

Montana Water Court
PO Box 1389
Bozeman MT 59771-1389
(406) 586-4364
1-800-624-3270 (IN-STATE)
FAX: (406) 522-4131

FILED

JUN 24 2016

Montana Water Court

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

* * * * *

CLAIMANTS: Loris L. Toole; Jeff Toole; Jeanette Toole

76F 149808-00

OBJECTOR: United States of America (Bureau of Land Management)

NOTICE OF INTENT TO APPEAR: Avista Corporation

ORDER DENYING OBJECTION AND ADOPTING MASTER'S REPORT

I. BACKGROUND AND ANALYSIS

This matter involves an objection to a Master's Report. The claimants are members of the Toole family. The single claim in this case is for mining, and has a flow rate of 5 gallons per minute. The Master's Report indicates this water right has been used for hand panning during the summer.

The Master's Report recommended dismissal of the Toole claim. The basis for this recommendation was repeated failure of the Toole family to comply with orders of the Court. The Master's Report highlights this history at length, and it does not need repetition here. The Toole's history of non-responsiveness can be summarized by observing that the Water Master gave the Toole family multiple chances to participate in this case and multiple warnings about the consequences of failing to do so. The record shows that the Toole family failed to respond to orders setting status conferences, orders requiring status reports, and an order setting a show cause deadline. This conduct spanned approximately two and a half years.

Although the record also shows that the Toole family sporadically made contact with the Court, that contact was often to request extensions of time, rather than providing substantive effort to resolve this case.

Despite this history, Jonathon Toole has filed an objection to the Master's Report asking that claim 76F 149808-00 be reinstated. Although Jonathon Toole claims to be an heir, he is not listed as an owner of the claim. The objection is not signed by any other members of the Toole family, and does not indicate whether other potential owners plan to participate in this case, when they plan on taking action, or what action might be taken.

The objection filed by Jonathon Toole indicates that ownership of this right may have passed among various members of the family over time, but there was no indication whether a current dispute over ownership exists, and if so, what efforts are being made to resolve it. Moreover, Section 85-2-424, MCA imposes on the parties to real estate transactions the obligation to update ownership records for water rights. It is unclear whether members of the Toole family have complied with this requirement. Regardless, water rights litigants run the risk of sanctions as a result of failure to update public records reflecting their ownership of water rights.

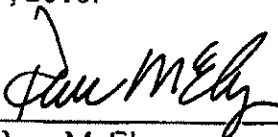
The Water Court often goes to extraordinary lengths to encourage participation by self-represented litigants. The Master's actions in this case are an example of that effort. At the same time, serial noncompliance with Court orders burdens the judicial system and imposes costs on other parties. Both of these problems have occurred in this case.

II. CONCLUSION AND ORDER

Although the Water Court strongly prefers resolution of water rights matters on the merits, there comes a point when disregard for Court processes can no longer be tolerated. This case has gone beyond that point.

The Toole objection to the Master's Report is DENIED, and the Master's Report is ADOPTED. Claim 76F 149808-00 is DISMISSED.

DATED this 24 day of June, 2016.



Russ McElyea
Chief Water Judge

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Jeff Toole
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Note: Service List Updated 6/23/2016

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76F 149808-00

OBJECTOR: United States of America
(Bureau of Land Management)

NOTICE OF INTENT TO APPEAR: Avista Corporation

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules (W.R.Adj.R) requires that written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure (M.R.Civ.P.) provides an additional 3 days to the 10-day objection period. This means your objection must be received no later than 13 days from the above stamped date.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. *If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.*

MASTER'S REPORT

Findings of Fact

1. On August 28, 2013, the court issued an order setting a status conference for October 9, 2013. Due to the government shutdown, the October 9 conference was not held. The court set a second status conference by order dated November 18, 2013. The conference was held January 3, 2014. No one attended for the claimants.

2. On January 3, 2014, the court issued an order requiring claimants to show cause why the claim should not be terminated, or to begin settlement negotiations. The performance date was February 18, 2014. Claimants did not respond to the order.

