

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER BETWEEN THE TONGUE & POWDER RIVER BASIN (42K)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF)
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND)
WITHIN THE YELLOWSTONE RIVER BETWEEN)
THE TONGUE AND POWDER RIVERS DRAINAGE)
AREA, INCLUDING ALL TRIBUTARIES OF THE)
YELLOWSTONE RIVER BETWEEN THE TONGUE)
AND POWDER RIVERS IN ROSEBUD, CUSTER,)
GARFIELD AND PRAIRIE COUNTIES, MONTANA.)

CASE 42K-14
42K-W-040785-00

FILED

MAR 12 1993

Montana Water Court

CLAIMANT: Buffalo Rapids Irrigation District #2
United States of America (Bureau of Reclamation)

OBJECTOR: United States of America (Bureau of Reclamation)

MASTER'S REPORT

MEMORANDUM

STATEMENT OF THE CASE

The United States of America, Department of Interior, Bureau of Reclamation, filed Statement of Claim for Existing Water Rights 42K-W-040785-00 for irrigation purposes. The claim stated that the United States and Buffalo Rapids Irrigation District #2 were co-owners of this right.

This is a claim for irrigation water diverted at the Shirley Pumping Unit of the Buffalo Rapids Irrigation Project, a project constructed by the Bureau of Reclamation during the Depression. The Project consists of two divisions located along the Yellowstone River in eastern Montana from approximately 18 miles northeast of Miles City at the southern end to Glendive at the northern end. The Shirley Unit is one of three pumping units in the Project's second division. A 1938 Notice of Appropriation,

amended in 1940, claimed a total flow rate of 150 cfs for the Shirley Unit. However, the capacity of the pumps actually installed at the Unit was only 111 cfs, the flow rate originally claimed on the Statement of Claim.

The Project has continually experienced water shortages during periods of peak irrigation demand. The record indicates that shortages in the Shirley Unit were common due to a pump capacity inadequate for supplying the acreage irrigated. In 1979, an engineering firm retained by the Project concluded that the pumps were nearing the end of their useful life. They were replaced in 1982 and 1983 by pumps with a total capacity of 137 cfs.

After publication of the Preliminary Decree for this Basin, the Claimant United States filed two timely objections to this claim: a December 9, 1985, objection to acres irrigated and a March 17, 1986, objection to flow rate. No other objections or notices of intent to appear were filed concerning this claim. In its flow rate objection, the United States asserted that the correct flow rate of this claim is 137 cfs, the present pump capacity at the Shirley Unit, rather than the 111 cfs claimed and represented by the historical pump capacity. The United States also maintained that the increased flow rate of 137 cfs was within the original intent and scope of the project as reflected by the original filing.

On December 29, 1987, the Water Court issued an order requiring the United States to "submit such evidence to the Water

Court as objector deems necessary to sustain its contention that claimants proceeded with reasonable diligence in accordance with Montana water law to put a 137 cfs flow rate to beneficial use at the Shirley Pumping Unit." A copy of this order was also sent to Buffalo Rapids Irrigation District, the co-owner of this claim.

On February 26, 1988, the United States submitted evidence to support its argument that Claimants proceeded with reasonable diligence to appropriate the amount of water claimed in the original filing. The United States also presented evidence resolving the acres irrigated issue. The evidence on reasonable diligence set forth by the United States demonstrated that each of the original three pumps installed at the Shirley Unit had an individual capacity of 37 cfs, and a combined capacity of 111 cfs. The first two pumps were installed in 1942 and 1943, the third in 1948. Project histories indicated that some materials could not be obtained for the Shirley Unit due to wartime shortages. However, these histories did not specifically reflect that smaller capacity pumps were installed as a result of these shortages, or that larger pumps with a capacity closer to the flow rate claimed were unavailable.

Based on the evidence presented by the United States in response to the Water Court's Order, the Water Master found "no evidence in either the documentation submitted . . . or in the Water Court record . . . that Claimants made any efforts between the years 1948 and 1977 toward constructing diversion works at the Shirley Unit capable of diverting in excess of 111 cfs." (Finding

of Fact No. 10, Master's Report filed April 17, 1989). The Master concluded that the evidence merely demonstrated a recognition that the 111 cfs pump capacity was insufficient; the evidence did not demonstrate any ongoing, steady application of effort to increase capacity that would constitute reasonable diligence. Thus, the Master concluded that the additional flow rate of 26 cfs (the difference between historic and present pump capacity) did not relate back to the Notice of Appropriation. (Conclusions of Law Nos. VII and VIII, Master's Report filed April 17, 1989).

