

Montana Water Court
PO Box 879
Bozeman, MT 59771-0879
1-800-624-3270 (In-state only)
(406) 586-4364

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BOULDER RIVER, TRIBUTARY OF THE JEFFERSON RIVER (41E)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND)
WITHIN THE BOULDER RIVER, TRIBUTARY OF)
THE JEFFERSON RIVER DRAINAGE AREA,)
INCLUDING ALL TRIBUTARIES OF THE)
BOULDER RIVER, TRIBUTARY OF THE)
JEFFERSON RIVER IN JEFFERSON COUNTY,)
MONTANA.)

CASE 41E-13
41E-W-094143-00

FILED

OCT 21 1993

Montana Water Court

CLAIMANT: Edward K. and Margy B. McCauley

ON MOTION OF THE WATER COURT

OBJECTOR: Edward McCauley

ORDER DISMISSING LATE NOTICE OF INTENT TO APPEAR

On September 8, 1993 claimants Emmett J. and Margy B. McCauley filed a Motion to Disqualify Expert Witness and to Dismiss Tom Carey Cattle Company as a Party. The Court issued a Scheduling Order and the parties submitted briefs on the Motion. After careful consideration of the briefs filed, the Court concludes that further argument is not necessary, and it is hereby

ORDERED that the claimants' Motion to Dismiss Tom Carey Cattle Company as a Party is GRANTED for the reasons set forth in the accompanying Memorandum.

MEMORANDUM

The extended deadline for filing objections to the Basin 41E Temporary Preliminary Decree was established as December 17, 1985. Pursuant to this deadline, the claimants of water right

claim 41E-W-094143-00, Emmett J. and Margy B. McCauley, filed an objection to the ownership, volume and flow rate of their claim appearing in the Temporary Preliminary Decree. The claim was also called in on Motion of the Water Court to clarify the volume, place of use, and ownership. The issues raised on Motion of the Court resulted from the Department of Natural Resources and Conservation identifying an overlap in the place of use claimed in this claim and in claim 41E-W-030884-00 during verification of these claims prior to issuance of the Temporary Preliminary Decree. After the Basin 41E objection list was made available to water users, on November 2, 1992 the Tom Carey Cattle Company filed a Notice of Intent to Appear with the Water Court indicating its intent to participate in the proceedings regarding claim 41E-W-094143-00.

The statutory basis for a Notice of Intent to Appear is found at § 85-2-233(4), MCA. The statute provides:

Upon expiration of the time for filing objections and upon timely receipt of a request for hearing, the water judge shall notify each party named in the temporary preliminary or preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in further proceedings must appear or file a statement. . . .

Section 85-2-233(4), MCA. (Emphasis added.) The Water Right Claim Examination Rules further describe the Notice of Intent to Appear. Rule 1.II(8) provides:

The written notice shall set a date on or before which parties who wish to participate further in any hearings or proceedings shall file in writing with the water court a notice of intent to appear and participate in such future hearings or proceedings.

Rule 1.II(8), Water Right Claim Examination Rules. The Notice described above was filed on September 30, 1987 in Basin 41E. The

deadline for parties to file a Notice of Intent to Appear was established as October 30, 1987. The Notice of Intent to Appear filed by Tom Carey Cattle Company was filed with the Court on November 2, 1987, 3 days after expiration of the deadline.

Tom Carey Cattle Company argues that it is within the discretion of the Court to allow the untimely Notice of Intent to Appear. It argues that the policy of the Court, as set forth in its recent decision in Basin 76M to allow parties to amend their objections, is to allow for resolution of as many issues regarding a particular claim as early as possible during the course of the adjudication. See Memorandum and Order Amending and Adopting Master's Report, Claim Nos. 76M-W-000494-00 and 76M-W-000495-00 (Montana Water Court May 17, 1993.) While this is the policy embraced by the Water Court, the decision to allow amendments to objections in the Basin 76M case does not apply. The threshold requirement for amendments to objections recognized in the Basin 76M case is that a timely objection was filed. Here the only timely pleading filed was an objection by the claimants themselves.

