

Montana Water Court
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FILED

AUG 04 2015

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
BLACKFOOT RIVER - BASIN 76F

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CLAIMANTS: United States of America
(Fish & Wildlife Service);
Steve M. Graveley; Susan G. Graveley;
Kyle Graveley

OBJECTORS: State of Montana
Department of Fish, Wildlife, and Parks;
Avista Corporation;
United States of America
(Bureau of Land Management)
United States of America
(Fish & Wildlife Service)

COUNTEROBJECTORS: Steve M. Graveley;
Susan G. Graveley

NOTICE OF INTENT TO APPEAR: Avista Corporation

CASE 76F-14
76F 33714-00
76F 97802-00
76F 110716-00
76F 110717-00
76F 110722-00

ORDER DENYING MOTION TO GENERATE IMPLIED CLAIM

PROCEDURAL HISTORY

On April 28, 2015 Claimants Steve M. Graveley and Susan G. Gravely filed an Objection to the Master's Report in this case. The Graveleys argued the Master erred by failing to generate an implied claim for wastewater use from either water right number 76F 110716-00 or 76F 110722-00. This Court issued an Order Amending and Adopting Master's Report on May 27, 2015. The Order stated that the Court would determine

whether or not an implied claim should be generated if the Graveleys submitted, on motion, evidence demonstrating proof of their entitlement to an implied claim. On June 26, 2015, the Graveleys filed a Motion to Generate an Implied Claim and Brief in Support. This Court has reviewed the evidence presented and determined that the Motion to Generate an Implied Claim should be denied.

LEGAL STANDARD

“Whenever a single claim appears to contain more than one right the claim will be sent to the water court requesting review for possible implied claims.” Rule 35(a), Water Right Claim Examination Rules. Therefore, implied claims serve to separate multiple claims found in a single filing. An implied claim should not be an expansion of a water right or an attempt to circumvent claim filing requirements under Sections 82-2-221 or 85-2-224, MCA. *Eliasson Ranch Co. v. Rodeghiero*, Case 40A-115 (Mont. Water Court Order Amending and Adopting Masters Report, June 28, 2004).

Typically, the Department of Natural Resources and Conservation (DNRC) discovers implied claims during its claim examination process prior to the issuance of a Water Court decree. Although Rule 35 of the Water Right Claim Examination Rules generally applies to claims under examination by DNRC prior to issuance of a decree, the Water Court routinely cites to the rule when it generates implied claims after the issuance of its decree. In those cases, the need for implied claims can be identified through the settlement process or as a result of a hearing. While the Rule does not provide specific criteria, the Court generally relies on the information found on the face of the statement of claim form and any material in the attachments to the claim that helps clarify the information found on the claim form.

The purpose of this review is to determine whether the claimant intended to claim two water rights even though only one claim was filed. The most common indicator is an overstatement of some element of the claim. Such indications include: listing points of diversion on two or more sources; listing two previously decreed rights with different priority dates on one claim form; combining the flow rates of multiple decreed rights on one claim; claiming a flow rate in excess of a previously decreed right; or combining

multiple purposes such as irrigation, stock, and mining uses on one claim form. *Eliasson* at 4-5.

Although the Water Court occasionally authorizes an implied claim based solely on the attachments to a statement of claim, implied claims usually have evidence of two or more claims on the face of the statement of claim form itself. This underscores the principle that generating an implied claim is intended to separate two or more water rights into separate claims so that they are accurately identified for adjudication and administration. Importantly, the generation of an implied claim must come from the statement of claim as it was originally filed on or before the filing deadline of April 30, 1982.

ANALYSIS

In support of their Motion to Generate an Implied Claim, the Graveleys contend that the acreage contained in claim 76F 110716-00 encompasses 43 acres for an additional wastewater right. The Graveleys state the implied wastewater claim would be subordinate to the rights of the parties involved and request a priority date of June 30, 1973. Further, they request a flow rate of 1.63 cfs, as identified by their consultant, Ms. Julie Merrit. *See* Motion to Generate Implied Claim and Brief in Support at 4-5 (June 26, 2015).

The Graveleys properly acknowledge that “[i]n order to generate an implied claim, the Court must find from the face of the statement of claim or the attachments to the claim that the claim actually contains two separate water rights.” *Id.* at 3. Further, the Graveleys do not contend that the statement of claim for 76F 110716-00 supports the generation of an implied claim, and state “the implied claim information arises not from the face of the claim, but from a review of the attachments to the claim.” *Id.* at 4.

The attachments filed by the Graveleys in support of an implied claim consist of the following: Exhibit A, the Settlement Stipulation between the Graveleys and Objectors Montana Department of Fish, Wildlife, & Parks and Avista Corporation; Exhibit B, a proposed abstract stating the contents of the requested implied claim; and Exhibit C, maps indicating the location of the requested implied claim and the location of the

McCormick – K. Coughlin Ditch. The Graveleys contend that a review of this evidence illustrates that “the property in Section 4 [is] also being irrigated with wastewater that collected in the conveyance system located on section 34 from irrigation from the adjacent landowner.” Motion to Generate an Implied Claim at 4. They further state that a consultant, Ms. Julie Merrit, visited the site “to confirm where wastewater collected,” with that location being indicated in Exhibit C as the place of the historical use of wastewater. *Id.*

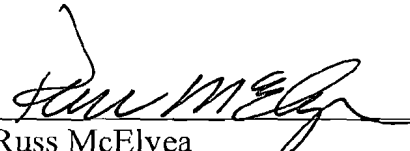
Unfortunately, the claim and the attachments to the claim do not contain evidence indicating the existence of an implied claim. There is no evidence of points of diversion on two or more sources within claim 76F 110716-00; there is no evidence of the existence of two or more priority dates attached to claim 76F 110716-00; there is no evidence that the flow rates of multiple decreed rights have been combined in claim 76F 110716-00; claim 76F 110716-00 does not claim a flow rate in excess of a previously decreed right; and there is no evidence that claim 76F 110716-00 combined multiple purposes of use into a single right.

Thus, even viewing the evidence in a light most favorable to the petitioner, the claim file for 76F 110716-00 does not indicate the presence of an implied claim. Notably, an affidavit from Mr. Charles Beck, submitted on June 28, 2007, describing the use of water associated with claim 76F 110716-00, makes no mention of the use of wastewater to irrigate a portion of the claimed acreage. Mr. Beck attested to irrigation practices involving claim 76F 110716-00 during the time he leased the land, which was from 1939 to 1973. Further, by the Graveleys’ own contention, the use of this right is based upon “irrigation from the adjacent landowner” rather than on any use associated with 76F 110716-00. Motion to Generate an Implied Claim at 4. Therefore, the evidence before this Court supports the conclusion that the Graveleys are not entitled to the generation of an implied claim.

CONCLUSION

The claim form and attachments for 76F 110716-00 provided by the Graveleys are insufficient to generate an implied claim. The request to generate an implied claim is DENIED.

DATED this 4 day of August, 2015.


Russ McElyea
Chief Water Judge

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