On May 15, 1989 the Claimant Irrigation District objected to these findings and conclusions. The Irrigation District did not object to the Master's findings and conclusions regarding acres irrigated. In addition to the objections to the Master's Report, the Irrigation District requested that the Court receive further evidence on reasonable diligence pursuant to Water Rights Claims Examination Rule 2. The Irrigation District alleges that the United States failed to fully develop the evidence of reasonable diligence. The United States has chosen not to pursue the matter further. On May 15, 1989 Chief Water Judge W. W. Lessley issued an order advising that a Water Master would set, hear and decide this case subject to the supervision of the Court.

A hearing on the objections to the Master's Report was scheduled for January 29, 1990 before Water Master Kathryn L. W. Lambert. The Court file indicates that prior to the hearing date, counsel for the Irrigation District contacted the Water Court and indicated that the District chose to rest on its brief in support

of its objections and the additional evidence submitted therewith. On November 10, 1993 the case was referred to the current Water Master.

DISCUSSION

The evidence upon which the first Master based his initial decision in this case consisted solely of the evidence submitted by the United States pursuant to the Court's December 29, 1987 order. The evidence indicated that the three pumps originally installed at the Shirley Unit had a capacity less than that set forth in the Notice of Appropriation, and that due to wartime shortages some materials needed for construction were not available. There was no direct evidence that the installation of pumps capable of pumping the 150 cfs filed for was foregone because of the war effort. Nor was there any evidence that the Bureau intended to install larger pumps once such pumps were available and after the useful life of the original pumps had expired. In short, the evidence submitted by the United States in support of its contention that it exercised reasonable diligence in expanding the facility from a 111 cfs to a 137 cfs capacity was speculative. As the first Master noted in his April 17, 1989 report, mere recognition that the historic 111 cfs capacity was insufficient and created shortages, absent ongoing efforts to increase capacity, does not constitute reasonable diligence.

The additional evidence now offered by the Irrigation District consists of a 1948 Project History, correspondence regarding construction of the project, correspondence and memoranda

regarding the need for improvements, and the Affidavit of the Project Manager. The additional Project History from 1948 submitted by the District describes this claim as a 150 cfs right. The District contends that this History allows an inference that the Bureau still intended a diversion of this magnitude. Like the United States, the District argues that it "is possible" that war-related shortages resulted in smaller pumps being installed in the Shirley Unit.

Much of the District's remaining "additional evidence" pertains to chronic water shortages in both divisions of the Project. This includes the Affidavit of the Project Manager, stating that upgrading the units of the second division (including the Shirley Unit) was subordinated to upgrading the units of the Project's first division.

The law governing appropriations by the United States for its reclamation projects at the time this appropriation was made is codified at § 89-808 Rev. Codes Mont. (1947). This section, first enacted in 1905, provides:

89-808. (7099) Appropriation by the United States. The government of the United States may, by and through the secretary of the interior, or any person by him duly authorized to act in that behalf, appropriate the water of streams or lakes within the state of Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals; provided such appropriation shall be held valid for the period of three years after the filing of the notice of appropriation thereof in the office of the county clerk and recorder of the appropriate county, but such appropriation shall be null and void after the period of three years unless, prior to the expiration of such period, the work of constructing the canal or ditch by which the same is to be diverted shall have been commenced; provided further, that if at

any time prior to the expiration of the aforesaid period of three years the secretary of the interior, or a person by him duly authorized to act in the premises, files a notice with the county clerk and recorder in the county in which the original appropriation notice was filed, announcing an abandonment by the government of the United States of the irrigation project for which the water was appropriated, then and in that event the appropriation shall become null and void.

Section 89-808 Rev. Codes Mont. (1947). Section 89-811 Rev. Codes Mont. (1947) sets forth the general rule on diligence. The statute provides:

89-811. (7101) Diligence in appropriating. Within forty days after posting such notice, the appropriator must proceed to prosecute the excavation or construction of the work by which the water appropriated is to be diverted, and must prosecute the same with reasonable diligence to completion. If the ditch or flume, when constructed, is inadequate to convey the amount of water in the notice aforesaid, the excess claimed above the capacity in the ditch or flume shall be subject to appropriation by any other person, in accordance with the provisions of this chapter.

