No. 5066. (Doc. 14.00). Winston contended that the priority date and historical basis issue related to Case No. 5066 had already been addressed in TPD case 41I-115 when the DNRC determined the remark was incorrect. (Doc. 15.00). Winston further argued issues concerning priority date and the validity of claim 41I 100358-00 were outside the scope of Staubach's NOIA. *Id.*

On December 15, 2025, this Court denied Staubach's request to take judicial notice of Case No. 5066 concluding "the issue concerning Case 5066 that appeared on claim 41I 100358-00 in the TPD was addressed and resolved." (Doc. 20.00). This Court also concluded Staubach's NOIA allowed it to participate in proceedings to resolve the issue remarks on claim 41I 100358-00, "including potential abandonment raised by the 0 acres irrigated issue remarks." *Id.*

On June 24, 2026, Staubach filed a Motion for Summary Judgment requesting an order adding an information remark to the abstract of claim 41I 100358-00. (Doc. 28.00). The requested information remark states "41I 100358-00 can only be exercised when 41I 100357-00 is in priority. *Id.* at 15. Winston filed a Response and Cross Motion for Summary Judgment requesting an order that: (1) priority date is outside of the scope of the NOIA; (2) deeming the NOIA resolved; and (3) and dismissing Staubach. (Doc. 30.00).

Oral argument on Staubach's Motion for Summary Judgment ("Motion") and Winston's Cross Motion for Summary Judgment ("Cross Motion") was held at the Water Court on September 2, 2026. (*See* Doc. 34.00). Attorney Rick C. Tappan argued on behalf of Winston. Attorney Betsy R. Story argued on behalf of Staubach. Water Judge Bina R. Peters presided.

APPLICABLE STANDARDS

Summary Judgment Standard

Summary judgment is appropriate when the “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). The initial burden is on the movant to “exclude any real doubt as to the existence of any genuine issue of material fact by making a clear showing as to what the truth is.” *Christian v. Atlantic Richfield Co.* 2015 MT 255, ¶ 12, 380 Mont. 495, 358 P.3d 131. 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.

The burden then shifts to the non-movant to show “in proper form, and by more than mere denial, speculation, or pleading allegation” specific facts demonstrating the existence of a material fact. *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 18, 410 Mont. 239, 518 P.3d 840. 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.* 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.

Resolution of Issue Remarks

Claims included in the Preliminary Decree for Basin 41I were subject to issue remarks used to denote potential issues affecting the claims. Rule 9(a) of the Water Right Adjudication Rules prescribes that the Water Court compile an objection list to identify all claims subject to objections, counterobjections, and issue remarks. Pursuant to Rule 7, W.R.Adj.R., the Water Court is required to resolve all issue remarks using procedures in §§ 85-2-247 to -250, MCA. The Water Court may resolve issue remarks based on information submitted by the DNRC or any other data and information obtained. *See* §§ 85-2-248 to -250, MCA.

Scope of Notices of Intent to Appear (NOIA)

All water users in a basin receive notice when a preliminary decree is issued and notice of their opportunity to file objections. Sections 85-2-231 to -233, MCA; Rule 5(a), W.R.Adj.R. Deadlines are set for filing objections. After the deadline for filing objections, a deadline is set for water users whose claim received an objection to file a counterobjection “to any claim of the objector in the decree.” Rule 6(a), W.R.Adj.R. An objection list is generated by the Water Court listing the claims within the decree subject to objections, counterobjections, and issue remarks. After an objection list is noticed, a deadline is set for filing NOIAs.

The scope of NOIAs is governed by Rule 9(b), W.R.Adj.R. NOIAs may be filed to participate in further proceedings on a claim. *Id.* NOIA parties receive notice of all future proceedings involving the claims and are entitled to participate in the resolution of the issues associated with those claims. *Id.* “Under these rules, such a party is limited to participating in resolution of issues raised by objections, counter-objections, issue remarks, or issues raised on motion of the Water Court.” *In re Erb*, 2016 Mont. Water LEXIS 2, *12. By electing not to object, a NOIA party jeopardizes its ability to raise new issues later. *Id.* at *17.

