

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

CLAIMANT: Libby Lots

CASE 76D-0567-R-2024
76D 7502-00

NOTICE OF FILING OF MASTER’S REPORT

This Master’s Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master’s Report within **10 days** of the stamped date if you disagree or find errors with the Master’s findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master’s Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the 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

Statement of the case

The above captioned domestic claim appeared in the Preliminary Decree with the following issue remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE. DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A FILED RIGHT.

Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim.

Montana law requires the Water Court to resolve issue remarks. Information before the court resolved the point of diversion issue remark. An order set a filing deadline for claimant to file its agreement with "filed" as the type of historical right or evidence supporting the type of historical right. Claimant failed to participate in the issue remark resolution process. The court order informed claimant that its lack of reply would be deemed its agreement to the suggested resolution of the issue remark. The court order also included the following language: "Failure to comply with this order may result in modification of your water right."

Issue

Are the issue remarks resolved?

Findings of fact

The type of historical right for domestic claim 76D 7502-00 should be “filed.” The Preliminary Decree abstract of domestic claim 76D 7502-00 reflects the historically accurate point of diversion.

Principles of law

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

4. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

5. All parties subject to the jurisdiction of the Montana Water Court in this

adjudication have the obligation to comply with Orders of this Court, including Orders issued by a Master appointed by the Court. If a claimant fails to comply with an Order issued by the Court in its review of issue remarks, the Court may amend the claim to conform with information found in the claim file and information before the Court. Section 85-2-248(9)(a),(b), MCA.

Analysis

Issue remark resolution

The statement of claim identified a “use water right.” The 1961 Ground Water Code stated that if you, or your predecessor, started digging your well after January 1, 1962, and did not file a Notice of Completion, then there was no valid ground water appropriation because the filing process was not completed. There was no notice of completion filed for claim 76D 7502-00. However, the Montana Water Use Act of 1973 provides some relief. It allows a Statement of Claim, timely filed in this adjudication, to serve as the Notice of Completion. Accordingly, the priority date is the date the Statement of Claim was filed. *See* Section 85-2-306(4), MCA. While DNRC correctly modified the priority date for claim 76D 7502-00, it failed to modify the type of historical right to “filed” based upon the filed statement of claim.

Based upon this information and pursuant to § 85-2-248(3), MCA, claimant was ordered to file a statement with the court agreeing with the suggested type of historical right (“filed”) or to file evidence establishing the type of historical right. Claimant failed to file a statement or evidence by the deadline.

Claimant’s failure to provide any evidence to address or resolve the type of historical right issue remark leaves DNRC’s examination of the claim and resulting issue remark as strong evidence of the type of historical right.

The second issue remark appearing on claim 76D 7502-00 noted point of diversion

was modified by DNRC during claims examination. The issue remark instructed claimant and other water users that if no objections were filed to the point of diversion, the point of diversion would remain as it appears on the Preliminary Decree abstract. No one objected to the elements of claim 76D 7502-00.

Conclusions of law

Based on information in the claim file and before the court, and the claimant’s failure to comply with an order issued by the Water Master, domestic claim 76D 7502-00 should be amended as recommended by the order setting filing deadline. The type of historical right issue remark is resolved.

The issue remark concerning point of diversion served its notice purpose.

Recommendations

Based upon the foregoing, claim 76D 7502-00 should be amended as follows to accurately reflect historical use.

TYPE OF HISTORICAL RIGHT: ~~USE~~ **FILED**

The type of historical right issue remark appearing on the claim should be removed.

A Post Decree Abstract of Water Right Claim accompanies this report to confirm implementation of the recommendations in the state’s centralized water right record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail

Libby Lots
2200 Powell Street, Suite 970
Emeryville CA 94608
(Mail Undeliverable)

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 7502-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: LIBBY LOTS
2200 POWELL STREET, SUITE 970
EMERYVILLE, CA 94608

Priority Date: DECEMBER 26, 1980

Type of Historical Right: FILED

Purpose (Use): DOMESTIC

Flow Rate: 10.00 GPM

Volume: 1.50 AC-FT

Households: 1

Source Name: GROUNDWATER

Source Type: GROUNDWATER

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	4	SEWSE	35	31N	31W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

THE POINT OF DIVERSION IS LOCATED IN EDGEWATER ESTATES PH 2, LOTS 8, 9, OR 12.

Period of Use: JANUARY 1 TO DECEMBER 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		3	SEWSE	35	31N	31W	LINCOLN