

Montana Water Court
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FILED

JUL 14 2015

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION SHOSHONE RIVER - BASIN 43N

CLAIMANT: S E Investments

OBJECTORS: Apsaalooke (Crow) Tribe; United States of
America (Bureau of Indian Affairs)

ON MOTION OF THE MONTANA WATER COURT

CASE 43N-4
43N 185501-00

ORDER AMENDING AND ADOPTING MASTER'S REPORT

BACKGROUND

Claim 43N 185501-00 received issue remarks during claims examination by the DNRC and objections from the Crow Tribe and the United States of America, Bureau of Indian Affairs (BIA). In May 2015, the claimants, the Tribe, and the BIA filed a Stipulation with the Water Court, which resolved the Objectors' concerns about claim 43N 185501-00 and the issue remarks associated with the claim.

The Water Master recommended that the Stipulation be accepted by the Court with one exception. The parties requested that the type of historical right for claim 43N 185501-00 be changed from "Reserved" to "Walton Right." The Master recommended that the type of right continue to be identified as Reserved pursuant to the Order Rejecting Master's Report, Order Approving Stipulation, and Order Closing Case in Case 43O-8, January 15, 2015 ("case 43O-8 Order").

Also pursuant to the Order in case 43O-8, the Master recommended the addition of the following information remarks:

THIS WATER RIGHT IS A WALTON RIGHT.

THIS WATER RIGHT IS NOT PART OF THE TRIBAL WATER RIGHT AS DEFINED IN THE CROW COMPACT.

The Crow Tribe and the BIA object to the Master's Report to the extent it denied the parties' request to change the type of right from Reserved to Walton. They argue that "the general term, 'Reserved right', lacks specificity and may cause unwanted confusion." United States' and Crow Tribe's Objection, 2. The Crow Tribe and the BIA request that the Court modify the listed type of historical right to indicate its unique Walton right status, or in the alternative, that the information remark identifying the right as a Walton right be moved closer to the abstract's type-classification section.

ANALYSIS

Although Walton rights are derived from *Winters* rights, they are not the same. As stated in the case 43O-8 Order,

The difference between *Walton* rights and *Winters* rights, as explained by the Ninth Circuit in *Anderson*, is that there are two significant restrictions on *Walton* rights. "The first restriction is that the non-Indian successor's right to water is limited by the number of irrigable acres of former reservation lands that he owns. The second restriction may be simply expressed as: use it or lose it."

Case 43O-8 Order. P.4 (quoting *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) (internal quotation marks omitted) (citing *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied* 454 U.S. 1092 (1981)).

The United States Supreme Court recently noted:

What may be true of happy families, L. Tolstoy, *Anna Karenina* 1 (R. Pevear and L. Volokhonsky transls. 2000) ("All happy families are alike"), or of roses, G. Stein, *Sacred Emily*, in *Geography and Plays* 178, 187 (1922) (reprint 1968) ("Rose is a rose is a rose is a rose"), does not hold true in elections of every kind.

Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1675 (2015).

Likewise, what may be true of happy families or of roses does not hold true for Reserved rights. While it is true that a *Walton* right is a Reserved right, *Walton* rights and *Winters* rights are distinct from each other.

Therefore, the type of historic right for claim 43N 185501-00 will continue to be identified as Reserved. However, the Court appreciates the potential for miscommunication or conflict if *Walton* rights are not distinguished from *Winters* reserved rights. To prevent confusion, the information remark identifying claim 43N 185501-00 as a *Walton* right will be moved to the first page of the abstract and located directly under the type of right classification.

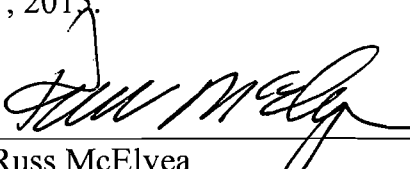
Accordingly, it is

ORDERED that the abstract for claim 43N 185501-00 is amended as described above;

ORDERED that the Master's Report is ADOPTED as amended by this Order; and

ORDERED that case 43N-4 is CLOSED.

DATED this 14 day of July, 2015.



Russ McElyea
Chief Water Judge

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SHOSHONE RIVER
BASIN 43N
IMPORTANT NOTICE**

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 43N 185501-00 RESERVED CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners: S E INVESTMENTS
PO BOX 165
DEAVER, WY 82421

Priority Date: MAY 7, 1868

Type of Historical Right: RESERVED

THIS WATER RIGHT IS A WALTON RIGHT.

THIS WATER RIGHT IS NOT PART OF THE TRIBAL WATER RIGHT AS DEFINED IN THE CROW COMPACT.

