

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)

CLAIMANTS: United States of America
(Department of Army Corps of Engineers);
City of Fort Peck

CASE 40E-69B
40E 165372-00
40E 182897-00

OBJECTOR: United States of America
(Department of Army Corps of Engineers)
State of Montana Attorney General

NOTICE OF INTENT TO APPEAR: United States of America
(Department of Army Corps of Engineers)

ON MOTION OF THE WATER COURT

**ORDER DENYING REQUEST TO REMOVE ISSUE REMARK,
ORDER JOINING STATE OF MONTANA AS A PARTY, AND
ORDER SETTING SCHEDULING CONFERENCE**

I. INTRODUCTION

This case originally involved two municipal water rights for the City of Fort Peck. Claim 40E 165372-00 was filed by the United States, but subsequently withdrawn. The sole remaining claim, 40E 182897-00, was filed by the City of Fort Peck. This claim has a flow rate of 930 GPM, a volume of 1,500 acre-feet per year, (AFY) and a priority date of December 31, 1934. It received an issue remark regarding volume.

The Water Court ordered Fort Peck to meet with DNRC personnel in Glasgow, Montana. The purpose of that meeting was to see if the City and the DNRC could

resolve the issue remark. The Court also ordered the DNRC to file a memorandum with recommendations for resolution of the remark.

Fort Peck and the DNRC were not able to resolve the remark, and the DNRC filed a report on July 14, 2016. The DNRC recommended setting volume at 206 AFY based on records from Fort Peck's water treatment plant, and other evidence.

Fort Peck has filed a motion asking that the claimed volume of 1,500 AFY be left in place and that the issue remark be removed from the claim.

Fort Peck makes three arguments. The first is that the prima facie status of its claim has not been overcome and that it is entitled to its claimed volume of 1,500 AFY. Second, Fort Peck asserts it is entitled to water for prospective use, and third, that its claim is protected from loss via abandonment by § 85-2-227, MCA.

This order is in response to Fort Peck's motion.

II. ISSUES

1. Is Fort Peck's claimed volume of 1,500 AFY entitled to prima facie status?
2. Is Fort Peck entitled to a volume of 1,500 AFY for prospective use?
3. Does § 85-2-227(4), MCA shield Fort Peck's water right from abandonment?

III. DISCUSSION

1. Is Fort Peck's claimed volume of 1,500 AFY entitled to prima facie status?

Water right claims in Montana's general adjudication have prima facie status. A claim for an existing right "constitutes prima proof of its content until the issuance of a final decree." Section 85-2-227(1), MCA. This prima facie status may be overcome "by a preponderance of the evidence [showing] that the elements of the original claim 'do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.'" *Nelson v. Brooks*, 2014 MT 120, ¶ 37, 375 Mont. 86, 329 P.3d 558 (quoting Rule 19, W.R.Adj.R.).

Remarks are added to water right claims "to limit or define a water right, to explain unique aspects of the water right, or to identify potential factual or legal issues." Rule 2(a)(57), W.R.C.E.R. Some issue remarks have a sound factual or legal basis while others are of little value.

The remark attached to Fort Peck's claim raises a factual issue regarding volume. Examination notes prepared by the DNRC indicate concerns that Fort Peck's volume was calculated based on an assumed diversion of 930 GPM on a year around basis. Fort Peck contends that the issue remark does not overcome the prima facie status of its claimed volume. Whether the prima facie status of Fort Peck's claim has been overcome depends on the presence or absence of facts to support the issue remark.

Issue remarks must be resolved pursuant to § 85-2-248, MCA. When an issue remark cannot be resolved by an objection, the Water Court "shall require the claimant to confer with the department..." § 85-2-248(5)(a), MCA. That requirement was met when Fort Peck was ordered to meet with the DNRC. A product of that meeting was the DNRC's memorandum on Fort Peck's right.

The DNRC's memorandum provided additional evidence regarding volume. Specifically, the DNRC provided census data for the years 1936, 1980, 1986, and between 1990 and 2014. The population of Fort Peck was 10,546 people in 1936 when the Fort Peck Dam was under construction. By 1980, the population dropped to 283 people, and has ranged between a low of 220 and a high of 333. The population in 2015 was 250 people.