DISCUSSION

In the Motion, Staubach argues this Court should grant Summary Judgment concluding there is no genuine issue of material fact that claim 41I 100358-00 is unable to be used without also using claim 41I 100357-00, and requesting the Court add an information remark to the abstract of claim 41I 100358-00 stating “41I 100358-00 can only be exercised when 41I 100357-00 is in priority.” (Doc. 28.00 at 2).

In the Cross Motion, Winston asserts Staubach’s request constitutes a priority date reduction, which is outside the scope of the NOIA and proceedings in this case. (Doc. 30.00 at 12-14). Winston requests this Court determine priority date is outside the scope of its NOIA, deem Staubach’s NOIA resolved, and dismiss Staubach from this case. *Id.* at 20. As an alternative to dismissing Staubach, Winston requests this Court limit Staubach’s participation to potential abandonment as raised by the 0 acres irrigated remarks. (Doc. 35.00 at 14).

I. Is Priority Date in the Scope of Staubach’s NOIA?

The Court first addresses the scope of Staubach's NOIA. While the relief requested by Staubach permits the October 1, 1865 priority date to remain on the face of the abstract, the requested information remark limits use of 41I 100358-00 to when 41I 100357-00 is in priority, at a 1904 priority date. The relief requested is a limitation on priority and use. Thus, the issue is whether the scope of Staubach's NOIA allows it to raise and limit the use and priority of claim 41I 100258-00.

A. General Scope

Statutory procedures in the Water Use Act, including publication of notice, an objection deadline, a counterobjection deadline, and publication of an objection list, set the parameters of litigation in adjudication proceedings. Here, notice of adjudication proceedings began with the publication of the 41I Preliminary Decree on June 24, 2022. Section 85-2-232, MCA. Although the right to object is provided by statute, notice of issuance of the decree and the deadline to file objections was also sent directly to water users, including Staubach. Sections 85-2-232 to -233, MCA. If Staubach determined elements of a water right did not reflect historical use, the statutes and direct notice instructed Staubach to object. In Basin 41I, the PD objection deadline was initially set as December 21, 2022, and was extended to January 20, 2023. Staubach received notice of the initial deadline and extended deadline and did not file any objections to Winston's claims.

Claim 41I 100358-00 was included on the PD Objection List issued on July 27, 2023. "All elements" was listed under the claim based on the 0 acres irrigated issue remarks. After the publication of the objection list, the final opportunity for Staubach to participate on claim 41I 100358-00 was through a NOIA. Rule 9(b), W.R.Adj.R. NOIA's are more limited than objections. Allowing NOIA parties to raise any issues would make the objection and counterobjection processes defined by statute meaningless and "would frustrate the legislature's intent when it designed the objection process." *In re Erb*, 2016 Mont. Water LEXIS 2, *21. An objector has more freedom to define the scope but faces a potential counterattack. By filing a NOIA rather than an objection, Staubach eliminated the risk to its own claims. Case 43B-0572-R-2022, *Windbreak Ranch LLC v. Alice Laubach Trust*, June 17, 2022, *6-7, 12.

Staubach's NOIA is limited to participation on resolution of issues raised pursuant to the issue remarks. *In re Erb*, *12. The issue remarks on claim 41I 100358-00 raised: 0 acres irrigated, which may indicate potential abandonment; flow rate, as it relates to the resolution of the acres irrigated issue remark; and a correction to the legal description of the point of diversion.

B. Effect of Objection List

Staubach contends the requested limitation on priority date is within the scope of the NOIA because "all elements" was listed on the 41I PD Objection List under claim 41I 100358-00. (Doc. 31.00 at 3-4; Doc. 35.00 at 2-4).

The objection list is a notice tool used to summarize claims that are subject to adjudication proceedings. The objection list broadly summarizes elements of claims that may be modified based on objections, counterobjections, issue remarks, and on motion orders. Elements that appear on the objection list are either identified by a water user, identified by the Water Court, or are automatically generated. For example, the objection and counterobjection forms provided by the Court include a list of elements that an objector marks to describe the subject of the objection, along with a written explanation of the objection.² Elements checked by an objector or counterobjector are transcribed onto the objection list. Issue remarks automatically trigger certain elements on an objection list. In other instances, including on motion orders, the Court may determine what elements may be included on the objection list. "All elements" is often used as a catch-all when the issues raised against a claim may extend beyond a particular element; as here, the 0 acres irrigated issue remark triggered "all elements," since the issue, depending on the evidence, may indicate potential abandonment. Moreover, the objection list does not define the scope of the proceedings, the language of the issue remarks and objections does.

