

Montana Water Court
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FILED

JUL 26 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
PEOPLES CREEK - BASIN 40I

CLAIMANT: United States of America (Bureau of Reclamation)

COUNTEROBJECTORS: Davies Ranch Co; Richard E. Grabofsky;
Ross 8 Bar 7 Ranch Inc; S Bar B Ranch Co

NOTICE OF INTENT TO APPEAR: Malta Irrigation District; Maggie
Nutter; State of Montana Attorney General

INTERVENOR: State of Montana Attorney General

ON MOTION OF THE WATER COURT

40I-28

40F 40948-00

40F 40949-00

40F 40950-00

40F 40951-00

40F 40952-00

IN THE WATER COURT OF THE STATE OF MONTANA
ST. MARY RIVER – BASIN 40T

CLAIMANT: United States of America (Bureau of Reclamation)

COUNTEROBJECTORS: Davies Ranch Co.; Richard E. Grabofsky;
Ross 8 Bar 7 Ranch; S Bar B Ranch Co.

NOTICE OF INTENT TO APPEAR: Malta Irrigation District; State of
Montana Attorney General

CASE 40T-33

40T 40955-00

40T 40958-00

40T 40959-00

40T 40960-00

CLAIMANT: United States of America (Bureau of Reclamation)

CASE 40T-34

40T 40956-00

40T 40957-00

40T 40961-00

**ORDER UPHOLDING WATER MASTER'S DENIAL OF LEAVE TO
REINSTATE OBJECTIONS**

I. BACKGROUND

The Blackfoot Tribe has requested review of three orders by the Water Master in cases 40I-28, 40T-33, and 40T-34. Those orders denied a request by the Tribe to reinstate its objections to claims filed by the United States for the Milk River Project.

The Tribe claims reserved water rights pursuant to the *Winters* doctrine. These claims were settled in a compact ratified by the Montana Legislature and codified at § 85-20-1501, MCA. The Compact was approved by the United States Congress in the Blackfoot Water Rights Settlement Act. Pub. L. No. 114-322, 130 Stat. 1628 (2016) (“Settlement Act”). The Compact was approved by tribal members in 2017.

Except for Basin 40J, the Settlement Act requires the Tribe to withdraw its objections to claims filed by the United States for the Milk River Project within 14 days of approval of the Compact by its members. Settlement Act, § 3720(c). The Settlement Act also allows the Tribe to ask the Montana Water Court to reinstate its objections to the Milk River Project if certain conditions regarding enforceability of the Settlement Act are not met by January 21, 2025. Settlement Act, §§ 3720(c)(1) and 3723. The Settlement Act requires that the Tribe seek reinstatement of its objections *prior* to withdrawal of those objections. Settlement Act, § 3720(c)(1).

Pursuant to these requirements, the Tribe simultaneously filed a notice of withdrawal of its objections to the Milk River Project, and a motion for leave to reinstate those objections. The Tribe sought permission to refile its objections after January 21, 2025 if conditions for enforceability of the Blackfoot Compact are not met by that date.

The Water Master granted the request to dismiss the Tribe’s objections, but denied its request to reinstate those objections after 2025. The Master reasoned that all three cases will be resolved by 2025, and that reinstatement of objections after these cases have been closed would undermine the finality of the adjudication. In cases 40I-28 and 40T-34, the Master additionally noted that the Tribe was asking for a ruling on an issue that might not arise for years, if at all. The same analysis applies in case 40T-33, though it was not explicitly stated in the order. The Master declined to render an advisory opinion on a future issue, stating that if “circumstances arise that prompt the Tribe to attempt to

reinstate its objections, the Court will rule on such a request at the time it is made.”
Cases 40I-28 and 40T-34, Order Dismissing Objections and Denying Request for Leave
to Reinstate Objections at 2 (June 21, 2017).

II. ISSUES

1. Whether a Water Judge should review interlocutory orders issued by a Water Master.
2. Whether the Water Master erred by denying the Tribe’s request to reinstate its objections.

III. ANALYSIS

1. Whether a Water Judge should review interlocutory orders issued by a Water Master.

The Chief Water Judge administers the adjudication process. Section 3-7-223, MCA. To assist with completion of the adjudication, the Chief Water Judge appoints Water Masters. Once appointed, Water Masters serve at the pleasure of the Chief Water Judge. Water Masters have the powers granted by Rule 53(c), M. R. Civ. P. Section 3-7-311(1), MCA.

Water Masters serve a vital role in the adjudication by reviewing summary reports of decrees, assisting with issuance of decrees, consolidating cases, conducting trials, and issuing decisions in the form of Master’s Reports. After a case begins, the Master serves as a trial judge, and makes the same decisions as a trial judge. These decisions include rulings on evidentiary matters, the issuance of stays, pre-trial orders, and rulings on summary judgment. A Master’s orders are subject to review by the Water Judges. *Bryan v. Teton Coop Reservoir Co.*, Case 41O-134, Decision Affirming Masters’ Order Denying Motion in Limine (Aug. 16, 2011); *Macrow v. Avista Corporation*, Case 76F-167, Order Reinstating Objections (July 9, 2015).

Water Masters make the adjudication process more efficient. Accordingly, the Water Court exercises restraint when asked to review interlocutory decisions issued by Water Masters. A policy of restraint discourages litigants from seeking review of every

order issued by a Master prior to completion of a case. The benefits obtained from appointing Water Masters would be lost if such orders were routinely challenged.

For these reasons, interlocutory orders by Masters will not generally be reviewed. In *Klamert v. Iverson*, Case 40B-1, the Water Judge declined to review a Master's order denying summary judgment. The Judge found that the Master's order was not dispositive because factual issues existed which precluded summary judgment. Case 40B-1, Order Dismissing Objection to Summary Judgment Ruling at 2 (Jan. 16, 2015).

