

FILED NOVEMBER 2, 2012

**MONTANA WATER COURT, UPPER MISSOURI DIVISION
MISSOURI RIVER FROM SUN RIVER TO MARIAS RIVER - BASIN 41Q**

CLAIMANT: Harrison Land & Livestock, LLC

CASE 41Q-12
(in part)
41Q 210370-00
41Q 210371-00

ORDER DENYING MOTION TO CORRECT PRIORITY DATE WITHOUT PREJUDICE

On August 8, 2012, the Court issued its Closing Order addressing the above two captioned claims. The claim abstracts attached to the Order contained a "claim filed late 05/01/1982" information remark. The claim abstract for 41Q 210370-00 contained a June 30, 1973 enforceable priority date notation.

On August 16, 2012, Harrison Land & Livestock, LLC, through its attorney Ron A. Nelson, filed its *Motion to Correct Priority Date*, urging the Court to eliminate the "claim filed late 05/01/1982" information remark and the June 30, 1973 enforceable priority date notation. It also urged the elimination of the same information remark from the abstracts of claims 41Q 210372-00 and 41Q 210373-00. The claimant argues that these four claims "were all postmarked April 30, 1982 which is within the filing deadline set for Statements of Claim."¹ *Motion* at 1.

¹ The digital copies of the claim files, available online through the DNRC Water Right Query System at <http://www.nris.mt.gov/dnrc/waterrights/>, indicate the statements of claim were notarized on April 30, 1982 and filed on May 1, 1982 with the Havre Regional Office of the Department of Natural Resources and Conservation. This would be consistent with an April 30, 1982 mailing and postmark. The abstract for 41Q 210372-00 indicates it is an exempt from filing claim that was voluntarily filed under § 85-2-222, MCA, and it contains no late claim remarks. Claim 41Q 210373-00 received no objections or issue remarks and did not appear on the basin objection list. In order to modify any element of this claim, a motion to amend under § 85-2-233(6), MCA, is necessary.

Claims which are postmarked on April 30, 1982, but not physically submitted to the Department of Natural Resources and Conservation (DNRC) by 5:00 p.m. on April 30, 1982, are not within the filing deadline. They are late claims and were forfeited pursuant to the conclusive abandonment statute set forth at § 85-2-226, MCA. See *In Matter of the Adjudication of Yellowstone River Water Rights*, 253 Mont. 167, 832 P.2d 1210 (1992), Rule 36, W.R.C.E.R., and § 85-2-221, MCA.

The 1993 Legislature provided some remission from this forfeiture. Section 85-2-221(3), MCA. Unless late claims fall within the scope of these remission statutes, they continue to be deemed abandoned and forfeit. See Findings 63 through 65 of the Basin 41Q Findings of Fact and Conclusions of Law filed May 27, 2010 and found online at http://dnrc.mt.gov/wrd/water_rts/adjudication/41Q_missouri_sun-marias/findings_41Q.pdf.

To help implement the 1993 legislative changes to § 85-2-221, MCA, the Water Court directed DNRC to add remarks to the abstracts of late claims. See Water Court December 1, 1997 letter to DNRC Adjudication Program Manager and Order on Late Claim Remarks filed October 1, 2003. These directions were updated and included in Water Right Claim Examination Rule 36, adopted by the Montana Supreme Court in 2006. The Late Claims section of the DNRC Claims Examination Manual in Chapter 11 was also updated. See May 2011 manual, at pages 566 through 569, found online at http://dnrc.mt.gov/wrd/water_rts/adjudication/claims_examination/chapter_11.pdf.

As a result of these directions, late claims are identified by the letter “A” or “B.”² The A represents claims which were postmarked on or before April 30, 1982 and received by the DNRC on or before May 7, 1982. The B represents all other late claims filed on or before July 1, 1996.

