

Montana Water Court
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FILED

JUL 18 2006

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MADISON RIVER BASIN (41F)

IN THE MATTER OF THE ADJUDICATION)	CASE 41F-A4
OF THE EXISTING RIGHTS TO THE USE)	41F 5962-00
OF ALL THE WATER, BOTH SURFACE AND)	
UNDERGROUND, WITHIN THE MADISON)	
RIVER DRAINAGE AREA, INCLUDING ALL)	
TRIBUTARIES OF THE MADISON RIVER)	
IN BEAVERHEAD, GALLATIN AND MADISON)	
COUNTIES, MONTANA.)	
_____)	

CLAIMANT: Alton Living Trust

MASTER'S REPORT

On January 27, 2004 Alton Living Trust filed a Motion to Amend Temporary Preliminary Decree of Statement of Claim No. 41F-W-005962-00 pursuant to section 85-2-233(6), MCA. On June 7, 2004 the Order Requiring Publication and Service of Notice of Motion to Amend was issued. On August 13, 2004 the Notice of Publication was filed. The deadline for filing objections or responses to the Motion to Amend, as stated in the newspaper notice, was September 13, 2004. On September 23, 2004 the Notice of Mailing was filed. On September 27, 2004 an Order Extending Filing Deadline was entered extending the filing deadline to November 15, 2004. On November 15, 2004 Hartmut Baitis, authorized representative of Cal Creek Ranch, filed an objection. On February 22, 2005 Hartmut Baitis filed an unconditional withdrawal of the objection.

Upon review of the Motion to Amend and supporting documentation, the Court had some questions about the requested amendments and issued an Order Setting Hearing on Motion to Amend on August 23, 2005 in order to afford Alton Living Trust an opportunity to present additional evidence or argument. On August 24, 2005 an Order Continuing Hearing of Motion to Amend was entered as Alton Living Trust requested that it simply file additional evidence and argument rather than present same at a hearing. On January 6, 2006 Alton Living Trust filed its Supplemental Brief in Support of Motion to Amend with the Supplemental Affidavit of Donald O. Thexton attached.

STANDARD OF REVIEW

Although leave to amend pleadings is to be freely given according to Rule 15 M.R.Civ.P. and Montana Supreme Court case law, a determination of whether the amendment relates back must first be made.

The scope of an amendment under Rule 15 is narrow. Rule 15(c) states that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." If the amendment of claim does not relate back to the original claim, the amendment cannot be made under Rule 15. The Montana Supreme Court has stated the following concerning the meaning of the language "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" in the following cases:

After reciting the same text from Rule 15(c) quoted above, the *Prentice*

Lumber Company v. Hukill (1972), 161 Mont. 8, 14 and 15, decision states:

We have not previously had occasion to construe this rule. Accordingly, we refer for guidance to Federal Rule 15(c) which contains identical language to that quoted above, and to federal court decisions construing its meaning and application. In speaking of Federal Rule 15(c), 1A Barron & Holtzoff, Federal Practice and Procedure, § 448, p. 757, has this to say:

"The general rule of 'relation back' is that *a pleading may not be amended to allege a new or different claim or defense unless it arose out of, or is based upon or related to, the claim, transaction or occurrence originally set forth or attempted to be set forth.* If the new claim or 'cause of action' meets this requirement, the amendment relates back to the time of the original filing so as to prevent the running of limitations which otherwise might bar the claim."

The following statement from 3 Moore's Federal Practice, § 15.15[3], pp. 1025-1027, delineates the type of amendments that will relate back:

" * * * Rule 15(c) is based on the concept that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that statutes of limitations are intended to afford. Thus, if the original pleading gives fair notice of the general fact situation out of which the claim or defense arises, *an amendment which merely makes more specific what has already been alleged*, such as by specifying particular acts of negligence under a general allegation of negligence, or remedies a defective pleading, will relate back even though the statute of limitations has run in the interim. *Similarly, while it is still the rule that an amendment which states an entirely new claim of relief based on different facts will not relate back, if the pleading sufficiently indicates the transaction or occurrence on which the claim or defense is based, amendments correcting specific factual details, such as time and place, as well as other items, will relate*

back."

An amendment that changes only the legal theory of the action will relate back. 3 Moore's Federal Practice, § 15.15[3], p. 1028, and cases cited therein. It is equally clear that an amendment that adds another claim arising out of the same transaction or occurrence will relate back. 3 Moore's Federal Practice, § 15.15[3], p. 1029, and cases cited therein. (emphasis added)

After discussing the facts in another case, the *Prentice* decision states at page 16:

The reasoning of the court was that the general wrong suffered and the general conduct causing the wrong controlled the determination of whether a new and different claim was stated in the amended pleading, and that the specified conduct of defendant upon which plaintiff tries to enforce his claim is to be examined rather than the theory of law on which the action is brought.