There are, however, occasions when review of an order prior to issuance of a Master's Report is appropriate. Review is proper where a Master's order has the potential to impact other cases, delay completion of a basin, or creates the possibility of multiple proceedings.

The Master issued such a ruling in the cases at hand. The question before the Master was whether to authorize what amounted to a stay for approximately eight years with the possibility of additional proceedings later. This scenario carried the potential for years of delay in these cases and the basins where they are located. Review of the Water Master's order is therefore warranted.

2. Whether the Water Master erred by denying the Tribe's request to reinstate its objections at a future date.

The Tribe makes three arguments in opposition to the Water Master's order. First, it asserts that the projected completion date for the adjudication is 2028, and that the deadline for satisfaction of conditions of enforceability under the Settlement Act is January 21, 2025. The Tribe contends that the gap between these dates allows enough time for its objections to be heard and still meet the 2028 goal for completion of final decrees.

Second, the Tribe asserts that the Water Master should have approved reinstatement because the State of Montana consented and the United States offered conditional consent.

Finally, the Tribe asserts that Rule 60(b), M. R. Civ. P. applies to its motion.

A. Completion of Final Decrees

There are several problems with the Tribe's argument that reinstatement of its objections will not delay issuance of final decrees in Basins 40I and 40T. As of July 3, 2017, adjudication of Basin 40I was 90.1% complete, and Basin 40T was 42.9% complete. The deadline for filing notices of intent to appear in Basin 40T was December 22, 2015, which means that 42.9% of the claims in that basin have been resolved even though litigation has been underway for less than two years. The two major obstacles to completion of final decrees in Basins 40I and 40T are disposition of the Blackfeet Tribe's claims and exempt from filing claims. Aside from these obstacles or others presently unknown, both basins should be completed and ready for final decrees several years before January 21, 2025.

The Tribe appears to assume that completion of the adjudication in 2028 means the Water Court will not issue final decrees until that date. That assumption, if it exists, is incorrect. Completion of final decrees in Montana's 85 river basins will occur in a staggered fashion. The Court will complete final decrees in each basin as soon as obstacles to decree issuance are removed. The objective is to begin completion of final decrees as far in advance of 2028 as possible.

Granting the Tribe's request to first withdraw and then immediately reinstate its objections is tantamount to issuance of a stay in Basins 40I and 40T until at least January 21, 2025, and possibly later. A delay for that length of time is unreasonable, especially given that the Tribe may choose not to pursue its objections after that date.

The requested delay becomes more unreasonable when added to the time already taken to bring the Blackfeet's claims to this juncture. The case involving adjudication of Blackfeet rights is WC-1991-01. That case began in 1991, and has been the subject of more than 20 stay orders. Those orders were designed to allow for negotiation of the Blackfeet Compact and approval by the Tribe, the State of Montana, and the United States. Despite much progress, there are additional milestones to achieve before the Blackfeet Compact becomes final. Even if the Compact is ultimately approved, it appears that nearly thirty-five years may pass before case WC-1991-01 can be closed.

Up to this point, the Water Court has liberally accommodated the Compact negotiation and approval process by granting serial requests for stays and by delaying issuance of decrees in Blackfeet country. Although these accommodations delayed the adjudication of water rights in certain areas, that delay was acceptable in the early phases of the adjudication when there was plenty of work elsewhere.

The era of unlimited accommodation is over. The adjudication has progressed to the point where further delays in Blackfeet country will delay completion of basins in that area and the adjudication as a whole. That does not mean reasonable requests for accommodation will be rejected, but it does signal that such requests will be weighed more carefully in the future.

While the Tribe's desire to maintain a full array of options is understandable, the impacts of such requests on the adjudication process and its diverse stakeholders must be considered. Aristotle observed that nature abhors a vacuum. A variant of that rule is that litigation consumes as much time as it is given. The Tribe's request for reinstatement of its objections is premised on the assertion that it comes at no cost. Similar assertions may have been true in the past, but they are not true today.

The Tribe seeks eight years of delay in these cases to preserve a future option it may never exercise. The costs of this request outweigh the benefits.

B. Consent by the Parties

The Tribe next asserts its request for reinstatement should be approved because it was not opposed by other parties. The State of Montana granted unconditional consent, while the United States reserved the right to oppose reinstatement if it was sought later.

The Water Court is not bound by the position of other parties when delay of a proceeding is requested. The delay requested in these cases has the potential to impact many other water users in Blackfeet country by postponing issuance of final decrees. These impacts, and others recited above, are not softened by the consent of one party and the conditional consent of another.

C. Application of Rule 60(b), M. R. Civ. P.

The Tribe asserts that Rule 60(b), M. R. Civ. P. applies to evaluation of its request. This rule is meant to provide a pathway for relief from a final judgment or order. The Master's decision is not final and it does not preclude the Tribe from seeking reinstatement of its objections in the future. Accordingly, Rule 60(b), M. R. Civ. P. is inapplicable.

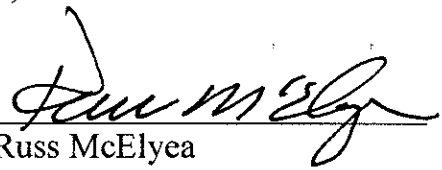
IV. CONCLUSION

The issues raised in the Tribe's request for review of the Master's orders are legal rather than factual. The Water Court reviews a Master's legal conclusions for correctness. The Master's decision to deny the Tribe's request for reinstatement of its objections was correct.

V. ORDER

The Tribe's objections to the Master's orders denying its request for reinstatement are denied.

DATED this 26 day of July, 2017.


Russ McElyea
Chief Water Judge

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