In Case 41I-0012-R-2023, *In re Hoppe*, 2026 Mont. Water LEXIS 102, claims were subject to a remark stating:

² The objection and counterobjection forms provided for the 41I PD are available at <https://dnrc.mt.gov/Water-Resources/Water-Rights/adjudication-pages/Upper-Missouri-River-Division,-Missouri-River-Above-Holter-Dam---Basin-41I---06-24-2022>

THE TYPE OF HISTORICAL RIGHT, PRIORITY DATE, AND FLOW RATE MAY BE QUESTIONABLE. THE CLAIMS FOLLOWING THIS STATEMENT USE THE SAME FILED APPROPRIATION TO DOCUMENT THE RIGHT. THE COMBINED FLOW RATE FOR THIS GROUP OF CLAIMS EXCEEDS THE TOTAL OF THE ORIGINAL APPROPRIATION.

In *Hoppe*, the claimants submitted evidence to resolve the issue remark. However, the NOIA party asserted that “all elements” appearing on the objection list allowed it to litigate the validity of the underlying appropriation. *Id.* at *5-7. This Court ruled the underlying Notice of Appropriation was beyond the scope of the NOIA and that if the NOIA “intended to attack the validity of the Notice of Appropriation, then it should have filed an objection.” *Id.* at *9. As part of the analysis, this Court explained that “all elements” on an objection list was taken in the context of the issue remarks. Just because the objection list states “all elements,” did not mean the NOIA could seek to litigate the validity of the claim when the issue remark was otherwise resolved. *Id.* at *7.

The objection list is a summary intended to be used as a tool for water users to provide generalized notice of litigation that may affect claims; however, it does not necessarily determine the scope of that litigation. Here, “all elements” was included on the objection list based on the 0 acres irrigated issue remarks. The fact that the objection list states “all elements” does not override the issues actually raised by the issue remarks. Therefore, Staubach is limited to participating in resolution of the number of acres irrigated, including potential abandonment; flow rate, as it relates to the resolution of the acres irrigated issue remark; and the correction to the point of diversion.

C. Abandonment and Timing of Beneficial Use

Staubach next argues the information remark it seeks relates to abandonment since the remark is a limit based on timing of beneficial use of water. (Doc. 31.00 at 3). Winston counters that Staubach has not alleged any long period of non-use, which is the first required element of abandonment. (Doc. 30.00 at 17-18; Doc. 35.00 at 5-9). Winston further argues that the 0 acres irrigated remarks, which may raise the issue of abandonment depending on the evidence and facts presented, do not open the door to priority date. *Id.*

Staubach’s argument regarding timing of beneficial use muddles legal principles. In the “first in time, first in right” principle, the basis of western water law’s priority

system, timing is essential. In the “use it or lose it” axiom often used to describe abandonment, time is also critical. Simply because both legal principles involve timing does not equate the two.

Abandonment requires proving specific elements: there must be both nonuse and an intent to cease beneficially using water. *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923). For existing water rights, a long period of nonuse creates a rebuttable presumption of an intent to abandon the right. *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218. The party asserting abandonment must prove, by a preponderance of the evidence, a sufficiently long period of continuous nonuse. *Thomas*, 66 Mont. at 168, 213 P. at 600. Once the rebuttable presumption has been established, the appropriator bears the burden of producing specific evidence that excuses the period of nonuse. *Heavirland v. State*, 2013 MT 313, ¶ 32, 372 Mont. 300, 311 P.3d 813.

Based on the 0 acres irrigated issue remarks, Staubach is permitted to argue abandonment based on potential non-irrigation of the claimed of the place of use. Priority date, however, does not necessarily have any bearing on a reduction to the place of use. Staubach asserts an information remark that effectively limits priority date relates to abandonment. Abandonment needs to be proven before the Court can consider whether such a remark is appropriate.