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 1.20 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 2 - MODERATELY HIGH

***Maximum Acres:** 31.70

Source Name: SAGE CREEK

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
*1		SWSESE	11	7S	25E	BIG HORN

Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

*2		W2NWNW	13	7S	25E	BIG HORN
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Period of Diversion: MAY 1 TO OCTOBER 31

Diversion Means: HEADGATE

Period of Use: MAY 1 TO OCTOBER 31

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	10.00		SWNW	11	7S	25E	BIG HORN
2	3.70		SENESE	11	7S	25E	BIG HORN
3	14.70		W2SE	11	7S	25E	BIG HORN
4	3.30		SWSESE	11	7S	25E	BIG HORN
Total:	31.70						

Remarks:

THIS WATER RIGHT IS LOCATED, IN WHOLE OR IN PART, WITHIN THE BOUNDARY OF THE CROW INDIAN RESERVATION.

Anika

E-MAIL FILED

JUN 10 2015

Montana Water Court

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ON MOTION OF THE MONTANA WATER COURT

UNITED STATES' & CROW TRIBE'S OBJECTION

COMES NOW, Yosef M. Negose, counsel of record for the United States of America (Bureau of Indian Affairs), and Nathan Espeland, counsel of record for the Crow Tribe, to hereby submit this limited objection to the Water Master's Report filed on June 2, 2015 in the above captioned matter. The Master's Report accepted a stipulation that resolved the claim at issue ("43N 185501-00"), and determined that an informational remark will identify said claim as to a "Walton right". However, the Report also concluded that the post-decree abstract for 43N 185501-00 should identify said claim as to a "Reserved right." The United States and Crow

Tribe object to this determination, because the United States and Crow Tribe believe that the general term, “*Reserved* right”, lacks specificity and may cause unwanted confusion.

ARGUMENT IN FAVOR OF MORE SPECIFICITY

The Montana Supreme Court has noted the oft quoted observation that a rose is a rose is a rose. See *Bain v. Gleason*, 223 Mont. 442, 452, 726 P.2d 1153, 1159 (1986) (finding no ambiguity where automobile liability policy defined ‘bodily injury’ as, *inter alia*, “bodily injury.”).¹ Likewise, a “*Walton* right”, such as 43N 185501-00, is a “*Walton* right.” Though derived from “*Winters* rights,”² such rights possess special characteristics—indeed, *limitations*—that distinguish them from federally-held “*Reserved* rights”. See Chief Water Judge Russ McElyea’s *Order Rejecting Master’s Report, Order Approving Stipulation and Order Closing Case in 43O-8*, filed on January 15, 2015 at 4 (“The difference between *Walton* rights and *Winters* rights... is that there are two *significant restrictions* on *Walton* rights.”) (emphasis added) (citations and quotation marks omitted).

To be sure, an informational remark identifying 43N 185501-00 as a “*Walton* right” could alert some to the right’s limitations; but only at the risk that the interplay between the term “*Walton*” in the post-decree abstract’s remark section, and “*Reserved*” in the post-decree abstract’s type-classification section, will confuse those unfamiliar with the significance of these terms, and with the body of law governing the alienability of federally-held water rights.

The Montana Supreme Court has observed that “[t]erminology can affect how people think” about water rights.³ And this Court has emphasized that “accuracy is an important goal in


¹ See also G. Stein, *Sacred Emily*, in *Geography and Plays* 178, 187 (1922) (reprint 1968).

² See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50-51 (9th Cir. 1981).

³ *Montana Trout Unlimited v. Beaverhead Water Co.*, 361 Mont. 77, 87, 255 P.3d 179, 187 (2011) citing Albert W. Stone, *Montana Water Law*, 73 (State Bar of Montana 1994).

this adjudication.”⁴ Where, as here, the parties, the record and the Court all agree that Claim 43N 185501-00 is to a “*Walton* right,” application of more accurate terminology may better communicate the parties’, and the Court’s shared understanding of the characteristics of 43N 185501-00. Because such specificity will limit potential for future confusion, and would assist the adjudication in firmly establishing the nature and scope of 43N 185501-00, the United States and Crow Tribe would request, that in addition to including an informational remark identifying Claim 43N 185501-00 as to a “*Walton* right,” the Court modify the listed type of historical right to reflect its unique, and non-federally held status, changing it from “*Reserved*” to “*Reserved (Walton)*,” “*Reserved**,” “*Reserved (W)*”, or, ideally, to “*Walton*.”⁵

RESPECTFULLY SUBMITTED, this 10th day of June, 2015.



Yosef M. Negose
Attorney for the United States
(Bureau of Indian Affairs)

/s/ _____
Nathan A. Espeland
Attorney for the Apsaalooke (Crow) Tribe

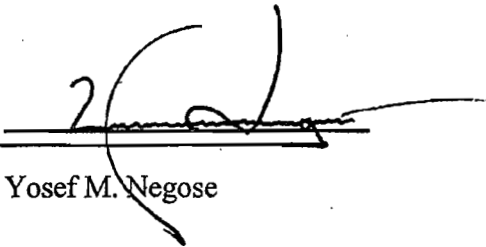
⁴ *In re Adjudication of the Existing Rights to the use of all the Water*, 2004 WL 6247820 (Mont. Water Ct.) at 3.

⁵ Alternatively, the United States would request that the post-decree abstract’s remark section be moved closer to the abstract’s type-classification section.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by first class mail to the party set forth
below this 10th day of June, 2015.

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