

Montana Water Court
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FILED

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Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
CLARK FORK RIVER BASIN ABOVE THE BLACKFOOT RIVER (76G)

CLAIMANTS: Clark Fork Coalition; Ted R. Beck; Leo A. Nicholes

OBJECTOR: Pam B. Hirsch; Jim Berg

ON MOTION OF THE WATER COURT

CASE 76G-A8
76G 91008-00
76G 214587-00
76G 214588-00

ORDER ADOPTING MASTER'S REPORT IN PART

I. PROCEDURAL BACKGROUND

Pursuant to Section 3-7-301, MCA, a Water Master was assigned to this case. On August 12, 2014, the Master filed with the Clerk of Court a Master's Report containing Findings of Fact and Conclusions of Law. All parties were served a copy of this Report.

On August 25, 2014, Claimant Clark Fork Coalition filed an objection to the Master's Report. The objection challenges the Master's placement of an information remark on the three claims in this case.

II. 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.

III. FACTUAL BACKGROUND

The Claims and the Motions to Amend the Claims

The claims in this Case are irrigation claims for water storage in Racetrack Lake. The three claims are owned by the Clark Fork Coalition (“CFC”) (claim 76G 91008-00), Ted Beck (claim 76G 214587-00), and Leo Nicholes (claim 76G 214588-00). All three claims are based on a single original right. Claims 76G 214587-00 and 76G 214588-00 were implied claims generated by the Water Court in May 1995. Both implied claims are based on the same underlying water right that forms the basis for claim 76G 91008-00.

The primary issue in this case was period of use for all three claims. CFC’s claim had a period of use from July 25 to August 24, while Beck’s and Nicholes’ claims had periods of use from May 1 to September 30. In March 2012, CFC filed a Motion to Amend the period of use for its claim to May 1 to September 30.

In January 2014, Mr. Beck filed a Motion to Amend the period of use of his claim. Mr. Beck asked to decrease his period of use from May 1 to September 30 to July 5 to August 30. Mr. Beck also requested that Mr. Nicholes’ claim be called in on motion of the Court to address period of use. A hearing on the Motions was held February 5, 2014.

The Master’s Report

The Master found that there was sufficient evidence presented to overcome the prima facie status of the period of use for CFC’s claim. Master’s Report, Conclusion of Law 12, p. 14. CFC’s Motion to Amend was granted and the period of use for claim 76G 91008-00 was changed to May 1 to September 30.

The Master did not grant Beck’s motion to change the period of use for the Beck and Nicholes claims. As a consequence, the period of use for all three rights was May 1 to September 30.

The Master also added an information remark to all three claims. The information remark explained and limited water use within the period of use established in the Master’s Report.

Clark Fork Coalition's Objection to the Master's Report

Clark Fork Coalition objected to the Master's Report, alleging that the addition of the information remark regarding period of use was improper. CFC's Objection to Master's Report, p. 4. CFC argued (1) the addition of the information remark constitutes resolution of a water distribution issue and the Water Court does not have authority to resolve water distribution issues; (2) the proposed information remark is vague and ambiguous and will result in additional litigation to interpret the meaning of the remark; and (3) the information remark is not necessary for the effective administration of Racetrack Lake water rights. *Id.*

IV. ISSUES

CFC's objection places the following issues before the Court:

1. Does the Water Court have authority to place information remarks on the water rights in this case?
2. Is the information remark vague or ambiguous?
3. Is the information remark necessary for the effective administration of Racetrack Lake water rights?

V. ANALYSIS

The Distinction Between Period of Use and Period of Diversion

The terms period of use and period of diversion define different elements of a water right. "Period of use" means the period in a year when water is used. It is the earliest month and day and the latest month and day water is beneficially used during each year. Rule 2(a) (51), W.R.C.E.R.

In contrast, "period of diversion" means the period when water is diverted from the source of supply. It is the earliest and the latest month and day that water is diverted each year. 2(a) (50), W.R.C.E.R.

Direct flow irrigation rights often have the same period of diversion and period of use because water is used immediately upon diversion. In this case, however, water is diverted for storage during part of the year, and released for use during another part of the

year. This means the period of diversion and period of use for the claims in this case are not the same.

The period of diversion in this case begins in the fall with impoundment of water in Racetrack Lake. The period of diversion ends the next year when stored water is released for use downstream.

The period of use occurs during the irrigation season, and is defined as the time when water is released from Racetrack Lake and used for irrigation by the claimants.

