

Montana Water Court
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FILED

JAN 10 2014

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
CLARKS FORK YELLOWSTONE RIVER BASIN (43D)

CLAIMANTS: Interstate Irrigation & Mining Ditch Company;
RLF Bighorn Properties, LLC

OBJECTORS: Apsaalooke (Crow) Tribe; United States of
America (Bureau of Land Management);
United States of America (Bureau of Indian
Affairs)

CASE 43D-517
(in part)
43D 24140-00
43D 24141-00

ORDER DISMISSING CLAIMS

PROCEDURAL AND FACTUAL BACKGROUND

Interstate Irrigation and Mining Ditch Company filed Statements of Claim 43D 24140-00 and 43D 24141-00 for water diverted from the Clarks Fork Yellowstone River through the Interstate Ditch in Wyoming to irrigate acreage in Montana. Interstate diversions of water between Wyoming and Montana are governed by the Yellowstone River Compact entered into by Wyoming, Montana, and North Dakota. The Compact is codified at section 85-20-101, MCA.

The Temporary Preliminary Decree for Basin 43D (TPD) described the point of diversion for each claim as:

NENW SEC 30, T58N, R101W, PARK COUNTY, WYOMING

Each abstract of claim appeared in the TPD with multiple issue remarks concerning the number of acres irrigated, flow rate, the interstate diversion and use of water, and

duplication of these claimed rights with other claims for the same water rights as recognized and authorized by the State of Wyoming.

There were no objections filed to claim 43D 24140-00. The United States Bureau of Indian Affairs (BIA) and the Crow Tribe of Indians objected to the maximum acres, place of use, flow rate, and volume of claim 43D 24141-00. Grove Creek Limited Liability Company filed Notices of Intent to Appear for both claims.

The claim files include copies of Wyoming Certificates of Appropriation of Water:

43D 24140-00: Proof Number 34316, Certificate Record Number 76, Order Record 32 Page 471.

43D 24141-00: Proof Number 34315, Certificate Record Number 76, Order Record 32 Page 471.

In addition, the Wyoming Water Rights are identified in the Basin 43D TPD as claims 43D 212319-00 (duplicate of 43D 24141-00) and 43D 212320-00 (duplicate of 43D 24140-00). Claims 43D 212319-00 and 43D 212320-00 are each denominated as an "INTER-STATE CLAIM" rather than a "STATEMENT OF CLAIM". The claim files for these Inter-State Claims include the same Wyoming Board of Control Certificates of Appropriation of Water found in the corresponding Statements of Claim as noted above. Although the elements for Montana claims 43D 21240-00 and 43D 212320-00 and claims 43D 21241-00 and 43D 212319-00 are not identical, they clearly represent the same historical water rights.

The Montana Department of Natural Resources and Conservation (DNRC) examination of claims 43D 212319-00 and 43D 212320-00 found no significant facts, data, or issues to report to the Water Court. Neither claim received objections in this adjudication. However, the DNRC added the following information remarks to the abstract of each claim:

THIS WATER RIGHT HAS BEEN ADJUDICATED BY WYOMING UNDER THE RULES FOR ADJUDICATING WATER RIGHTS ON INTERSTATE DITCHES, ADOPTED BY THE YELLOWSTONE RIVER COMPACT COMMISSION ON SEPTEMBER 20, 1984.

THIS IS A WYOMING WATER RIGHT (CERTIFICATE RECORD 76, PAGE 39) ISSUED ON FEBRUARY 24, 1988 BY THE STATE OF WYOMING BOARD OF CONTROL. THE POINT OF DIVERSION IS IN WYOMING AND ALL OR A PORTION OF THE PLACE OF USE IS IN MONTANA.

On February 13, 1996 Grove Creek Limited Liability Company unconditionally withdrew both Notices of Intent to Appear. On July 1, 1996 Interstate Irrigation and Mining Ditch Company, the BIA, and the Crow Tribe of Indians filed a Stipulation with the Water Court resolving the objections and requesting reductions in the maximum acres, place of use, flow rate, and volume of claims 43D 24140-00 and 43D 24141-00. The Stipulation does not address interstate use or the duplication of claims referenced in the issue remarks.

At the request of the Water Master DNRC Water Resource Specialist Pat Riley reviewed the changes proposed by the parties in their Stipulation. On August 13, 1996, Pat Riley filed his Memorandum stating, in part:

Finally, both claims carry a remark that the claim is duplicated by a Wyoming Water Right. According to the Yellowstone River Compact Commission Administrative Rules Article IV part 8, regarding a Water Right with a point of diversion that is in Wyoming and irrigates land in Montana states:

- a. The right will be a Wyoming water right with a priority date as established by this procedure.
- b. The amount of this right will be determined as provided by Wyoming law.

According to our interpretation of the Yellowstone River Compact Commission rules, water rights 43D-W024140-00 and 43D-W024141-00 should not exist in the Montana Water Rights Adjudication. Keeping these claims in our system except in the form of the X rights [43D 212319-00 and 43D 212320-00] is contrary to the rules established by the Yellowstone River Compact Commission.

