

Montana Water Court
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Montana Water Court

MONTANA WATER COURT, UPPER MISSOURI DIVISION
SMITH RIVER - BASIN 41J

CLAIMANT: Dana Ranch Co. Inc.

OBJECTORS: David G. Cameron;
State of Montana Attorney General

CASE 41J-265
41J 193435-00
41J 193437-00
41J 193438-00
41J 193440-00
41J 193444-00
41J 193447-00
41J 195251-00

**ORDER DENYING MOTIONS TO AMEND,
ADDING THE MONTANA ATTORNEY GENERAL AS A PARTY, AND
ORDER SETTING SCHEDULING CONFERENCE**

I. BACKGROUND

This case involves seven irrigation claims filed by Dana Ranch Co. Inc. (Dana Ranch). Each claim received issue remarks stating that the water resources survey or aerial photographs showed no irrigation.

David G. Cameron filed objections to these claims. Mr. Cameron was president of Dana Ranch at the time the objections were filed. The objections stated "I agree with the DNRC Issue Remarks showing zero acres irrigated." The Water Court treated Mr. Cameron's objections as withdrawals of Dana Ranch's water rights.

Prior to issuance of the Water Court's decision, Dana Ranch was sold. The new owners asserted that Cameron's objections were not withdrawals, and asked that its claims be reinstated. The Water Court granted that request and ordered Dana Ranch to meet with the DNRC to resolve issue remarks attached to Dana Ranch's water rights.

The Water Court also directed the DNRC to file a memorandum containing its recommendations regarding those issue remarks.

The DNRC filed its memorandum on October 30, 2015. Submitted with the DNRC's memorandum were motions to amend prepared by Dana Ranch. Two of those motions requested conversion of irrigation claims to stock water rights. Two motions requested modifications to flood irrigation claims. Three motions requested conversion of flood irrigation claims to claims for natural subirrigation.

II. ISSUES

1. Has Dana Ranch provided enough evidence to meet the burden of proof applicable to motions to amend a water right claim?

III. ANALYSIS

Motions to amend water rights are authorized by Section 85-2-233(6), MCA and by Rule 10, W.R.Adj.R. A party seeking to amend its water right has the same burden of proof as an objector. That burden requires a showing by a preponderance of the evidence that the elements originally claimed for a water right are incorrect. *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558. Parties seeking to amend water rights typically rely on facts showing a pattern of historical beneficial use that differs from, and justifies modifications to, the original claim.

Claim 41J 193435-00

Dana Ranch has filed a motion to amend this claim from an irrigation right to a stock right. According to materials attached to the motion, the point of diversion for the proposed stock water right is in the NWSWSW of Section 30, T15N, R3E. The means of conveyance is a headgate and pipeline, which terminates at a stock tank constructed from a tire. The source is identified as an unnamed tributary of Trout Creek.

The original irrigation claim filed by Dana Ranch differs from the stock right proposed in its recent motion to amend. The irrigation claim identifies the source as Robertson Coulee, a tributary of Trout Creek. The point of diversion is in the in NESWSW of Section 30, not the NWSWSW. There is no evidence indicating when the change in point of diversion requested in the motion to amend occurred, and the original

irrigation claim is supported by a notice of appropriation which does not mention utilization of a pipeline for stock water. Both the irrigation claim and the notice of appropriation reference diversion by means of a ditch.

The original irrigation claim contains the following sworn statement: "the contents of this claim and the matters and things stated there are true and correct." The claim was signed by David G. Cameron, President of Dana Ranch. The notice of appropriation upon which the claim was based was signed by Bessie J. Robertson, who also swore under oath that the contents of the notice of appropriation were true. Neither Cameron nor Robertson referenced the stock water right now described in the Dana Ranch motion to amend.

The motion to amend contains a statement by David Killam, the current president of Dana Ranch, stating that the information contained in the verified motion to amend is true.

The motion to amend does not state when usage of the proposed stock water right began. There is no information connecting usage of the stock water right with the underlying irrigation right, and no flow rate identified for the proposed stock right.