The period of use varies from year to year. Evidence presented by the parties, including historic water commissioner reports, shows that release of water from Racetrack Lake begins as early as May in some years and as late as September in others. *CFC Exhibit 8; CFC Exhibit 11.*

Wayne Lee Jacobson testified regarding the historic use of Racetrack Lake water. Mr. Jacobson stated that historically, usually at some point in July, the boards impounding water were removed and the water from Racetrack Lake was allowed to flow freely until the Lake was drained to low pool. *Jacobson Testimony at 10:22.25-10:25.12.*

Mr. Jacobson testified that in his experience, all three rights have always been used simultaneously. He did not remember a time when one claimant took their right at a different time than the other two claimants. *Jacobson Testimony at 10:28.32-10:29.04.*

Expert witness Tracey Turek testified that once the boards were pulled and water was released from Racetrack Lake, releases of stored water normally lasted for 26-32 days. *Turek Testimony at 10:42.16-10:44.08.*

From the testimony at the hearing, it is clear that the duration of water use each year is about 30 days. Those 30 days of use can shift from early in the summer to late in the summer, depending on conditions and the needs of the claimants.

1. Does the Water Court have authority to place information remarks on the water rights in this case?

CFC argues that creation of an information remark amounts to resolution of a water distribution issue, and is therefore outside the jurisdiction of the Water Court.

The claims in this case have been used in a unique manner. While the Master established a period of use stretching from May 1 to September 30 of each year, that period of use alone is inadequate to completely describe the pattern of historical use for each claim. That pattern includes simultaneous use of all three rights every year, varying start dates for releases of Racetrack Lake water each year, and an average duration of use lasting approximately 30 days.

The information remark supplied by the Master addresses each of these attributes:

THE FOLLOWING CLAIMS ARE ALL FOR WATER STORED IN AND RELEASED FROM RACETRACK LAKE. THESE CLAIMS ARE ALL USED IN UNISON WITH ONE ANOTHER. THE CLAIMS ARE RELEASED AT THE SAME POINT IN TIME AND FLOW AT A CONTINUAL RATE UNTIL ALL THE STORAGE WATER IS DEPLETED, WHICH TAKES APPROX. 30 DAYS. THIS 30 DAY PERIOD CAN VARY WITHIN THE DECREED PERIOD OF USE ACCORDING TO THE IRRIGATION NEEDS OF A PARTICULAR YEAR.

The information remark accurately describes the pattern of historic use of the three claims in this case, and provides the owners of the rights and the water commissioner with information needed to ensure the right will be used in accordance with that pattern.

The rationale given by the Master for use of the information remark was as follows:

When distribution issues become apparent during the adjudication of a particular water right or rights, it is incumbent on the Water Court to act by clearly setting out the parameters of the rights in such a way as to eliminate the controversy while the claims are in front of the Court. To do otherwise would only lead to more costly litigation in District Court, where the claims would likely be certified to the Water Court to answer the very questions that are being answered now.

CFC argues that the Master was improperly trying to resolve a water distribution controversy, which is outside the authority of the Water Court. It argues that resolution of such controversies is the exclusive province of District Courts.

In support of this argument, CFC cites 85-2-406, which gives District Courts the authority to "supervise the distribution of water among all appropriators." Section 85-2-

406(1), MCA. If a distribution controversy arises, this statute requires District Courts to certify to the chief water judge “the determination of existing rights that are involved in the controversy” when those rights have not already been determined by the Water Court.

CFC asserts that no distribution controversy exists in District Court, and no case has been certified to the Water Court. It argues that the Water Court cannot add an information remark to a claim unless there is a distribution controversy in District Court, and the District Court certifies questions regarding the rights at issue to the Water Court for consideration. In effect, CFC is arguing that the jurisdiction of the Water Court to define the historic use of a water right is only triggered by a water distribution controversy and a referral from a District Court. Without such a referral, CFC contends the Water Court has no jurisdiction to adjudicate a water right. CFC contends the Master cannot “preemptively resolve an issue that has not been properly certified by a district court.” CFC’s Objection to Master’s Report, p. 5.

This argument misconstrues the jurisdiction of the Water Court, the purpose of the adjudication, and the purpose of placing information remarks on water rights.

The purpose of the Water Court is to define water rights. Defining water rights comprehensively and accurately reduces the probability of future conflict. The Water Court’s jurisdiction grants the Court broad powers to achieve this purpose. “The chief water judge and the associate water judge have jurisdiction over ...all matters relating to the determination of existing water rights within the boundaries of the state of Montana.” Section 3-7-224(2), MCA. An existing right is “a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Section 85-2-102(12), MCA.

Existing water rights are described by reference to attributes called elements. These elements are listed in Section 85-2-234(6), MCA, and include owner name, priority date, flow rate and place of use. Also included are “the inclusive dates during which the water is used each year.” Section 85-2-234(6)(h), MCA. This latter element is the period of use for a water right. Once elements of a water right are identified based on historical use, they are incorporated into a decree by the Water Court.

