

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

CLAIMANT: Michael R. Brewer

CASE 76D-0596-R-2024
76D 2720-00

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 fish and wildlife claim appeared in the Preliminary Decree with the following issue remarks:

NO PRIORITY DATE WAS CLAIMED.

A GUIDELINE FOR THE FLOW RATE AND VOLUME OF THIS CLAIM CANNOT BE DETERMINED FROM AVAILABLE INFORMATION, AND FLOW RATE AND VOLUME REMAIN AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE AND VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE AND VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

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. There was enough information before the court to resolve the issue remark concerning flow rate and volume. The issue remark concerning priority date was not resolved through the objection process and while there appeared to be enough information in the claim file and before the court to resolve the issue remark, pursuant to § 85-2-248(11), MCA the court may not resolve an issue remark modifying an element without agreement from the claimant. An order set a filing deadline for Michael R. Brewer to file his agreement with a December 31, 1971 priority date or evidence supporting a different priority date. Mr. Brewer failed to participate in the issue remark resolution process. The court order informed the claimant that a lack of reply would be deemed Mr. Brewer’s 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.”

Issues

1. What priority date should fish and wildlife claim 76D 2720-00 identify?
2. Are the issue remarks appearing on fish and wildlife claim 76D 2720-00 resolved?

Finding of fact

The priority date for fish and wildlife claim 76D 2720-00 should be December 31, 1971.

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

Issues 1 and 2 – priority date and issue remark resolution

Included with statement of claim 76D 2720-00 was a statement by then claimant Donald R. Boslaugh. Mr. Boslaugh stated, “I have used these waters for recreational purposes since I purchased it [the land] in 1971...”. Based upon Mr. Boslaugh’s statement and identification of only a year (1971), it appeared the priority date for the claim should be December 31, 1971. Rule 13(f)(3)(iii), Water Right Claim Examination Rules.

Pursuant to § 85-2-248(3), MCA, Michael R. Brewer was ordered to file a statement with the court agreeing with the suggested December 31, 1971, priority date or to file evidence establishing the priority date. Mr. Brewer failed to file a statement or evidence by the deadline. Mr. Brewer’s failure to provide any evidence to address or resolve the priority date issue remark leaves the information in the claim file as evidence of actual historical use.

An additional issue remark appeared on claim 76D 2720-00 concerning flow rate and volume. The issue remark instructed claimant and other water users that if no objections were filed to the flow rate and volume, these elements would remain as they

appear on the Preliminary Decree abstract. No one objected to the elements of claim 76D 2720-00.

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, fish and wildlife claim 76D 2720-00 should be amended as recommended by the order setting filing deadline. The priority date issue remark is resolved.

The Preliminary Decree abstract for fish and wildlife claim 76D 2720-00 identifies the historically accurate flow rate and volume. The issue remark concerning these elements served its notice purpose.

Recommendations

Fish and wildlife claim 76D 2720-00 should be amended as follows to accurately reflect historical use.

PRIORITY DATE: ~~BLANK~~ **DECEMBER 31, 1971**

The issue remarks 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

Michael R Brewer
PO Box 1584
Eureka MT 59917

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

Water Right Number: 76D 2720-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: MICHAEL R BREWER
PO BOX 1584
EUREKA, MT 59917

Priority Date: DECEMBER 31, 1971

Type of Historical Right: USE

Purpose (Use): FISH AND WILDLIFE

Flow Rate: 4.00 CFS

Volume: 0.10 AC-FT

Source Name: THERRIAULT CREEK

Source Type: SURFACE WATER

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		NENW	35	36N	26W	LINCOLN

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: INSTREAM

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			NWNENW	35	36N	26W	LINCOLN
2			SWNENW	35	36N	26W	LINCOLN