Tom Carey Cattle Company also argues that the doctrine of laches should apply to the claimants' Motion to Dismiss. "Laches is negligence in the assertion of a right; 'it exists when there has been unexplained delay of such duration or character as to render enforcement of the asserted right inequitable.'" Estate of Winter, 226 Mont. 24, 27, 734 P.2d 178 (1987), quoting Montgomery v. First National Bank of Dillon, 114 Mont. 395, 408-9, 136 P.2d 760-66 (1943). In this case, the parties advised the Water Court on several occasions that they would attempt to settle the issues regarding this water right claim as part of an ongoing settlement

process involving numerous claims and objections of both parties in Basin 41E. In light of these representations, the claimants cannot be characterized as negligent in filing their Motion to Dismiss at this time, nor can the delay in the filing of this Motion be characterized as unexplained. Laches does not apply.

Additionally, the Court notes that the facts presented here are nearly identical to those regarding the Notice of Intent to Appear filed by the McCauleys regarding claim 41E-W-030884-00. Claim 41E-W-030884-00 was also consolidated in this case. The Court dismissed a late Notice of Intent to Appear filed against that claim, owned by James Franchi, that was filed by the McCauleys on the same day as the Notice here. The reasoning applied by the former Water Master in dismissing that claim applies to this claim as well.

However, for claim 41E-W-030884-00 the Master directed the clerk to docket the late objection and late Notice of Intent to Appear at issue for disposition after the issuance of the preliminary decree. The filing of a Notice of Intent to Appear is essentially an intervention of right conferred by statute. See Rule 24(a)(1), M.R.Civ.P. After intervention, an intervenor's rights are as broad as those of other parties to the action. Burgess v. Hooks, 103 Mont. 245, 62 P.2d 228 (1936); Allman v. Potts, 140 Mont. 312, 371 P.2d 11 (1962). Generally, an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. Vinson v. Washington Gas light Co., 321 U.S. 489, 64 S.Ct. 731, 88 L.Ed. 883 (1944); 59 Am.Jur. 2d Parties § 173, p.

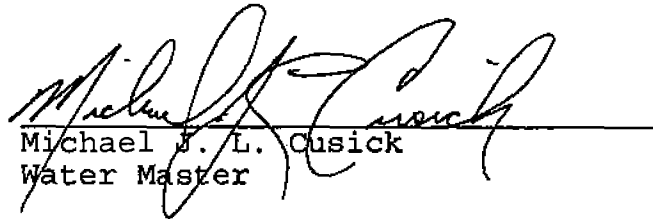
673; see also Master's Report, Water Court Case 43QJ-76 (Order Adopting issued March 18, 1982). For claim 41E-W-030884-00, there were specific issues raised by a late objection. In this case, the court cannot predict whether any party will file an objection to this claim after the issuance of the preliminary decree, and thereby raise issues in a case that would induce a third party to file a Notice of Intent to Appear. Therefore, the Court declines from automatically docketing the Notice of Intent to Appear for disposition after issuance of the preliminary decree. Tom Carey Cattle Company will have an opportunity to participate as an objecting party after issuance of the preliminary decree, or it may file a Notice of Intent to Appear if another party files an objection at that time.

Finally, although the late filing of Tom Carey Cattle Company's Notice of Intent to Appear denies it the opportunity to exercise its statutory right to intervene, it still has the right to seek permissive intervention according to Rule 24(b), M.R.Civ.P., or an intervention of right under Rule 24(a)(2), M.R.Civ.P. Nevertheless, intervention will not automatically be granted as a substitute for a late Notice of Intent to Appear simply in the interest of resolving issues at the Temporary Preliminary Decree stage. Intervention must be made in accordance with the Rules. No motion to intervene has been filed nor have the issues of intervention been fully briefed at this stage of the proceedings.

The Notice of Intent to Appear of the Tom Carey Cattle Company to claim 41E-W-094143-00 was not filed in a timely manner and is not properly before this Court. The facts and issues

raised by claimants' Motion have been clearly articulated and argued in the briefs submitted, rendering oral argument unnecessary. Tom Carey Cattle Company's request for oral argument is DENIED and claimants' Motion to Dismiss Tom Carey Cattle Company as a Party is GRANTED.

DATED this 21st day of October 1993.


Michael E. L. Cusick
Water Master

Edward K. & Margy McCauley
P.O. Box 393
Boulder, MT 59632

Emmett J. & Margy B. McCauley
P.O. Box 25
Boulder, MT 59632

Ted Doney, Attorney
P.O. Box 1185
Helena, MT 59624

Tom Carey Cattle Co.
P.O. Box 47
Boulder, MT 59632

Robert T. Cummins, Attorney
1 Last Chance Gulch
Helena, MT 59601