3. On July 30, 2014, the court issued an order setting a status conference for August 21, 2014. The master learned the names of potential claimants Loris, Jeff, and Jeanette Toole and provided them an opportunity to come forth and assert ownership of the claim if they wished to do so.

4. On August 8, 2014, potential claimant Jeff Toole sent an e-mail to the master asking for 90 days before a hearing. He mentioned having spoken to counsel for the objectors.

5. On August 15, 2014, the court vacated the September 2, 2014 status conference to give Mr. Toole the opportunity to negotiate settlement. The order required status reports by November 14, 2014. Mr. Toole asked for more time. On November 6, 2014, the court issued an order requiring status reports by January 14, 2015.

6. On January 13, 2015, the United States filed a status report which said that it sent Mr. Toole a draft settlement agreement on August 11, 2014, but had received no reply.

7. On January 22, 2015, the court granted Mr. Toole's request for more time. Status reports were due April 13, 2015.

8. On April 13, 2015, objector BLM filed a motion for default judgment and dismissal of the claim, in which it requested dismissal of the claim or amending the claim to fit the terms of the settlement agreement which it had sent to Mr. Toole. The United States reported no contact from the claimants between August 2014 and April 2015.

9. On April 24, 2015, the United States withdrew its motion for default judgment

because Jeff Toole had contacted water rights consultant Tracey Turek, who was working on the ownership issue and other issues raised by the objections.

10. On April 27, 2015, the court issued an order requiring status reports by June 15, 2015.

11. Hearing nothing from the parties, the court moved this claim to the haring track on June 19, 2015.

12. The court set a status conference for September 23, 2015. At the conference, the parties noted that the mining claim underlying this water right claim has ownership questions. The mining claim is in the name of Loris, Jeff, and Jeanette Toole. The water use consists in hand panning during the summer months.

13. The United States filed a conditional withdrawal. The conditions were completion of an ownership update and changes to the point of diversion.

14. On September 24, 2015, the court ordered the potential claimants to file a written status report by March 25, 2016, detailing their progress and giving an estimate of when the ownership update could be completed.

15. On April 19, 2016, the court issued an order for a status report, due May 6, 2016. The order warned the potential claimants that the claim could be dismissed if they did not file a report. Several of the earlier orders contained the same warning.

16. Claimants have failed to comply with orders of the water court.

Conclusions of Law

1. Claimants have failed to comply with orders of the water court on several occasions.

2. Claimants were adequately warned about the possible consequences of failing to comply with the court's orders.

3. Rule 22, W.R.Adj.R., allows the court to impose sanctions up to and including dismissal for failure to obey its orders.

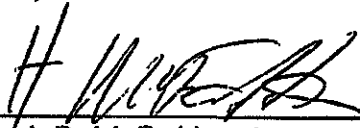
4. Under the circumstances, where the court's orders are frequently, and the claimants' position on redescribing the place of use is unknown, the appropriate sanction is dismissal of the claim.

Recommendations

Dismiss this claim.

A post-decree abstract of the claim is served with this report to confirm that the recommended change was made in the state's centralized record system.

DATED this 24 day of May, 2015.



Hugh B. McFadden, Jr.
Water Master

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM**

**BLACKFOOT RIVER
BASIN 76F**

IMPORTANT NOTICE

*****THIS WATER RIGHT CLAIM HAS BEEN DISMISSED*****

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: 76F 149808-00 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: DISMISSED

Owners:

**JOHN H TOOLE
DECEASED
617 CRESTLINE DR
MISSOULA, MT 59801**

**JOAN P TOOLE
211 S MONTANA AVE
HELENA, MT 59601 5160**

**BRUCE R TOOLE
DECEASED
3019 GLACIER DR
BILLINGS, MT 59102**

Priority Date:

Type of Historical Right:

Purpose (use): MINING

Flow Rate:

Volume:

Source Name: WEASEL CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE 76F PRELIMINARY DECREE.