In *Sooey v. Petrolane Steel Gas, Inc.* (1985), 218 Mont. 418, 422- 423, the Court stated : "It will be seen from a reading of Rule 15(c), that an amended complaint relates back to the date of the original pleading when the amended pleading depends on *the same set of operative facts as contained in the original pleading.*" (emphasis added) See also *Smith v. Butte-Silver Bow County* (1994), 266 Mont. 1, 10, in which the Supreme Court upheld the district court's refusal to allow amending the complaint because "the original complaint and the proposed amendment do not share the same operative facts."

So, for claim 41F 5962-00, what is the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" (the "operative facts") and does the requested amendment merely make "more specific what has already been alleged?"

Irrigation Statement of Claim form 41F 5962-00 was completed and filed by Arthur L. Eshe and states that the owners of the claim are Arthur L. Eshe and Frances M. Eshe. The historical basis of the claim is a use right with a priority date of March 16, 1930 . The source claimed is Twin Lake with two points of diversion: NWNWSE 1 T7S, R2W and NWNESE 36 T6S, R2W. The flow rate claimed is 100 miner's inches and the volume claimed is 675 acre feet per year. A total of 158 acres in the SE 36 T6S, R2W is claimed as the place of use. The affidavit of William G. Thexton is attached which states:

having been duly sworn, depose and say that I, being of legal age, know the contents of this claim and that the matters stated there pertaining to priority date or date of first use, source of water, and place of use are true and correct.

The map attached to the Statement of Claim is a copy of the 1954 Madison County Water Resources Survey maps for T6S, R2W and T7S, R2W spliced together to show Twin Lake, the ditch conveying water from Twin Lake to Moran Creek, the transport through Moran Creek, and the secondary diversions out of Moran Creek at the place of use. There are other lakes on this map but only Twin Lake is identified and marked as the point of diversion claimed. It is very clear what is claimed: a March 16, 1930 use right for 100 miner's inches, 675 acre feet per year, diverted from Twin Lake, carried by ditch to Moran Creek and subsequently diverted out of Moran Creek through two points of diversion at the 158 acre place of use. This is the occurrence set forth in the original pleading. These are the operative facts plead in Statement of Claim 41F 5962-00.

During the Montana Department of Natural Resources and Conservation

["DNRC"] claim examination prior to issuance of the Temporary Preliminary Decree, only 30 of the claimed 158 acres were confirmed as irrigated. The maximum acres and place of use were reduced to 30 acres. The claimed flow rate and volume were each then reduced based on irrigating 30 acres rather than 158 acres. The flow rate was reduced to 1.14 cfs (the equivalent of 45.6 miner's inches) and the volume was reduced to 132.00 acre feet per year. The source name was standardized - instead of the reservoir as the named source, Moran Creek was specified with the Twin Lake reservoir included in the point of diversion description. Claim 41F 5962-00, with the source name standardization, reduced flow rate, and reduced volume, appeared in the Temporary Preliminary Decree for the Madison River Basin (41F) issued on July 25, 1984.

There were no objections filed to this claim as it appeared in the Temporary Preliminary Decree but the claim was called in on motion of the Montana Water Court due to a computer calculation error concerning the volume. The volume should have been reduced to 216.00 acre feet, not the 132.00 acre feet as appeared in the Temporary Preliminary Decree. On April 16, 1985 Chief Water Judge W. W. Lessley entered an Order stating that all such volume corrections shall be made. The Master's Report concerning the volume correction was issued on May 19, 1993 and the Order Adopting Master's Report was issued on June 29, 1993.

So, from the filing of the Statement of Claim through issuance of the Order Adopting Master's Report, the occurrence set forth in the original pleading has not

changed. Some of the facts - the number of acres irrigated, flow rate, and volume - were reduced, but otherwise, the occurrence remains the same. The right claimed is the same - a March 16, 1930 use right diverted from Twin Lake, carried by ditch to Moran Creek, and subsequently diverted out of Moran Creek through two points of diversion at the place of use.

On May 26, 1999 an ownership update was filed recording the transfer of this claim from Frances Mae Eshe and Arthur Eshe to Alton Living Trust.