The DNRC memorandum also provided information regarding historical use of municipal water by the City of Fort Peck. In 1936, when the population was high because of dam construction, annual water usage was 2,953.5 AFY. By 2015, that number had dropped to 145.1 AFY, a decrease of ninety-five percent. Figures were also provided for water produced by Fort Peck's water treatment plant between 1989 and 2016. None of these figures show treatment or use of 1,500 AFY.

The DNRC noted that Fort Peck's population was relatively stable over the last 35 years, and recommended a volume of 206 AFY. This volume equaled the amount used in 1990, which represented the highest usage in any year for which data was available other than 1936. The DNRC's recommended volume amounts to 565 gallons per citizen per day (gpcd), which is more than twice the 250 gpcd standard normally applied to municipal rights. Rule 29(b)(4)(ii), W.R.C.E.R.

Attached to the DNRC memorandum was a history of construction of the Fort Peck Dam, which described a large influx of workers to the area in the 1930s. The population of Fort Peck fell sharply after the dam was completed.

The City of Fort Peck attached to its motion an agreement with the Fort Peck Rural County Water District. This agreement, signed in 1998, showed that Fort Peck's water treatment capacity was 500,000 gallons per day (gpd). Fort Peck agreed to upgrades to its water system enabling it to increase that capacity to 600,000 gpd. Assuming continuous operation at full capacity, that upgrade would enable Fort Peck to treat approximately 1.84 acre-feet of water per day, or 672 AFY. That capacity is less than half of the 1,500 AFY Fort Peck claims.

The foregoing evidence establishes several points. First, Fort Peck has not used 1,500 AFY for several decades. Second, the volume claimed by Fort Peck was based on continuous usage of a flow rate of 930 gpm. There is no evidence this amount of water has been diverted by Fort Peck since construction of the dam. Fort Peck's water treatment system cannot accommodate the water it has claimed, its population has been stable for the last 30 years, and there is no evidence of plans to expand future water use beyond the capacity of its present system.

Issue remarks may be addressed by the Water Court using information in the claim file and other information obtained by the Court, including information compiled by the DNRC. § 85-2-248(3), MCA. The information presently available is sufficient to overcome the prima facie status of Fort Peck's claimed volume. This information indicates there was a reasonable factual basis for the issue remark, and a reasonable factual basis for leaving it on the claim.

Fort Peck argues that the prima facie status of its claim relieves it of an obligation to substantiate the volume it claimed. That argument is correct, but only if the prima facies status of its claim has not been overcome. The record shows by a preponderance of the evidence that Fort Peck's claimed volume is not consistent with historical use of its right. The issue remark on its claim remains unresolved, and the burden of proof has shifted to Fort Peck to establish the correct volume for its right.

The Water Court “shall schedule proceedings” when issue remarks cannot be resolved. §85-2-248(6), MCA. In accordance with that requirement, a hearing will be set to enable Fort Peck to present additional evidence regarding volume. Otherwise, Fort Peck’s volume will be set in accord with the present record.

2. *Is Fort Peck entitled to a volume of 1,500 AFY for prospective use?*

The Montana Water Court and the Montana Supreme Court have recently issued several decisions affirming that water rights may be appropriated for sale to third parties without immediate application to beneficial use. These include *Lockwood Area Yellowstone County Water & Sewer Dist.*, 2015 Mont. Water LEXIS 12 (June 8, 2015) (Water Court Case No. 43Q 200996-00 et al.) (municipal rights); *Curry v. Pondera Cnty. Canal and Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440 (appropriations by a Carey Land Act project); and *In re United States*, 2016 MT 348, 386 Mont. 121, 386 P.3d 952 (appropriations by the BLM). Fort Peck cites the *Lockwood* case to support its claim for a prospective appropriation.

Montana’s first Constitution recognized and protected the right to appropriate water “for sale, rental, distribution or other beneficial use” Mont. Const., art. III, § 15 (1889). This constitutional provision recognizing the sale of water as a beneficial use “protected and encouraged investments in water development.” *Lockwood* at 10.

Fort Peck, like any municipality, can benefit from this rule if the facts justify its application. Fort Peck’s status as a municipality does not automatically entitle it to set aside water for prospective use. The rule does not apply if there is no intent to appropriate excess water for future beneficial use, and no credible plan for that use.

The facts in the *Lockwood* case are different from the present case. First, *Lockwood* expressed intent to appropriate water for future growth, and that intent existed at or near the time of initial appropriation. Second, *Lockwood* invested in a system with excess capacity to accommodate growth. Third, growth occurred. The *Lockwood* system grew from 180 families to 1,600 residential taps for 6,500 people and 172 additional taps for commercial and industrial use. *Lockwood* intended to supply water to an expanding customer base, and it did so.