On August 2, 1996, the Water Master issued an "Order Setting Deadline to File Briefs in Support of Stipulation Filed July 1, 1996" stating that Interstate Irrigation and Mining Ditch Company claims 43D 24140-00 and 43D 24141-00 still appeared to duplicate claims 43D 212320-00 and 43D 212319-00. The Order set a September 13, 1996 deadline for the parties to file responses supporting the validity of claims 43D

24140-00 and 43D 24141-00 as described in the July 1, 1996 Stipulation. The Order stated: "If the Court has received nothing by this date it will proceed with the Master's Report and dismiss claims 43D-W-024140-00 and 43D-W-024141-00." None of the parties complied with this filing deadline. However, a Master's Report was never issued for these claims.

DISCUSSION

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Section 85-2-233, MCA, and all matters concerning the determination and interpretation of existing water rights pursuant to Section 3-7-501, MCA. This includes the jurisdiction to determine rights to the use of water in interstate tributaries of the Yellowstone River that may be claimed in this general adjudication. *Utah International, Inc. v. Intake Water Co.*, 484 F. Supp. 36, 43-44 (D. Mont. 1979). The right to use water in the Clarks Fork Yellowstone River is governed, in part, by the Yellowstone River Compact (Compact). Pub. L. No. 82-231, 65 Stat. 663 (1951); Section 85-20-101, MCA. "The Compact ... has the status of a treaty and state law is subordinate to it. ... Thus, Montana's water statutes are subordinate to the Compact provisions." *State ex rel. Intake Water Co. v. Montana Board of Natural Resources & Conservation*, 197 Mont. 482, 489, 645 P.2d 383, 387 (1982) (rehearing denied May 13, 1982) (internal citation omitted).¹

The Yellowstone River Compact provides that appropriations in the Yellowstone River System,

may ... be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.

Compact, Art. VII(C).

¹ When the parties are private individuals, the jurisdiction of federal and state courts to construe provisions of the Yellowstone River Compact is concurrent, and with respect to federal courts, discretionary. *Utah International, Inc.*, 484 F. Supp. at 42.

Rule IV of the Yellowstone River Compact Commission Rules for Adjudicating Water Rights on Interstate Ditches provides that “where the point of diversion is in Wyoming and place of use in Montana,” the procedure for determining and adjudicating water rights associated with interstate ditches shall be the Wyoming Procedure set forth in Rule IV(A), paragraphs 1 through 8. Upon entry of the water right into the Wyoming Board of Control records, the Commission Rules classify the water right as a “Wyoming water right.” Rule IV(A)(8).

Interstate Irrigation and Mining Ditch Company followed this procedure as is evident by the Wyoming Certificates of Appropriation of Water, Proof Number 34315, 34316. Filing Montana Statements of Claim 43D 24140-00 and 43D 24141-00 was superfluous as the State of Montana cannot grant a water right for water diverted in Wyoming. Under the terms of the Compact, the State of Wyoming is the authority for granting such rights.

At the same time, Montana can recognize rights that have been adjudicated in Wyoming and are used to irrigate acreage in Montana. This has been accomplished by the inclusion of Inter-State Claims 43D 212319-00 and 43D 212320-00 in the Basin 43D TPD, and ultimately, their inclusion in the Final Decree for Basin 43D.

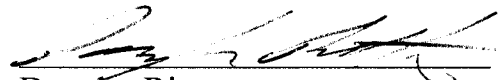
The August 2, 1996, “Order Setting Deadline to File Briefs in Support of Stipulation Filed July 1, 1996” issued by the Water Master gave all parties notice of this issue and an opportunity to address the appropriate method for including these two Wyoming water rights in Basin 43D proceedings. By failing to respond to the Order it is presumed all parties agree the water rights are appropriately reflected in claims 43D 212320-00 and 43D 212319-00 and that claims 43D 24140-00 and 43D 24141-00 should be dismissed.

This matter having come before the Court, it is

ORDERED that Interstate Irrigation and Mining Ditch Company Statements of Claim 43D 24140-00 and 43D 24141-00 are DISMISSED. The Stipulation signed by the parties to resolve objections is therefore moot and is not approved by the Montana Water Court.

A Post Decree Abstract of Water Right Claim is attached to this Order to confirm that both claims appear as dismissed in the State's centralized water right record system.

DATED this 10 day of January, 2014.


Douglas Ritter
Associate Water Judge

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
CLARKS FORK YELLOWSTONE RIVER
BASIN 43D**

IMPORTANT NOTICE

*****THIS WATER RIGHT CLAIM HAS BEEN DISMISSED*****

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: 43D 24140-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: **DISMISSED**

Owners: INTERSTATE IRRIGATION & MINING DITCH CO
PO BOX 40
BELFRY, MT 59008

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE 43D TEMPORARY PRELIMINARY DECREE.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
CLARKS FORK YELLOWSTONE RIVER
BASIN 43D**

IMPORTANT NOTICE

*****THIS WATER RIGHT CLAIM HAS BEEN DISMISSED*****

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: 43D 24141-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: **DISMISSED**

Owners: INTERSTATE IRRIGATION & MINING DITCH CO
PO BOX 40
BELFRY, MT 59008

Priority Date:

Type of Historical Right:

Purpose (use): IRRIGATION

Flow Rate:

Volume:

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE 43D TEMPORARY PRELIMINARY DECREE.