² Originally, the A or B designation replaced the water right identification code (the -W- in the original claim numbering system). For example, claim 41Q 210370-00 was originally designated as 41Q-W-210370-00. Since this example claim is an A claim, its number would have been 41Q-A-210370-00. Due to later changes in the DNRC water right centralized record system, the water right claim identification codes have been deleted. Under the current numbering system, the previous letter designations have been removed from the actual claim number and placed in what is referred to as the “extended information portion” of the claim number. Under this system, for example, claim 41Q-A-210370-00 is identified on its claim abstract as follows:

41Q 210370-00 STATEMENT OF CLAIM
STATUS: ACTIVE
LATE CLAIM: A

Information remarks for A or B claims are added to the abstracts of all late filed claims under the priority date element. The A claim information remark is:

CLAIM FILED LATE (filing date). AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL FEDERAL AND INDIAN RESERVED WATER RIGHT.

The B claim information remark is:

CLAIM FILED LATE (filing date). AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL FEDERAL AND INDIAN RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Additionally, all B claims receive the following issue remark on its claim abstract:

CLAIM FILED LATE (filing date). IN ADDITION TO BEING SUBORDINATE TO ALL FEDERAL AND INDIAN RESERVED RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW, THIS CLAIM MAY ALSO BE SUBORDINATE TO CERTAIN PERMITS AND RESERVATIONS OF WATER. SEE SECTION 85-2-221, MCA.

This B claim issue remark provides notice to water users of the opportunity to file an objection pursuant to § 85-2-221(3)(f)(ii), MCA.

As the two captioned claims were notarized on April 30, 1982, apparently mailed to the DNRC, and filed May 1, 1982, they are late claims, but are only subordinate to federal and Indian reserved rights. Section 85-2-221(3), MCA. If claims are only subordinate to federal and Indian reserved claims, the claim's historical priority date is retained and that historical priority date is identified as the claim's enforceable priority date.

Those claims which fall into the § 85-2-221(3)(f), MCA, category (the B claims) are subordinate to all federal and Indian reserved water rights and are also subordinate to all timely filed water right claims. These highly subordinated B claims retain the reference to their historical priority date on the abstract (in case there is a distribution

conflict with another subordinated B claim), but they receive the June 30, 1973 enforceable priority date and are distributed as a June 30, 1973 water right claim. This practice is set forth in the DNRC Claims Examination Manual, Chapter 11, section C at page 567, located online at http://dnrc.mt.gov/wrd/water_rts/adjudication/claims_examination/chapter_11.pdf.

Claim 41Q 210370-00, an A claim, was decreed with an April 1, 1898 priority date and a June 30, 1973 enforceable priority date. The 1973 enforceable priority date appears to be a DNRC error, although there is no indication in the digital claim file as to how or why this error occurred.

Claim 41Q 210371-00, an A claim, was decreed with a May 1, 1982 priority date. It appears that both the priority date and enforceable priority date were modified on September 8, 2007 by the DNRC claims examiner from a claimed priority date of January 18, 1906 to May 1, 1982, based apparently on the claim filing date. Although the 1982 priority date modification was a DNRC error, the claimant apparently voiced no objection to the DNRC priority date modification, even though the claimant received at least two notices of the modification and two opportunities to correct the error.

First, the digital claim file indicates DNRC mailed a copy of the Harrison Land and Livestock LLC water right review abstracts, including claim 41Q 210371-00 with the modified 1982 priority date, to Harrison Land and Livestock LLC on October 24, 2007 for a final review. The claims examiner's cover letter requested the claimant to review the information and to contact him to "address any problems with your claims and questions you may have." If no response was received within 30 days, the claims examiner advised that he would consider his "examination of these claims complete." There is no indication of a claimant response in the digital claim file.

Second, after the decree was issued in May 2010, the claimant was mailed copies of its water right claim abstracts and was notified to file an objection if the abstracts were in error. See *Notice of Entry of Preliminary Decree and Notice of Availability* dated,

filed, and mailed to Basin 41Q water users on May 27, 2010. Neither the claimant nor any other water user filed objections to either of the two captioned claims.