None of these factors are present with the City of Fort Peck. Fort Peck claimed a volume less than its peak usage; it has shown little effort to set aside water for future growth; and its population has declined to a fraction of its peak. Fort Peck eventually made a small investment in expansion of its system, but most of that cost was borne by another party with a separate water right.¹ The agreement between Fort Peck and the Fort Peck Rural County Water District also shows that expansion of the City's system was driven by the District's needs rather than the needs of Fort Peck.² Finally, expansion of Fort Peck's system did not occur until 1998, over sixty years after its water right was appropriated.

There is no evidence supporting a claim for 1,500 AFY, and no evidence showing how Fort Peck intends to use that much water in the future. Data from 2015 shows water use of only 145.1 acre-feet that year. There is no evidence that expansion of Fort Peck's water usage is likely, much less an expansion of 1,000%.

Fort Peck asserts that it claimed 1,500 AFY to supply rural water users outside the city limits, and produced several affidavits substantiating this practice. Accepting all these affidavits as true, it remains unclear how many people outside the city limits are supplied using Fort Peck's water right. The Fort Peck Rural County Water District was formed to supply rural water users, some or all of whom may have been previously supplied by the City of Fort Peck. The District encompasses 3,770 acres, and although it relies on the same water treatment system as Fort Peck, its water comes from a different right. The evidence does not indicate whether the City of Fort Peck is supplying any water to rural users outside the District boundaries, and if so, in what amounts.

The present record does not support Fort Peck's claim for prospective use.

¹ The Fort Peck Rural County Water District represented it had a water right for 750 AFY and 2,000 gpm. Interlocal Agreement, ¶ 5.01, at 10.

² Paragraph 1.05 on page 2 of the agreement states that "the most cost effective method for the District to provide water services to the properties and customers within the District would be for the District to obtain water from the Town's system, rather than design and construct a water supply system of its own."

3. *Does § 85-2-227(4), MCA shield Fort Peck's water right from abandonment?*

Fort Peck asserts it is entitled to retain a 1,500 AFY volume under § 85-2-227(4), MCA. This statute provides unique protections from abandonment for municipal users. Fort Peck's argument appears to acknowledge that a portion of its claim could be subject to abandonment without these protections. Fort Peck has not used 1,500 AFY during the last twenty-five years, and possibly for much longer.

The statute pertaining to resolution of issue remarks states that "the water court shall join the state of Montana through the attorney general as a necessary party" to address unresolved issue remarks involving nonperfection or abandonment.

§ 85-2-248(7)(a), MCA.

The issue remark attached to Fort Peck's water right is unresolved and the record indicates part of Fort Peck's claimed volume may have been abandoned. Under these circumstances, adding the state of Montana as a necessary party is proper. Fort Peck's arguments regarding the applicability of § 85-2-227(4), MCA will not be addressed until the state of Montana has an opportunity to respond.

IV. CONCLUSION

1. The prima facie status of Fort Peck's claimed volume has been overcome by evidence showing it has not used that volume for the last twenty-five years and has no plan to do so in the future. Fort Peck now has the burden of substantiating its claimed volume. A hearing will be scheduled for that purpose.

2. Fort Peck's claim for prospective use is not supported by the record presently before the Court. Fort Peck will have an opportunity to supplement that record at the upcoming hearing.

3. The Water Court will determine whether § 85-2-227(4), MCA shields Fort Peck's water right from abandonment after the state of Montana has decided whether to address this issue.

V. ORDER

Fort Peck's motion to remove the volume remark on claim 40E 182897-00 is DENIED. The state of Montana, through the attorney general, is joined as a necessary

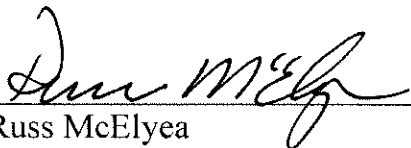
party. The state of Montana, through the attorney general, and the Glasgow DNRC office are added to the service list.

A telephone conference to schedule additional proceedings will be held **March 29, 2017 at 10:00 AM**. The City of Fort Peck, the attorney general, and the Glasgow DNRC are required to participate. 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 *7th* day of *March*, 2017.


Russ McElyea
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Note: Caption and Service List Updated 3/3/2017