

Montana Water Court
PO Box 1389
Bozeman MT 59711-1389
(406) 586-4364
1-800-624-3270 (IN-STATE)
FAX: (406) 522-4131

FILED

AUG 27 2014

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
BLACKFOOT RIVER - BASIN 76F

* * * * *

CLAIMANTS: Gordon Jones; Vicki Jones

OBJECTORS: Avista Corporation;
United States of America
(USDA Forest Service)

CASE 76F-110
(Part of)
76F 97781-00
76F 97782-00
76F 97783-00

ORDER ADOPTING MASTER'S REPORT

I. PROCEDURAL BACKGROUND

Claimants Gordon and Vicki Jones ("Claimants") are the owners of water right claims 76F 97781-00, 76F 97782-00, and 76F 97783-00, located in Basin 76F (Blackfoot River). Claims examination by the Department of Natural Resources and Conservation (DNRC) prior to the issuance of the Preliminary Decree on February 10, 2011 resulted in issue remarks being added to the abstracts of claims 76F 97781-00, 76F 97782-00, and 76F 97783-00. The three claims also received objections from Avista Corporation and the United States of America (USDA Forest Service) ("Forest Service").

On July 30, 2012, Claimants filed a Motion to Amend Water Rights Claims. The Motion to Amend requested the issue remarks on claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 concerning flow rate and purpose of use be removed and that the priority date for the rights be changed from November 5, 1964 to June 1, 1890. Claimants filed another Motion to Amend requesting the same relief on January 31, 2014. Avista Corporation filed a Status Report on March 3, 2014 stating that it would withdraw its

objections to claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 on the condition that the Motion to Amend was granted. The Forest Service unconditionally withdrew its objections to the three claims on June 4, 2014.

A Master's Report was issued on June 20, 2014. The Master recommended removing the issue remarks concerning flow rate and purpose of use. The Master did not recommend a change in the priority date of the three claims because Claimants did not present substantial evidence to support such a change.

Avista Corporation filed a Conditional Withdrawal of its objections to claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 on June 25, 2014. The withdrawal of their objections was conditioned on the Master's Report being approved and adopted by the Court.

The Claimants filed a Response to the Water Master's Report on July 7, 2014, objecting to the denial of Claimants' motion to change the priority dates of claims 76F 97781-00, 76F 97782-00, and 76F 97783-00.

II. STATEMENT OF THE ISSUE

The only issue before the Court is whether the Master was correct in his conclusion that Claimants' motion to change the priority dates of their claims fails for lack of substantial evidence.

III. STANDARD OF REVIEW

The Water Court may appoint a Water Master to prepare a report containing the Master's Findings of Fact and Conclusions of Law. M.R.Civ.P. 53(a)(1)(C); Rule 23, W.R.Adj.R. The Water Court reviews the Master's Findings of Fact for clear error and the Master's Conclusions of Law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, ¶25, 328 P.3d 644 (citing *Heavirland v. State*, 2013 MT 313, ¶ 13, 372 Mont. 300, 311 P.3d 813). Based on these standards of review, the water judge "may adopt, modify, or reject the [Master's] report, in whole or in part, or may receive further evidence or recommit it with instructions." Rule 23, W.R.Adj.R.

IV. ANALYSIS

Pursuant to § 85-2-227, MCA, a claim of an existing right constitutes prima facie proof of its contents. The statements of claim for claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 list the priority dates for those claims as November 5, 1964. A claimant is not entitled to a change in priority date unless substantial evidence is presented to overcome the prima facie status of the claim. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance." *Strom v. Logan*, 2001 MT 30, ¶ 23, 304 Mont. 176, 18 P.3d 1024.

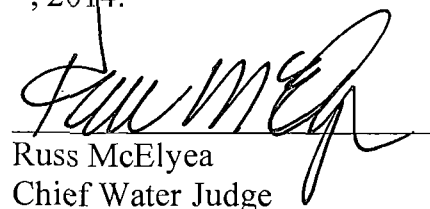
Here, Claimants allege that claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 have been used in association with mining operations since before 1890. However, the evidence presented by Claimants does not adequately support a conclusion of continuous, historic beneficial use of water by Claimants or Claimants' predecessors since the 1890s. Claimants assert the priority date for the water rights at issue should be moved to 1890 because mining has been occurring on Claimants' land since that time. The existence of mining claims in the 1890s does not establish the existence or use of water rights. Claimants do not assert that water usage has occurred since 1890.

Mr. Jones' affidavit cannot establish continuous beneficial use of the claims beginning in 1890 because Mr. Jones does not have personal knowledge concerning the use of those rights since that time. Claimants did not carry their burden of overcoming the prima facie status of claims 76F 97781-00, 76F 97782-00, and 76F 97783-00 by providing substantial evidence of water use since 1890.

V. ORDER

Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court ORDERS the Master's Report and its Recommendations are ADOPTED.

DATED this 27th day of August, 2014.


Russ McElyea
Chief Water Judge

James J. DuBois, Attorney
US Department of Justice
999 18th Street, South Terrace Suite 370
Denver, CO 80202
(303) 844-1375
james.dubois@usdoj.gov

Cory R. Gangle
Gangle Law Firm, PC
PO Box 669
Missoula, MT 59806
(406) 273-4304
cory@ganglelaw.net

R. Blair Strong
Paine, Hamblen, LLP
717 West Sprague, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
r.blair.strong@painehamblen.com