The priority date for the underlying irrigation right is June 1, 1903. There is no evidence that diversion of stock water using the headgate, pipeline, and stock tank described in the motion to amend began on that date.

The stock water right requested in the motion has a separate point of diversion, a separate means of conveyance, and a separately constructed stock tank. There is no indication any of these features were built when the underlying irrigation water right was appropriated. Likewise, there is no indication any of these features were used to divert or deliver water in connection with the underlying irrigation right.

The information supplied by Dana Ranch falls short of the preponderance of evidence standard imposed upon a party seeking to amend their water right. On this basis alone, denial of the motion to amend is appropriate.

There is, however, an additional reason to reject Dana Ranch's motion. Montana imposed a deadline for filing water right claims in its general adjudication. That deadline

was April 30, 1982. Failure to file a claim resulted in a conclusive presumption that the unfiled water right was abandoned. § 85-2-212, MCA. Although the Legislature subsequently provided for remission of forfeiture for claims filed before July 1, 1996, Dana Ranch did not file its stock water right before either deadline.

Some types of water rights were exempt from the claim filing deadlines. Among these were water rights for livestock and individual uses based upon instream flow or ground water sources. The stock right asserted by Dana Ranch is not an instream flow right or a ground water right. Accordingly, it does not fall within the class of claims exempted from the filing deadlines.

Motions to amend are intended to provide water right claimants with an opportunity to modify the elements of a previously filed water right. They are not intended to enable claimants to obtain water rights that were not timely filed.

Here, Dana Ranch is asking to substitute a previously unclaimed stock water right for an irrigation right it appears to concede is invalid. Granting this request would circumvent the claim filing deadline imposed by statute.

In summary, Dana Ranch has not supplied sufficient information to meet the preponderance of evidence standard applied to motions to amend. Moreover, it is not seeking to amend a claim, but to have a separate and previously unfiled claim recognized. For these reasons, Dana Ranch's motion to amend claim 41J 193435-00 is denied.

Claim 41J 193438-00

Dana Ranch has also filed a motion to amend claim 41J 193438-00 from an irrigation right to a stock water right. There are differences between this motion and the one discussed above.

Here, the stock right is based upon livestock watering directly from a stream. Such rights were exempt from the claim filing deadline imposed upon other water rights by statute. Again however, Dana Ranch is using the amendment process in an effort to obtain a previously unfiled water right.

In 2013, the Legislature created a process for filing exempt claims. § 85-2-222, MCA. Dana Ranch may use this process if it wants to claim an unfiled exempt stock

right. It may not use the amendment process for that purpose, and its motion to amend is accordingly denied.

Claim 41J 193444-00

This claim was originally filed by Dana Ranch for a flood irrigation right on the North Fork of Allen Creek, otherwise known as Fourteen Creek. The claim was filed for 300 gallons per minute for irrigation of 34 acres with a priority date of May 15, 1894. The claim was based on a notice of appropriation filed by S.E. Jameson.

The motion to amend seeks to add an additional point of diversion and to correct the place of use.

In support of this amendment, Dana Ranch supplied copies of aerial photographs taken in 1957 and 1966. These photographs do not show significant irrigation on the requested place of use. The DNRC reviewed these photographs as part of its memorandum to the Water Court. Although the DNRC memorandum indicates that a ditch system may be present in part of the place of use, the memorandum also states that “most of the land claimed as the place of use for this right in the proposed amendment does not appear to be irrigated.” DNRC Memorandum, at 4, October 30, 2015.

One issue remark stated that field notes associated with the 1960 Cascade County Water Resources Survey indicate that 0.00 acres were irrigated with this water right. Another states that an aerial photograph taken in 1977 appears to indicate that 0.00 acres were irrigated. This lack of irrigation is consistent with the lack of irrigation shown on the 1957 and 1966 photos supplied by Dana Ranch.