Due to the presence of DNRC issue remarks on the claim abstracts, the two captioned claims did appear on the basin objection list. However, the only issues raised and the only notice provided to other water users by their appearance on the objection list was to “flow rate, purpose, volume” for claim 41Q 210370-00 and to “period of diversion and period of use” for claim 41Q 210371-00. Since there was not a priority date issue or a priority date objection, priority date is not listed as an issue for either claim on the basin objection list. If the claimant now wishes to provide evidence of an earlier priority date, the Water Court needs to perform an analysis under § 85-2-233(6), MCA, to determine if there will be any adverse affect to any other water rights. If the claimant is satisfied with the 1982 priority date for claim 41Q 210371-00, no further action is necessary.

In order to make the modifications requested by the claimant in its Motion to Correct Priority Date, a Motion to Amend is required pursuant to § 85-2-233(6), MCA, for the two captioned claims and for claim 41Q 210373-00. To give the claimant time to review this lengthy Order and perhaps discuss its contents with the Water Master, the Court will set at least a thirty day period for the claimant to file a Motion to Reopen and Motion to Amend Priority Dates. If no motion is filed by that date, the Court will consider this matter closed.

While reviewing the claimant’s Motion to Correct Priority Date, the Court also reviewed the Case 41Q-12 Master’s Report filed September 5, 2012 and the DNRC Memorandum filed August 9, 2012. Both appear to contain some errors. In a separate Order the Court has withdrawn its Order Adopting Master’s Report filed September 25, 2012 and has referred several claims in the report to the Water Master for additional review. Accordingly, it is

ORDERED that Motion to Correct Priority Date is **DENIED WITHOUT PREJUDICE**; and

ORDERED that if Harrison Land & Livestock, LLC intends to file a Motion to Reopen and Motion to Amend Priority Dates, it should do so on or before **December 14, 2012**. If no motions are filed or extensions of time granted, the Court will consider this matter closed.

DATED this 2 day of November, 2012.

/s/ C. Bruce Loble
C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Jamie Pope, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER DENYING MOTION TO CORRECT PRIORITY DATE WITHOUT PREJUDICE** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

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Team A
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ATTORNEY	REPRESENTING
Ron A. Nelson	Harrison Land & Livestock, LLC

DATED this _____ day of November, 2012.

Jamie Pope
Deputy Clerk of Court

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FILED NOVEMBER 8, 2012

**MONTANA WATER COURT, UPPER MISSOURI DIVISION
MISSOURI RIVER FROM SUN RIVER TO MARIAS RIVER - BASIN 41Q**

CLAIMANTS: Harrison Land & Livestock, LLC

CASE 41Q-12
(In Part)

41Q 161048-00 41Q 216199-00
41Q 192883-00 41Q 216200-00
41Q 192884-00
41Q 192890-00
41Q 192894-00
41Q 192898-00
41Q 192901-00
41Q 192904-00

**ORDER WITHDRAWING ORDER ADOPTING MASTER'S REPORT FILED
SEPTEMBER 25, 2012 FOR THE ABOVE CAPTIONED CLAIMS AND
REFERRING CLAIMS TO WATER MASTER FOR FURTHER PROCEEDINGS**

Pursuant to Montana Code Annotated, § 85-2-233(5), the claims captioned above were assigned to Water Master Hugh B. McFadden, Jr. On September 5, 2012, the Water Master filed a report containing Findings of Fact and Conclusions of Law with the Clerk of Court and copies were served upon the parties. No objections to the report were filed and on September 25, 2012, the Court issued its Order Adopting Master's Report.

Due to a recent review of a Motion to Correct Priority Date filed by the claimant on August 16, 2012 for two other non-captioned claims in this case, the Court re-reviewed the September 5, 2012 Master's Report and discovered it contained some errors. Although the errors, in a grand overview of the statewide adjudication effort, would likely have no practical affect, they need to be reviewed and corrected.