Abandonment cannot be used as cover to extend the scope of litigation to priority date. A NOIA party is “limited to participating in resolution of issues raised by objections, counterobjections, issue remarks, or issues raised on motion of the Water Court.” *In re Erb*, 2016 Mont. Water LEXIS 2 *12. Without the establishment of abandonment, a priority date limitation is not resolving a raised-issue. Staubach has not provided evidence of the elements of abandonment. Therefore the 0 acres irrigated remarks do not provide an avenue to attack priority date.

In sum, short of proving the elements of abandonment, Staubach’s NOIA does not extend to limiting the priority or use of claim 41I 100358-00.

II. Is Summary Judgment Warranted?

Staubach's request for summary judgment is not warranted because there are genuine issues of material fact that preclude limiting the priority date and use of claim 41I 100358-00.

While there is evidence Winston uses 41I 100358-00 and 41I 100357-00 together, specifically early in the season to effectively irrigate the place of use (Doc. 35.00 at 11-12), the evidence does not show there is no genuine issue of material fact that the priority date should be limited.

First, the context of the evidence is notable. The DNRC recommended the flow rate be reduced to the DNRC standard based on the reduction of the acres of claim 41I 100358-00. (Doc. 7.00). In response to the recommendation, Winston asserted the flow rate should not be reduced and provided information to DNRC based on an August 22, 2024 site visit. (Doc. 30.00 at 14-15). The site visit occurred after Winston had ceased irrigating and when only 1.25 CFS was available in Beaver Creek. *Id.* At the time of the site visit, there were condition issues with the ditch, including a portion of the ditch that was affected by cattle and, apparently, an ongoing maintenance project. *Id.* The evidence concerning flow rate was intended to address the reduction to the DNRC standard. The level of the creek and state of the ditch at the time of the site visit was not necessarily reflective of the use of the claim earlier in the season or over the history of use of the claim. Limited information regarding flow rate does not justify a permanent restriction on priority date.

Staubach further argues that testimony from Winston's expert, Ben Davis of Downstream Research, proves there is no genuine issue of material fact that the priority date of claim 41I 100358-00 should be limited. (Docs. 28.00, 31.00). When Davis was asked whether the 1.50 CFS flow rate of claim 41I 100358-00 would make it down the ditch to the place of use, Davis initially answered that he did not know, but then speculated based on his August 22, 2024 site visit that 5.00 or 6.00 CFS would be necessary. (Doc. 28.00 at 6-7; Doc. 30 14-15). Davis' testimony also describes the combined use of claims 41I 100357-00 and 41I 100358-00 to effectively convey water to the place of use. (Doc. 31.00 at 8.00). That said, the context of the site visit, and a

practice of combining water rights for effective irrigation is not necessarily relevant to the historical use pertaining to priority date.

In sum, there are genuine issues of material fact that preclude a limit on the priority date and use of claim 41I 100358-00. Therefore, even if priority date was within the scope of the NOIA, Staubach is not entitled to judgment as a matter of law.

CONCLUSION

Staubach's request to add a remark limiting the priority and use of claim 41I 100358-00 is outside the scope of the NOIA. Although the 41I PD Objection List noted "all elements," the scope of proceedings is limited by the issue remarks which address 0 acres irrigated; potential abandonment; flow rate, as it relates to the resolution of the acres irrigated issue remark; and the correction to the legal description of the point of diversion. The fact that abandonment may be raised by the 0 acres irrigated issue remark does not place priority date at issue when there has been no showing of the elements of abandonment.

Irrespective of the scope of the NOIA, there are genuine issues of material fact that preclude summary judgment as requested by Staubach. Unless Staubach intends to pursue abandonment, the issues have been sufficiently resolved, pursuant to § 85-2-248, MCA. If Staubach does not intend to address abandonment, proceedings in this case may be closed.

Therefore, it is

ORDERED that Staubach Creek Ranch LLC's Motion for Summary Judgment is DENIED.

ORDERED that Winston Realty LLC's Cross Motion for Summary Judgment is GRANTED, in that

- Staubach Creek Ranch LLC's requested information remark is rejected; and
- Staubach Creek Ranch LLC's NOIA is limited to participation on potential abandonment of claim 41I 100358-00.

ORDERED that Staubach shall file notice whether it intends to pursue abandonment no later than **October 30, 2026**, otherwise, the Court will determine whether a closing order may be issued in this case.

Service via Electronic Mail

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