Section 89-811 Rev. Codes Mont. (1947). When read together, these statutes provide an exception to the general forty day rule for commencing construction of diversion works. The exception applies to appropriations made by the United States for its irrigation projects. The first statute clearly limits the time for commencing construction of such projects to three years after the filing of a notice of appropriation in order for the priority date of the appropriation to relate back to the initial posting of the notice at the intended point of diversion. See § 89-810 Rev. Codes Mont. (1947). Otherwise, the United States was required to proceed in making appropriations of water in the same manner as any other corporation or individual. Bailey v. Tintinger, 45 Mont. 154, 177, 122 P. 575 (1912). Once construction of the project had commenced the United States was subject to the same rules of

reasonable or due diligence that apply to individual and corporate appropriators. See § 89-811 R.C.M. (1947) [§ 7101 R.C.M. 1921]; Department of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416, 558 P.2d 1110 (1976); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912).

What constitutes due diligence is a factual question to be determined on a case by case basis:

Diligence does not require unusual or extraordinary effort, but it does require a steady application of effort -- that effort that is usual, ordinary, and reasonable under the circumstances. . . . So long as the applicant prosecutes the construction of works in good faith with a steady effort, he should be held to have prosecuted with diligence. (Emphasis added.)

Intake, 171 Mont. at 434, quoting Clark, Waters and Water Rights, Vol. 6 §514.1, p. 308, 309. Thus, actual use of the water need not be immediate, but may be prospective and contemplated. "Actual use was represented only by a bona fide intention; it did not have to be immediately accomplished to create a right; but the flow could be held for future needs; nonuse was immaterial unless it was accompanied with an actual intent to permanently abandon the possession." Bailey, 45 Mont. at 173-74, quoting 1 Weil on Water Rights in the Western States §133.

The Statement of Claim for Existing Water Rights filed by the Bureau claimed a flow rate of 111 cfs, the historic pumping capacity of the Shirley Unit. Pursuant to § 85-2-227, M.C.A. such claim constitutes prima facie proof of its content for purposes of adjudicating rights. Even after addition of the "new" evidence submitted by the Irrigation District to the record, the claimants have still failed to overcome this prima facie status with evidence that would support a finding of due diligence.

The record submitted by the District fails to demonstrate a steady application of effort or a bona fide intent on behalf of the claimants. It merely emphasizes that the Shirley Pumping Unit as originally constructed was inadequate, and that some of these inadequacies may have been due to war-related shortages. In this regard, the "additional" evidence is cumulative of the evidence submitted earlier by the Bureau. And like the evidence submitted earlier by the Bureau, this additional evidence is speculative on the issue of reasonable diligence. The addition of cumulative evidence of a speculative nature lends no credence at all to the claimants' arguments.

Furthermore, the Irrigation District's argument that the claimants never relinquished the intent to fully develop the right is without merit. Without a showing of due diligence in the construction of the diversion works, the claimants had nothing to relinquish. Moreover, absent evidence of a bona fide intention to use the full amount claimed in the original filing sufficient to overcome the prima facie proof contained in the Statement of Claim, lack of evidence of an intent to abandon the additional flow rate is irrelevant. As the evidence in the record is insufficient to indicate that the claimants had a bona fide intent to perfect the additional 26 cfs flow rate claimed, the claimants had no additional flow rate to abandon.

Upon review of the record, the arguments of the Irrigation District regarding reasonable diligence, although plausible, are speculative at best. The claimants have failed to meet their burden by presenting evidence of reasonable diligence sufficient to overcome the prima facie status of the claim as

filed.

Based on the foregoing discussion, the Court makes the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT

1. The United States of America, Department of the Interior, Bureau of Reclamation and Buffalo Rapids Irrigation District #2 filed Statement of Claim for Existing Water Rights 42K-W-040785-00 for 111 cubic feet per second of water with a priority date of June 17, 1938 diverted from the Yellowstone River for irrigation purposes.

2. On December 9, 1985 the United States filed an objection to the acres irrigated appearing in the preliminary decree of this claim. In its objection the United States alleged that the preliminary decree listed an incorrect number of acres irrigated in parcels 001 and 011, and that parcel 001 should be reduced from 10.7 acres to 4.4 acres and that parcel 011 should be increased from 2.4 acres to 8.7 acres.

3. During the second status conference held in Case 42K-14, Marty Van Cleve, water rights specialist with the Department of Natural Resources and Conservation stated that the acreage changes proposed by the United States are not in disagreement with the acreage figures found during examination of this claim. Although no sworn testimony was entered into the record regarding these acreage changes, the Court, in its initial Master's Report dated April 17, 1989, recommended that these changes be made to the abstract of this claim. The claimants, while having filed objections to other findings and conclusions contained in the April

17, 1989 Report, did not object to the findings and conclusions of the Court regarding the acres irrigated of these two parcels.

4. The flow rate of water right claim 42K-W-040785-00 appearing in the preliminary decree is 111.00 cfs, the flow rate originally claimed. On March 17, 1986 the United States Bureau of Reclamation filed a second objection to this claim, seeking to amend the claimed flow rate of 111.00 cfs to 137.00 cfs, the present capacity of the Shirley Unit Pumping Plant. No other parties have filed an objection or Notice of Intent to Appear regarding this claim.

5. On December 29, 1987 the Water Court ordered the United States to "submit such evidence to the Water Court as objector deems necessary to sustain its contention that claimants proceeded with reasonable diligence in accordance with Montana water law to put a 137 cfs flow rate to beneficial use at the Shirley Pumping Unit." On February 26, 1988 the United States filed Documents in response to the Court's Order. Based on the evidence submitted at that time, this Court concluded that the United States had failed to demonstrate reasonable diligence.

6. On May 15, 1989 the co-claimant Irrigation District objected to the Court's conclusions regarding reasonable diligence. Additionally, the Irrigation District alleges that the United States failed to fully develop the evidence of reasonable diligence and requested that the Court receive further evidence on this issue.

7. As discussed in the foregoing Memorandum, the record as developed by the co-claimants the United States and the Irrigation District is speculative with respect to the issue of

diligence and is therefore insufficient to support a finding that the claimants exercised reasonable diligence in expanding the Shirley Pumping Unit from a capacity of 111 cfs to 137 cfs.

CONCLUSIONS OF LAW

I.

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

II.

Upon review of the additional evidence submitted by the Irrigation District it appears to be relevant and is hereby admitted.

III.

However, this Court's review of this evidence, in addition to the evidence originally submitted by the United States and viewed in the light most favorable to the Claimants, indicates that the new evidence adds no credence to the claimants' arguments. The evidence submitted fails to demonstrate that the claimants prosecuted the construction of facilities capable of pumping 137 cfs with reasonable diligence. The record does not demonstrate an ongoing, steady application of effort between 1948 and 1977 for construction of increased diversion capacity at the Shirley Pumping Unit, nor does it demonstrate that the claimants had a bona fide intent to perfect the additional 26 cfs flow rate now claimed sufficient to overcome the prima facie status of the 111 cfs originally claimed.

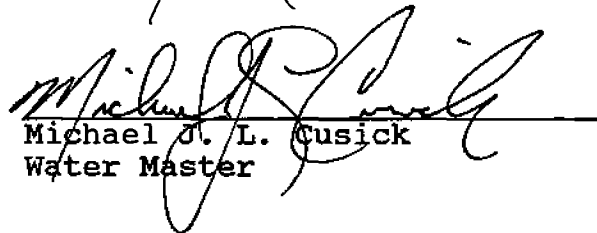
IV.

Because the record does not support a finding of reasonable diligence, the United States should not be permitted to relate back the additional 26 cfs to the 1938 Notice of Appropriation filed by Buffalo Rapids Irrigation District. In order to benefit from relation back, the appropriator must comply with the statutory scheme. Section 89-811 Rev. Codes Mont. (1947) [§ 7101 R.C.M. 1921]; Bailey, 45 Mont. 154, 122 P. 575 (1912). The flow rate for claim 42K-W-040785-00 should remain unchanged at 111 cfs.

V.

The changes to acres irrigated stated in Findings of Fact Nos. 2 and 3 should be made to correct the Preliminary Decree in the Yellowstone River Basin Between Tongue River and Powder River, Basin 42K.

DATED this 12th day of March, 1993.


Michael J. L. Cusick
Water Master

CERTIFICATE OF SERVICE

I, Lori M. Burnham, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

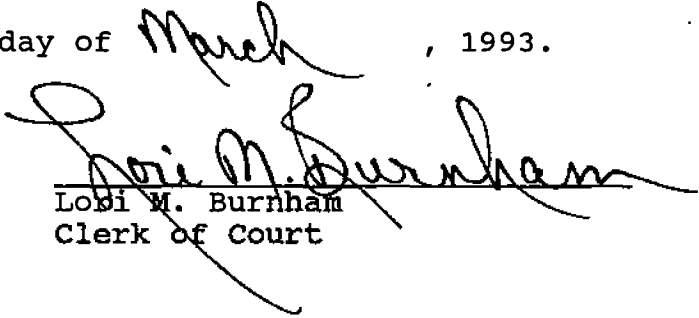
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DATED this 12 day of March, 1993.


Lori M. Burnham
Clerk of Court