Discussion

Claims 41Q 161048-00, 41Q 192883-00, 41Q 192884-00, 41Q 192890-00, 41Q 192894-00, 41Q 192898-00, 41Q 192901-00, and 41Q 192904-00 were decreed in the 41Q basin decree without priority dates. They are livestock claims asserting an appropriation from a surface water source.

The claimant agreed to a priority date of April 30, 1982 for these claims, the date the claims were filed with the Department of Natural Resources and Conservation. The Master accepted the claimant's proposal and placed an information remark on the claims that "THIS IS AN EXISTING RIGHT. ITS POST-1973 PRIORITY DATE IS DECREED PURSUANT TO SECTION 85-2-306(4) MCA." Accepting the 1982 priority date is a pragmatic solution, but it creates several water rights which are outside the jurisdiction of the Water Court. Recognizing claims outside its jurisdiction limits puts these claims at risk to some future challenge. Adding the preceding remark will not help in a future defense, but instead, the remark's citation to § 85-2-306(4), MCA, will underscore the error if it is ever challenged.

The Water Court's jurisdiction is limited to the determination of "existing rights." Section 3-7-224(2) and 3-7-501, MCA; *State ex rel. Jones v. Fourth Judicial District*, 283 Mont. 1, 6, 938 P.2d 1312 (1997). An "existing right" is a right to the use of water that is protected under the law as it existed prior to July 1, 1973. Section 85-2-102(12), MCA. The reference to § 85-2-306(4) in the information remark is a reference to certain groundwater rights which were in use prior to July 1, 1973, but which were not filed in accordance with the 1961 Groundwater Act. The cited statute is not applicable to water rights appropriated from a non-groundwater source.

If the first use of these surface stock water claims was after June 30, 1973 (i.e. April 30, 1982), the Water Court does not have jurisdiction over them and they should be dismissed from the adjudication. If the first beneficial use was, for example, on June 30, 1973, then the priority date should be revised to the date of first use and the information remark deleted.

With respect to claims 41Q 216199-00 and 41Q 216200-00, these claims apparently were filed with the Department of Natural Resources and Conservation on June 28, 1996 and are late claims. As explained in the *Order Denying Motion to Correct Priority Date without Prejudice* filed in this case on November 2, 2012, late claims filed after May 7, 1982, but on or before July 1, 1996 are type B late claims. Type B late claims are subordinated to all timely filed claims and receive an enforceable priority date of June 30, 1973. If an objection is filed to a B claim under § 85-2-221(3)(f)(ii), MCA, the B claim could become subordinated to post June 30, 1973 permits or reservation. However, without such an objection, B claims have an enforceable priority date of June 30, 1973.

Apparently, the DNRC claims examiner modified the priority date to June 28, 1996 during the DNRC claims examination process (which preceded the issuance of the Water Court decree). The DNRC modification was an error. The claim priority dates for these surface claims should not have a priority date equal to the date the statements of claim were filed, even though they were filed late. Instead, the priority date should be the date the claims were first put to historical beneficial use prior to July 1973, although as type B late claims, their enforceable priority date would be June 30, 1973. If the claims were first used after June 1973, they should be dismissed from the adjudication. Accordingly, it is

ORDERED that the Order Adopting Master's Report filed September 25, 2012 is withdrawn as to the above captioned claims; and

ORDERED that the above captioned claims are referred to Water Master Hugh B. McFadden, Jr. to establish the date of first beneficial use of these claims and to process them in accordance with this Order, in accordance with the late claim discussion set forth in the Court's *Order Denying Motion to Correct Priority Date without Prejudice* filed in this case on November 2, 2012, and in accordance with § 85-2-233(6), MCA, if necessary.

DATED this 8 day of November 2012.

/s/ C. Bruce Loble
C. Bruce Loble
Chief Water Judge