The Alton Living Trust Motion to Amend is “to correct the priority date, flow rate, maximum volume, acres irrigated, source, points of diversion, means of diversion, the reservoir record and the historical place of use so that it accurately reflects the historical use of the Claimant’s *reservoir system* in the Moran Creek drainage.” (emphasis added) The Motion states that Twin Lake is one of three naturally occurring lakes, that the level of each of the three lakes was raised by dam to create additional storage, that all the reservoirs were developed by the Thexton family in the 1920s, that one of the dam levels was raised again in the 1930s and the other two were each raised again in the 1940s. Some of the requested amendments are that the priority date be changed to 1924 when the reservoirs were constructed, add the volume of the other two reservoirs to this claim, add the points of diversion for the other two reservoirs to this claim, and add a second source to this claim (the unnamed tributary of Moran Creek on which one of the reservoirs is located). The Supplemental Brief in Support of Motion to Amend requests

that the priority date be 1947 instead of 1924 as 1947 is the year the last of the dams was raised.

What is implicit in these requested amendments is the necessary underlying conclusion that the water impounded in 1924 in these three separate reservoirs and the additional water impounded when each of the dams was raised (the last in 1947) comprise one single water right appropriation from Moran Creek, that the appropriation was begun in 1924 but not completed until the last dam level was raised in 1947, and that a 1947 priority date “more accurately reflects a unified priority for completion of the entire Axolotl Reservoir system.”

Contrary to the assertion there was just one water right appropriated, the record indicates there are actually six different water rights appropriated: a 1924 use right appropriated from Moran Creek when the Twin Lake East dam first impounded water; a 1924 use right appropriated from Moran Creek when the Reservoir Lake dam first impounded water; a 1924 use right appropriated from an unnamed tributary of Moran Creek when the Axolotl Lake dam first impounded water; a 1947 use right appropriated from Moran Creek when the Twin Lake East dam level was raised and impounded additional water; a 1935 use right appropriated from Moran Creek when the Reservoir Lake dam level was raised and impounded additional water, and a 1947 use right appropriated from an unnamed tributary of Moran Creek when the Axolotl Lake dam level was raised and additional water impounded.

The Motion states that the conduct, transaction, or occurrence to be analyzed is the construction of a reservoir system on Moran Creek and an unnamed tributary to Moran Creek beginning in 1924 and completed in 1947. The subject matter at hand is existing water rights, not existing reservoir systems. The claim before this Court - the pleading to be made - is a claim for an existing water right, not a claim for existing impoundment structures. The claim is for the water right appropriation facilitated by the building of a specific dam which thereby caused the impoundment of water and the formation of a reservoir. A Statement of Claim is a form pleading and for the sole purpose of pleading only one thing - an existing water right. The conduct, transaction, or occurrence of every Statement of Claim is the existing water right which is plead thereon. Of the six apparent appropriations made between 1924 and 1947, Statement of Claim 41F 5962-00 is for only one of those rights - the initial appropriation facilitated by construction of the dam on Twin Lake East. There are six different occurrences and six different sets of operative facts: different dams at different locations, different sources, different amounts of water impounded, and different amounts of increased impoundment at these different locations at the different times each dam level was raised. The occurrence and the operative facts of the five other appropriations not included in Statement of Claim 41F 5962-00 are not the same as that one appropriation which was claimed. Therefore, the requested amendments do not relate back. Those five other waters rights must be plead separately.

All statements of claim for existing water rights had to be filed by 5:00 pm April 30, 1982. Section 85-2-221(1) MCA. If not filed by the deadline they are deemed forfeit. Section 85-2-226 MCA. The legislature has provided a remission of that forfeiture, with terms and conditions, for late claims filed between May 1, 1982 and July 1, 1996. Sections 85-2-221(3) and 85-2-225(3) MCA. As of July 2, 1996, no statements of claim can be filed. Alton Living Trust filed a single late claim, claim number 41F 214412-00, for all three reservoirs. It appears this late claim will need to be divided into its constituent rights and implied claims generated for the different rights erroneously grouped together on a single claim form.

It appears implied claims can be generated from the late claim because, on its face, it includes all six of the rights. Implied claims for the other five rights cannot be generated from claim 41F 5962-00 because those other rights are not included in Statement of Claim 41F 5962-00. It is not appropriate for the Court to allow the amendment of a claim for a single water right into a claim for six water rights, then generate implied claims for the other five rights.

