

DA 18-0689

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 116N

CLAIMANTS: JOHN R. SAMPSON; PETER &
KELLY C. MCLOUGHLIN REVOCABLE LIVING TRUST;
STATE OF MONTANA, BOARD OF LAND COMMISSIONERS

APPEAL FROM: Montana Water Court, Case Nos. 41F 136419-00, 41F 136420-00, and
41F 136421-00
Honorable Douglas Ritter, Associate Water Judge

COUNSEL OF RECORD:

For Appellant:

W. John Tietz, Browning, Kaleczyc, Berry & Hoven, P.C., Helena,
Montana

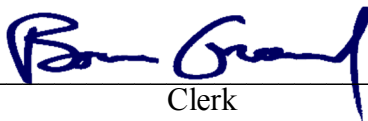
For Appellee:

Timothy C. Fox, Montana Attorney General, Kirsten Madsen, Assistant
Attorney General, Helena, Montana

Submitted on Briefs: May 8, 2019

Decided: May 21, 2019

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Water right claims 41F 136419-00, 41F 136420-00, and 41F 136421-00 were decreed on July 25, 1984, in the Basin 41F Temporary Preliminary Decree. Claimants John R. Sampson and the Peter and Kelly C. McLoughlin Revocable Living Trust ("Claimants") moved the Water Court in June 2017 to amend two of the claims to generate implied claims for stockwater based on the filed Statements of Claim.¹ The Statements of Claim were filed April 21, 1982, by Claimants' predecessor in interest, Peter Combs. Combs asserted an irrigation right for each claim, with respective priority dates of October 11, 1919, and August 18, 1947. Combs did not file separate Statements of Claim for stockwater use. Claimants argued that both the 1919 and 1947 Notices of Appropriation specified appropriation of water for irrigation "and other purposes," that there was evidence of actual historic stockwater use that corroborates the implied claims, and that the generation of an implied claim would not result in a change to historic water use or increase the historic burden to other water users. Claimants submitted affidavits to support their position that stockwater use has occurred consistently since at least the mid-1940s, attesting that as many as 1,200 cows have been run on the property at one

¹ Claim 41F 136421-00 was not part of the request and is not at issue in this appeal.

time and that, more recently, between 300-500 head of cattle and 40-60 head of horses have been run on the property.

¶3 Claimants and the State of Montana, which owns a portion of the place of use for claims 41F 136420-00 and 41F 136421-00, submitted a joint motion in May 2018 to split those two claims and issue distinct water right numbers to each claimant, to amend the point of diversion, and to generate implied claims for 41F 136420-00. In that motion, the State of Montana, Board of Land Commissioners, joined in Claimants' motion to generate implied stockwater claims for 41F 136420-00 and requested that such claims also be generated in the name of the State.

¶4 The Water Master issued a report in August 2018, in pertinent part denying the motion to generate implied claims. Observing that the 1982 Statements of Claim said nothing about stockwater use, the Master concluded that Combs "simply forgot to file stockwater claims for the 1919 and 1947 Madison River stockwater rights." Claimants filed objections with the Water Court, which considered the matter and adopted the Master's Recommendations on November 9, 2018.

¶5 Rule 10 of the Montana Water Rights Adjudication Rules permits water rights claimants to file an amendment to their own water right claims in accordance with § 85-2-233(6), MCA. The Water Court's claim examination rules define an "implied claim" as "a claim authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights." Water Right Claim Exam. R. 2(a)(33). The Water Court has held that implied claims "serve to separate multiple claims found in a single filing[,]" but that such claims "should not be an expansion of a

water right or an attempt to circumvent claim filing requirements under Sections 82-2-221 or 85-2-224[, MCA.]” *Graveley v. Montana*, No. 76F-14, at 2 (Mont. Water Court Order Denying Motion to Generate Implied Claim, Aug. 4, 2015). The Water Court has allowed implied claims because “the purpose of the adjudication is not to eradicate claims or to punish claimants confused by a complicated and often intimidating claim filing process[,]” but “to decree rights in accordance with historic use.” *Foss v. U. S. Forest Serv.*, No. 76HF-580, at 22 (Mont. Water Court Order Amending and Partially Adopting Master’s Report As Amended, Jan. 31, 2013).

¶6 The Water Court identified the issue in this case as whether the language in the 1919 and 1947 Notices of Appropriation, “irrigation and other useful and beneficial purposes” and “irrigation and other purposes,” was sufficient to indicate an intent to include two claims in a single statement of claim filing. The court applied a three-part test it has used to evaluate implied claims:

1. The implied claim must be justified by some evidence in the claim form or the documents attached thereto.
2. Evidence must exist of actual historical use corroborating the implied claim.
3. Creating the implied claim should not result in a change to historical water use or increase the historical burden on other water users.

(quoting *Foss*, at 20). The Water Court found that the language in the Notices of Appropriation indicated that “the original intent was to use the claims for irrigation and any other use that presented itself.” “As a result,” the court concluded, “there is an indication of more than one use in the attachments to the statement of claim.” But the Water Court concluded that the Notices of Appropriation did not necessarily reflect the

intent of Peter Combs when he filed the Statements of Claim in 1982, and the Claimants thus could not meet the first criterion for implied claims.

¶7 Claimants argue that, though recognizing its own test for implied claims, the Water Court failed to apply that test when it added a new requirement that the intent of the person filing the Statements of Claim must be evaluated. Claimants maintain that “the intent of the claimant” is not among the factors the Water Court has considered in evaluating implied claims and that the court erred by failing to consider the actual historical beneficial use of the water. Claimants agree that the Water Court’s criteria articulated in *Foss* comport with the Montana Water Use Act both by requiring the Statements of Claim to contain evidence of multiple uses and by requiring proof of the actual historical use of water to corroborate the claimed use while not adversely affecting other water users. When it expressly found indication of more than one use in the attachments to the Statements of Claim, Claimants argue, the Water Court should have found the first *Foss* criterion met and considered the other criteria. The State of Montana joins the Claimants’ arguments and requests that a stockwatering claim also be implied for the portion of 41F 136420-00 now split out as 41F 30114842 in the name of the State.

¶8 The Water Court reviews a Water Master’s findings of fact for clear error and the Master’s conclusions of law to determine whether they are correct. *Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.*, 2014 MT 167, ¶ 25, 375 Mont. 327, 328 P.3d 644. This Court then reviews “the Water Court’s order de novo, to determine whether it correctly applied the clear error standard of review to the Master’s findings of fact and whether its conclusions of law were correct.” *Skelton Ranch, Inc.*, ¶ 26.

¶9 Both the Claimants and the State accept the Water Court’s three-part *Foss* standard for evaluating implied claims. The Water Court reaffirmed and purported to apply its *Foss* criteria in this case. Having done so, the court failed to reconcile its express finding that the Notices of Appropriation indicated more than one use with the first *Foss* standard that “[t]he implied claim must be justified by some evidence in the claim form *or the documents attached thereto*” (emphasis added). We conclude, based on the Water Court’s own factual finding, that the court erred when it held the Claimants had not satisfied the first factor of the court’s articulated standard.

¶10 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by the clear application of the governing standards of review. The Water Court’s November 9, 2018 Order Adopting Master’s Report is reversed, and the case is remanded for further proceedings.

/S/ BETH BAKER

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR