

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN (43B)
* * * * *

IN THE MATTER OF THE ADJUDICATION OF) CASE 43B-60
THE EXISTING RIGHTS TO THE USE OF ALL)
THE WATER, BOTH SURFACE AND UNDERGROUND,) 43B-W-008955-00
WITHIN THE YELLOWSTONE RIVER ABOVE AND)
INCLUDING ALL TRIBUTARIES OF THE)
YELLOWSTONE RIVER ABOVE AND INCLUDING)
BRIDGER CREEK IN GALLATIN, PARK, SWEET)
GRASS AND STILLWATER COUNTIES, MONTANA.)

FILED

DEC 28 1992

Montana Water Court

CLAIMANT: Frank E. Ashley and Mary J. Ashley (Former Owners)
Charles B. Hubbard and Janice D. Hubbard (Present Owners)

OBJECTOR: Frank E. Ashley, Maryanne Mott

MASTER'S REPORT

FINDINGS OF FACT

1. Frank E. Ashley objected to the number of acres irrigated on this Frank E. Ashley and Mary J. Ashley irrigation claim 43B-W-008955-00.

2. Maryanne Mott objected to the existence of the right, ownership, flow rate, volume and priority date.

3. Frank E. Ashley filed a Notice of Intent to Appear.

4. On May 26, 1987 a Water Right Transfer Certificate was filed recording the transfer of this claim from Frank E. Ashley and Mary J. Ashley to Charles B. Hubbard and Janice D. Hubbard.

5. On June 27, 1990 Charles Hubbard, Janice Hubbard and Maryanne Mott filed a Stipulation and Withdrawal of Objection which specifies a change to the priority date.

6. There was a Decree entered in 1938 and a Supplemental Decree entered in 1969 of the water rights on Tom Miner Creek. This right which was appropriated in the late 1950's or early

1960's was not included in the Supplemental Decree.

7. The Temporary Preliminary Decree states that the priority date is April 15, 1961.

8. The priority date should be June 1, 1970.

9. On July 31, 1990 Frank Ashley and Mary Ashley filed a Withdrawal of Objection.

10. The acres irrigated, ownership, volume and flow rate do not require change.

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.

Section 89-829-R.C.M. (1957), entitled Procedure for appropriating water of adjudicated streams, states that one desiring to appropriate waters from a previously adjudicated source shall file a petition with the Court which issued the prior decree. This statute also specifies other requirements concerning the petition filing.

III.

The petition process set out in Section 89-829 R.C.M. (originally enacted in 1921) is the exclusive method of acquiring a water right on an adjudicated stream. Anaconda Nat. Bank v. Johnson et al., 75 Mont. 401, 244 P. 141 (1926). However Section 89-837 (1921) provides some relief for those who fail to use the

petition process. It states:

89-837. (7126) Penalty for noncompliance with act. Failure to comply with the provisions of this act deprives the appropriator of the right to use any water of such stream, or other source of supply, as against any subsequent appropriator mentioned in or bound by a decree of the court.

"[T]his act" refers to the act originally passed in 1921. Section 89-829 was section 4 of that act and Section 89-837 was section 11.

The claimants have specified a change in their priority date so that it is junior to all the rights in the Supplemental Decree. This removes the opportunity for anyone in the Supplemental Decree to be deprived of his water right.

IV.

Upon review of the Stipulation and Withdrawal of Objection, it appears that the change to priority date specified by this Stipulation is proper and is accepted by this Court.


V.

The priority date should be changed from April 15, 1961 to June 1, 1970.

VI.

The change states in the Findings of Fact should be made to correct the Temporary Preliminary Decree in the Yellowstone River Above and Including Bridger Creek Basin (43B).

DATED this *21* day of *December*, 1992.


Kathryn L. W. Lambert
Senior Water Master

CERTIFICATE OF SERVICE

I, Judith A. Salvas, Deputy 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.

Frank E. & Mary J. Ashley
426 S. 7th
Livingston, MT 59047

Maryanne Mott
P. O. Box 670
Emigrant, MT 59027

Charles B. & Janice D. Hubbard
Route 1, P. O. Box 657
Emigrant, MT 59027

David Pengelly, Attorney
P. O. Box 8957
Missoula, MT 59807

Sarah Nash Zimmer, Attorney
P. O. Box 1330
Bozeman, MT 59715

DATED this *28th* day of *December*, 1992.



Judith A. Salvas
Deputy Clerk

any party in their assertion of beneficial historic or current use of water in accordance with the laws of the State of Montana.

5. This Stipulation was entered into and executed voluntarily by Claimants and Objectors in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.

6. When the above changes are made part of the Temporary Preliminary and all subsequent Decrees and so long as the above listed changes are incorporated into said Decrees, the Notice of Objection of Maryanne Mott shall be deemed to have been withdrawn.

Dated this 25 day of ~~April~~^{JUNE}, 1990.



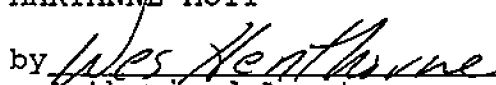
CHARLES HUBBARD



JANICE HUBBARD

Dated this 25 day of ~~April~~^{June}, 1990.

MARYANNE MOTT

by 

Authorized Agent