Some of the various amendments requested in the Motion to Amend appear to be amendments which should be made to the appropriation claimed on 41F 5962-00. The Supplemental Brief in Support of Motion to Amend states that the appropriation claimed on 41F 5962-00 is that facilitated by the first dam built on Twin Lake East in 1924, not the later appropriation in 1947 when the dam level was raised, so it is clear the

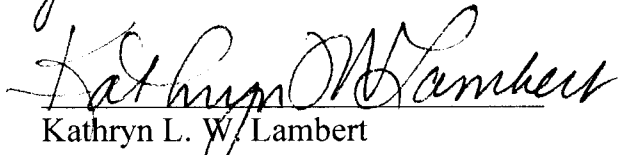
1930 priority date specified on the Statement of Claim is erroneous. The right claimed is the same, but the priority date needs correction. The Motion could be granted in part as to the right actually claimed - the impoundment on Twin Lake facilitated by construction of the first dam - as some of the requested amendments appear to be “correcting specific factual details, such as time and place, as well as other items.” *Prentice* at 161 Mont. at 15. However, such alternate, limited implementation of the modifications sought in the Motion to Amend should not be done without a request from the claimant. Changes to claim 41F 5962-00 which could be made through this Motion to Amend are changing the type of irrigation system to sprinkler/flood, changing the source to unnamed tributary of Moran Creek, changing the priority date to December 31, 1924 (as no evidence that an appropriation occurred on June 1), changing the flow rate from quantified to the standard onstream reservoir remark, changing the volume quantification to the volume impounded by the 1924 dam (more evidence needed to determine volume based on 7.5 acre surface area, depth, number of fills, etc.), changing the period of use, changing means of diversion to dam, adding a remark to point of diversion concerning the secondary diversions from Moran Creek, changing the maximum acres and place of use to 282.00 acres, and adding the supplemental rights remark. Such changes are for the same occurrence, based on the same set of operative facts, merely make more specific that which has already been plead, and therefore, relate back to the original pleading and can be made if the claimant would like. The claimant could pursue such limited granting of the Motion to Amend by

filing an objection to this Report clearly requesting opportunity to provide some additional evidence concerning the volume and to grant the Motion to Amend to the extent it relates to the appropriation which resulted from the building of the dam on Twin Lake East. Absent such objection to this Report, it is

RECOMMENDED that the Motion to Amend Temporary Preliminary Decree of Statement of Claim No. 41F-W-005962-00 be denied as the requested amendments do not relate back to the original pleading as they are not based on the same conduct, transaction, or occurrence and are not based on the same set of operative facts. It is also recommended that the following remark be added to the abstract of this claim as it appears to duplicate (in part) the claimant's late filed claim 41F 214412-00:

CLAIM 41F 5962-00 APPEARS TO DUPLICATE ONE OF THE RIGHTS INCLUDED IN CLAIM 41F 214412-00. CLAIM 41F 214412-00 WAS FILED LATE AND DID NOT APPEAR IN THE TEMPORARY PRELIMINARY DECREE FOR THIS BASIN. THIS ISSUE WILL BE ADDRESSED AFTER ISSUANCE OF THE NEXT DECREE FOR THIS BASIN.

DATED this 18 day of July, 2006.


Kathryn L. W. Lambert
Senior Water Master

CERTIFICATE OF SERVICE

I, Patricia J. Gunderson, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Alton Living Trust
% N. Kirby & Janice M. Alton, Trustees
815 Country Valley Road
Thousand Oaks CA 91361

Michael J.L. Cusick, Attorney
Moore, O'Connell & Refling, P.C.
PO Box 1288
Bozeman MT 59771-1288

DATED this *18th* day of *July*, 2006.

Patricia J. Gunderson
Patricia J. Gunderson
Deputy Clerk of Court

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
MADISON RIVER
BASIN 41F**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 41F 5962-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: ALTON LIVING TRUST
% N KIRBY & JANICE MALTON, TRUSTEES
815 COUNTRY VALLEY RD
THOUSAND OAKS, CA 91320

Priority Date: MARCH 16, 1930

Enforceable Priority Date: MARCH 16, 1930

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.14 CFS

***Volume:** 216.00 AC-FT

Climatic Area: 5 - LOW

Maximum Acres: 30.00

Source: MORAN CREEK

Source Type: SURFACE WATER

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		NWNWSW	9	7S	2W	MADISON

Diversion Means: HEADGATE

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWNWSW	9	7S	2W	MADISON

Period of Diversion: APRIL 1 TO AUGUST 19

Period of Use: APRIL 1 TO AUGUST 19

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	30.00		SE	36	6S	2W	MADISON

Total: 30.00

Remarks:

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS. THESE ISSUES MAY REMAIN UNRESOLVED IF NO OBJECTIONS ARE FILED DURING THE NEXT OBJECTION PERIOD.

CLAIM 41F 5962-00 APPEARS TO DUPLICATE ONE OF THE RIGHTS INCLUDED IN CLAIM 41F 214412-00. CLAIM 41F 214412-00 WAS FILED LATE AND DID NOT APPEAR IN THE TEMPORARY PRELIMINARY DECREE FOR THIS BASIN. THIS ISSUE WILL BE ADDRESSED AFTER ISSUANCE OF THE NEXT DECREE FOR THIS BASIN.