While the elements of a water right may in some cases be sufficient to describe a claim completely, many water rights cannot be accurately described by elements alone, and are therefore supplemented with information remarks. Information remarks “limit, define, or explain unique aspects of a claim.” Rule 2(a) (57), W.R.C.E.R. Information remarks provide facts regarding prior use of a right that are critical to its administration in accord with historical use. The information supplied by such remarks is not evident by reference to the elements of a water right alone. For that reason, information remarks are routinely used by the Water Court to supplement abstracts. The Water Court has placed information remarks on thousands of water right claims. The use of such remarks is routine, and has been ongoing since the beginning of the adjudication.

The use of information remarks is also consistent with the Water Court’s purpose of defining water rights. Defining water rights as clearly as possible reduces the likelihood of future conflicts over those rights. CFC argues that the Water Court may not anticipate future disputes over water, and must await the development of such disputes before it can act. Adoption of CFC’s rationale would generate unnecessary litigation in District Courts, would create repetitive litigation in the Water Court, and is inconsistent with the Water Court’s mission to fully define water rights so that future conflict can be avoided.

CFC’s argument that the Water Court must wait to resolve issues until receiving a certification order from a District Court is without merit for several additional reasons. First, CFC placed the issue of period of use before the Water Court by filing a motion to amend, thereby invoking the Court’s jurisdiction over the claims before it. Second, the Water Court has the authority to raise such issues on its own motion, even in the absence of objections by a party. “The water court may issue such orders on its own motion as may be reasonably required to allow it to determine whether a claim accurately reflects its claimed pre-July 1, 1973 beneficial use.” Water Right Adjudication Rule 8.

The Water Court has the authority to define water rights in a manner that minimizes the possibility of future conflict. It does not have to wait until such conflict

arises to exercise that authority, nor does its authority depend on a certification from a District Court.

2. Is the information remark vague or ambiguous?

CFC's second argument is that the proposed information remark will result in additional litigation because it is vague and ambiguous.

The information remark states that the rights are to be released from Racetrack Lake simultaneously, as they have been historically. CFC's real concern is not that the remark is ambiguous, but that CFC's future water needs may be different than those of the other two owners, and different from the pattern of historical use.

According to testimony at the hearing, however, the three users of this right coordinated releases from Racetrack Lake, and the information remark accurately describes this practice. CFC cites evidence that releases were not coordinated, but this activity took place after 1973, and was not relevant to determination of the pre-1973 attributes of the claims.

Likewise, the evidence showed that in dry water years, the need for Racetrack Lake water came earlier and in wet years it came later. *Jacobson Testimony at 10:34.06-10:35.11*. Again, the information remark accurately reflects this history.

Finally, the information remark accurately indicates that releases from Racetrack Lake have always lasted about 30 days.

Because the remark accurately reflects historical use of the three rights, the Court concludes the remark is not vague or ambiguous.

3. Is the information remark necessary for the effective administration of Racetrack Lake water rights?

CFC argues the information remark is not necessary for the effective administration of Racetrack Lake water rights.

Despite arguing that an information remark is not needed, CFC proposes its own remark to facilitate administration of water. CFC's proposed remark includes the following language: "THE CLAIMS MAY BE OPERATED AND MEASURED INDEPENDENTLY." CFC's Objection to Master's Report, p. 9. As support for this

remark, CFC cites evidence from the 1990s suggesting that its water right was used independently of the other two.

Evidence of post-1973 usage is not typically relevant to determination of the pre-1973 historical use of a right, and there is no reason to depart from this general rule here. The remark proposed by CFC is not consistent with the evidence of pre-1973 use of the rights at issue. Moreover, CFC's decision to propose its own remark supports the Master's conclusion that a remark is needed to fully describe the claims at issue and reduce future conflict over use of these claims.

VI. CONCLUSION

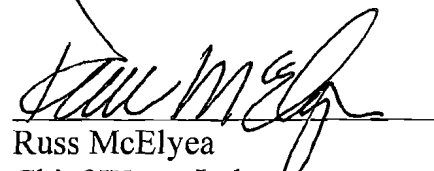
Upon review of the entire record, the Court finds that the addition of the information remark to claims 76G 91008-00, 76G 214587-00 and 76G 214588-00 is within the Court's authority, is not vague or ambiguous, and is necessary to adequately describe the historic use of the claims. The Court concludes that the Master's findings are supported by substantial evidence, that the Master has not misapprehended the effect of the evidence, and that no material mistake with respect to the findings has been made.

Conclusion of Law 14 in the Master's Report states that the Water Court has implied discretion to set period of use because of its statutory discretion to establish volume. This statement is incorrect. The Water Court's ability to establish the period of use for a water right is not implied, it is direct. Section 85-2-234(6)(h), MCA requires the Water Court to include "the inclusive dates during which water is used each year" in each of its final decrees. Accordingly, the Court does not adopt the first three paragraphs of Conclusion of Law 14 in the Master's Report.

Accordingly, it is

ORDERED that the Master's Report is ADOPTED IN PART.

DATED this 29 day of October, 2014.


Russ McElyea
Chief Water Judge

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