The claim file for this water right contains a claimant contact record prepared by the DNRC (record). The person who prepared the record was Mary Guokas. Ms. Guokas met with Mr. David Cameron, President of Dana Ranch, on June 6, 2006. According to the record, Mr. Cameron seemed to know Dana Ranch well, and mentioned that “generally, irrigation water rights had not been used since a flood in the 1950’s [sic].” Claim File 41J 193444-00, Record at 1. Mr. Cameron also asked DNRC personnel the length of time a person could not use a water right and still keep it active. Claim File 41J 193444-00, Record at 1.

The Dana Ranch motion to amend does not contain sufficient information to support the requested changes to this water right. Likewise, the record provided does not address issue remarks suggesting nonuse and potential abandonment of this claim. The proposed amendment does not contain sufficient information to explain apparent nonuse of this water right since the 1950s. Absent such evidence, there is no basis for removal of issue remarks regarding nonuse.

The motion to amend claim 41J 193444-00 is denied and the issue remarks will remain in place.

Claim 41J 195251-00

The motion to amend this right seeks to change the place of use and add a point of diversion. The analysis for this claim is similar to that for claim 41J 193444-00. While there may have been irrigation recently occurring in connection with this right, the record suggests a long period of nonuse, or partial use.

The motion to amend claim 41J 195251-00 is denied and the issue remarks will remain in place.

Claims 41J 193437-00, 41J 193440-00, and 41J 193447-00

Dana Ranch has asked that three of its rights be converted from flood irrigation to natural subirrigation. Natural subirrigation is “a naturally occurring high water table condition that supplies water for crop use.” Rule 2(a)(44), W.R.C.E.R.

The requested shift to natural subirrigation has two potential consequences. First, it suggests that the underlying flood irrigation rights were either never perfected, or were abandoned. Second, the claimants are requesting recognition of a property interest arising from a natural event caused without human intervention. Although a man-made diversion is not a prerequisite for all water rights, Montana law requires intent to appropriate, communication of adequate notice of that intent, and actual beneficial use. *In re Adjudication of Existing Rights to the Use of all Water*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396. The Dana Ranch motion to amend does not address these criteria using evidence developed prior to July 1, 1973.

The present factual record is inadequate to support conversion of Dana Ranch's flood irrigation rights to natural subirrigation. As an example, there is no information indicating how or when such rights were perfected, which leaves the correct priority for such rights undefined. There is no information indicating how such rights might be quantified, if at all. And finally, aerial photos cast doubt about whether subirrigation has occurred as asserted by the claimant.

The motions to amend claims 41J 193437-00, 41J 193440-00, and 41J 193447-00 are denied and the issue remarks on these claims shall remain in place.

IV. RESOLUTION OF ISSUE REMARKS

All of the claims in this case have unresolved issue remarks regarding abandonment. The information in the claim files, including aerial photographs, the objection by Cameron, and the DNRC's memorandum all suggest protracted periods of nonuse.

The process used to address unresolved issue remarks involving nonperfection or abandonment of a water right is provided by statute. Section 85-2-248(7)(a), MCA provides:

If an unresolved issue remark involves nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. The water court shall notify the attorney general of the joinder.

In accordance with Section 85-2-248(7)(a), MCA, the Water Court is joining the Montana Attorney General as a party to this case. The purpose of this joinder is to assist the Court with resolution of the issue remarks attached to these claims.

V. ORDER


1. Dana Ranch's motions to amend are DENIED.
2. The State of Montana, through the Attorney General, is joined as a party to this action. The clerk of the Water Court is directed to provide notice of this joinder to the Montana Attorney General.

3. A telephonic scheduling conference will be held in this case at **10:00 a.m. on January 7, 2016**. The instructions for accessing the call are as follows:

1. At the designated conference time dial the toll free telephone number:
1-877-526-1243
2. At the prompt, enter the participant pin code followed by the pound (#) key:
7685196#.
3. At the prompt state your name followed by the pound (#) key.

If you have any questions or if you experience problems placing this call you may contact the Water Court at 1-800-624-3270 (in state) or (406) 586-4364.

DATED this *15* day of *December*, 2015.



Russ McElyea
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